Criminal Trial Courts Bench Book

Judicial Commission of New South Wales

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The Judicial Commission of New South Wales welcomes your feedback on how we could improve the *Criminal Trial Courts Bench Book*. Please send your comments by mail, to the address above, or email to: criminalbb@judcom.nsw.gov.au

Currency

Update 75, December 2023

Update 75 amends the *Criminal Trial Courts Bench Book* to incorporate recent case law and legislative developments. The following chapters have been revised or added:

Pre-recorded evidence in child sexual offence proceedings

- The chapter at **[5-400]**ff has been extensively revised to incorporate amendments made by the *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act* 2023 which commences 29 January 2024. The Act amends the *Criminal Procedure Act* 1986 by inserting new Div 1A, extending the Child Sexual Offence Evidence Pilot scheme (confined to Downing Centre, Sydney and Newcastle District Courts), with some amendments, to all District Courts ("relevant places") in NSW. The amending Act applies to proceedings commenced on and from 29 January 2024.

Abusive behaviour towards intimate partners

- A new chapter at **[5-2000]**ff provides suggested directions and commentary on the new offence of abusive behaviour towards intimate partners created by the *Crimes Legislation Amendment (Coercive Control) Act* 2022 (expected to commence between 1 February and 1 July 2024). The offence involves engaging in a course of conduct consisting of abusive behaviour (violence, threats, intimidation, or coercion or control of a person) against a current or former intimate partner, with the intention of coercing or controlling that person. The new offence provisions will only apply to conduct occurring on or after the commencement of the amendments.

Prospect of disagreement

- **[8-100]** to add reference to *Haile v R* [2022] NSWCCA 71 where it was held that the trial judge's omission of a reference to the power to discharge the jury as required by *Black v The Queen* (1993) 179 CLR 44 was erroneous, and to modify the jury directions at **[8-070]** and **[8-090]** to take account of s 56 of the *Jury Act* 1977.

Foreword

The *Criminal Trial Courts Bench Book* is prepared for use by Supreme Court and District Court judges and it constitutes a major contribution by the Judicial Commission of New South Wales to the administration of justice of this State. The members of the Committee who produced the work, and who have kept it up to date, are to be congratulated.

The overriding responsibility of the trial judge in a criminal trial is to ensure a fair trial. To achieve that result, the summing-up to the jury must be tailored appropriately to the particular circumstances of each case. A summing-up to a trial jury is an exercise in communication between judge and jury, the principal object of which is to explain to the jury the legal principles relevant to the performance of their task and to relate those principles to the facts and circumstances of the particular case. For that reason, it is important for judges to employ easily understood, unambiguous and non-technical language. The authors of this *Bench Book* have striven to ensure that the directions they recommend are in accordance with this approach, even in circumstances where difficult concepts are involved.

There is a danger that publication of standard directions will convert a summing-up into a series of formulae which are not necessarily appropriate to the facts and circumstances of each particular case. For that reason, it is important to recognise that, subject to any appellate indications to the contrary, no particular form of words is required and an individual judge is free to depart from the suggested directions and to direct the jury as he or she thinks fit, provided that the directions are in accordance with the law.

On the other hand, the advantage of standard directions is that, properly used, they improve the efficiency of the administration of criminal justice and assist in eliminating error on the part of trial judges. The draft directions are intended to remind judges of what has to be said and to suggest a way in which it can be said. The directions are not intended to constitute an authoritative statement of the law, nor is it the case that the whole of each direction will be appropriate in each case. In all respects the directions ought be adapted to the circumstances of the individual case and the legal issues which have arisen.

Previous editions of the *Bench Book* have been available only to judges. The Judicial Commission has decided to make the *Bench Book* more generally available. It hopes this will further enhance the contribution of the *Bench Book* to the efficient administration of criminal justice by ensuring that the legal representatives of all parties are aware of what kind of direction is likely and are able to make submissions directed to adapting the standard directions for the particular circumstances of the case.

The Judicial Commission has always welcomed criticism and suggestions from judges about the contents of the *Bench Book*. Now that the *Bench Book* will be more widely available, the invitation to make suggestions and advance criticisms is extended to the broader legal community, with the hope that this will ensure the maintenance of a *Bench Book* of the highest quality and authority over the long term.

It is appropriate to reiterate that the *Bench Book* does not contain an authoritative statement of the law. Practitioners should not act on the basis that a failure to direct

in accordance with the *Bench Book* is of itself indicative of legal error for appellate purposes. Authority for what ought have been in the contents of a direction in a particular case will need to be identified elsewhere.

The Honourable JJ Spigelman AC
Chief Justice
October 2002

Comments and Contacts

The *Criminal Trial Courts Bench Book* has been designed to assist in the conduct of trials, and was developed under the direction of the Criminal Trial Courts Bench Book Committee.

The suggested directions and accompanying text are not intended to constitute an authoritative statement of the law. They are guidelines only and aim to reflect the law as it stands at the time of publication.

The *Criminal Trial Courts Bench Book* will be progressively updated in accordance with legislative changes and decisions of the higher courts.

Although considerable care has been taken in the preparation of these materials, the content should not be regarded as a substitute for the actual text of legislation or court decisions.

As we wish to produce materials which are of benefit to judicial officers, the Judicial Commission would welcome any criticisms or suggestions as to the form or content of the *Criminal Trial Courts Bench Book*, and we urge you to contact us should any errors or omissions be found —

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Outline of trial procedure

For discussion of judge-alone trial procedures, refer to **[1-050] Judge-alone trials**.

[1-000] Introduction

Last reviewed: September 2023

The following provides a brief overview of pre-trial and trial procedures with reference to sections of this Bench Book. It is intended to assist a judge conducting a criminal trial. There are suggestions included which might be followed as a matter of practice by the trial judge but are not required by law.

The procedure for offences dealt with on indictment in the Supreme and District Court is set out in Ch 3 (ss 45–169) *Criminal Procedure Act* 1986.

Unless otherwise stated, the section numbers below refer to the provisions of the *Criminal Procedure Act*. Paragraph references are to sections of the Bench Book.

As to trial procedures generally, see *Criminal Practice and Procedure NSW*, Pt 7, Trial Procedure.

[1-005] Pre-trial procedures

Last reviewed: September 2023

Trial court's jurisdiction

The criminal jurisdiction of the District Court is contained in Pt 4 *District Court Act* 1973.

In the usual case, the accused is committed for trial to the relevant trial court after a case conference certificate is filed or, if a case conference is not required to be held (because the accused is unrepresented or a question of fitness to be tried has been raised (s 93(1)), after a charge certificate is filed: s 95(1).

The indictment is to be presented to the trial court within a specified time after committal: s 129 and District Court Rules 1973 Pt 53. The trial court can make directions and orders even where the indictment has not been presented: s 129(4).

The indictment

There can only be one operative indictment before the court: *Swansson v R* (2007) 69 NSWLR 406. However, the indictment can include multiple charges and multiple accused.

The DPP may present an ex officio indictment where the magistrate does not commit an accused for trial, where the charge in the indictment is different to the committal charge or even where there have been no committal proceedings: s 8(2). This is not a matter that will generally affect the course of the trial.

Generally it is sufficient if the charge in the indictment is set out in terms of the provision creating the offence: s 11. However, there is a common law requirement for particulars as to the place, time and manner of the commission of the offence to be included, see generally *Criminal Practice and Procedure NSW* [2-s 11.1].

After presentation, the court has general powers to conduct proceedings on that indictment, including the issuing of subpoenas: *KS v Veitch* [2012] NSWCCA 186. The indictment can be amended at any time with leave of the court or the consent

of the accused: s 20. Before trial the amendment can occur by the substitution of another indictment for that filed: s 20(3), see *Criminal Practice and Procedure NSW* [2-s 21.1]ff; *Criminal Law (NSW)* at [CPA.21.20]ff.

Arraignment

An arraignment occurs when the charge in the indictment is read to the accused who is asked to plead to the charge. The charge is usually read by the judge's associate as "clerk of arraigns" but some judges prefer to undertake this task. If the plea is "not guilty" the accused stands for trial: s 154.

The accused should enter the plea personally. See generally, *Amagwula v R* [2019] NSWCCA 156 at [26]–[41] (Basten JA; Lonergan J agreeing); at [238]–[309] (Button J).

The accused may be represented by a legal practitioner or appear self-represented: s 36. The accused has no right to be assisted by a person known generally as a "McKenzie friend": *Smith v The Queen* (1985) 159 CLR 532. It is rare to permit a person other than a legal practitioner to play an active role in the trial.

Generally, the accused is placed in the dock, but may be permitted to remain outside the dock, particularly where self-represented: s 34. The history of s 34 was considered in *Decision Restricted* [2018] NSWSC 945 and *R v Stephen (No 2)* [2018] NSWSC 167. It is not prejudicial to require an accused to sit in the dock: *Decision Restricted* [2018] NSWSC 945 at [56]; *R v Stephen* at [13]. The dock is the traditional symbol of what is at stake in a criminal trial and is a means of impressing on the community, and the jury, the gravity of the proceedings: *Decision Restricted* [2018] NSWSC 945 at [32]; *R v Stephen (No 2)* at [11].

If there is more than one charge, the accused is asked to plead to each individually as each charge is read out. Where there are multiple accused they can be arraigned on different occasions.

Where multiple accused are before the court, they can be arraigned individually or together depending upon what course is more convenient having regard to the nature of the charges.

There will be no arraignment where:

(a) a question has arisen as to the accused's fitness to stand trial, see **[4-300]**.

(b) there is an application to stay the indictment, see *Criminal Practice and Procedure NSW* [2-s 19.5]ff; *Criminal Law (NSW)* at [CPA.19.60]ff.

(c) there is an application to quash the indictment or to demur to the indictment: ss 17, 18, see *Criminal Practice and Procedure NSW* [2-s 17.1]ff; *Criminal Law (NSW)* at [CPA.17.20].

(d) the court permits time before requiring a plea to the indictment: s 19(2), see *Criminal Practice and Procedure NSW* [2-s 40]ff; *Criminal Law (NSW)* at [CPA.19.40]ff.

There is a general power to adjourn proceedings: s 40.

As to the necessity to re-arraign the accused after an amendment of the indictment see *Kamm v R* [2007] NSWCCA 201.

There are a number of special pleas that can be made to the indictment. These are rare but include a plea of autrefois: s 156. Such a plea is determined by a judge alone.

The accused may plead not guilty to the charge stated in the indictment but plead guilty to an offence, not set out in the indictment, but included in the charge: eg plea of guilty to offence of robbery on charge of armed robbery. The Crown may accept the plea in discharge of the indictment or refuse to do so: s 153. If the Crown does not accept the plea, it is taken to have been withdrawn. If the accused pleads not guilty to the primary charge but guilty to an alternative count on the indictment and that plea is not accepted by the Crown in discharge of the indictment, the plea to the alternative count remains but the accused is placed in charge of the jury on the primary charge only, see *Criminal Practice and Procedure NSW* at [2-s 153.1]; *Criminal Law (NSW)* at [CPA.154.120].

Pronunciation and forms of address

Where appropriate, judicial officers should clarify, at the beginning of proceedings, the correct pronunciation of any name and the appropriate gender pronoun to be used for counsel, parties, children, witnesses, interpreters, solicitors and others relevant to the case.

Reference should also be made to the *Equality before the Law Bench Book* chapter 9.6.1 Modes of Address.

Judge-alone trials

For a discussion of the specific procedures relevant to judge-alone trials see **[1-050] Judge-alone trials**.

Pre-trial rulings

Section 130 provides that, where the accused has been arraigned, the trial court may make orders for the conduct of the trial before the jury is empanelled. Chapter 3, Pt 3, Div 3 of the Act makes provision for the court to order pre-trial hearings, pre-trial conferences and further pre-trial disclosure. The purpose of these provisions is to reduce delay in the proceedings. It is for the court to determine which (if any) of those measures are suitable: s 134(2). The accused is required to give notice of alibi (s 150) and evidence of substantial mental impairment (s 151).

It is suggested that before the date of the trial the judge ask the defence whether there is a challenge to the admissibility of evidence in the Crown case and request the parties to define the issues to be placed before the jury. In particular the judge should identify whether evidence challenged will substantially weaken the Crown case and, therefore, may engage s 5F(3A) *Criminal Appeal Act* 1912 if the ruling is made against the Crown. Any such ruling should be made before the jury is empanelled in case the Crown appeals the ruling.

Before embarking upon any pre-trial application the trial judge should ensure the accused has been arraigned.

Orders or directions made after arraignment but before empanelment of a jury include:

(a) order for a separate trial of offences or offenders: s 21, see **[3-360] Suggested direction — joint trial**.

(b) (for State offences only) an order for trial by judge alone: ss 131–132A and see *R v Belghar* [2012] NSWCCA 86. For a discussion of the principles to be applied under ss 131–132A, see *Alameddine v R* [2022] NSWCCA 219 at [15]–[24]. The provisions do not apply to Commonwealth offences: *Constitution* (Cth), s 80.

(c) evidentiary rulings including those where the leave of the court is required: s 192A *Evidence Act* 1995.

(d) orders for closed court, suppression and non-publication of evidence. See general discussion of *Court Suppression and Non-publication Orders Act* 2010 at **[1-349]**ff. As to other statutory provisions empowering non-publication or suppression, or self-executing prohibition of publication provisions, see **[1-356]**ff.

(e) change of venue: s 30, see *Criminal Practice and Procedure NSW* at [2-s 30.5]; *Criminal Law (NSW)* at [CPA.30.20].

Any orders made by the court before a jury is empanelled are taken to be part of the trial: s 130(2). Pre-trial orders made by a judge in proceedings on indictment are binding on a trial judge unless it would not be in the interests of justice: s 130A. Section 130A orders extend to a ruling given on the admissibility of evidence: s 130A(5) (inserted by the *Statute Law (Miscellaneous Provisions) Act (No 2)* 2014).

Section 306I *Criminal Procedure Act* 1986 provides for the admission of evidence of a complainant in new trial proceedings. Under s 306I(5), the court hearing the subsequent trial may decline to admit the record of evidence if the accused "would be unfairly disadvantaged". Section 306I(5) is directed to the position *after* specific questions of admissibility, determined under the *Evidence Act* 1995, have been addressed and permits the court to have regard to the effect of any edits to the record of evidence: *Pasoski v R* [2014] NSWCCA 309 at [29].

Sexual assault communications privilege

In sexual assault trials, there are special provisions associated with the production, and admissibility, of counselling communications involving alleged victims of sexual assault. These are in Ch 6, Pt 5, Div 2 of the *Criminal Procedure Act* "Sexual assault communications privilege" (SACP).

As a general rule, a person in possession of such material cannot be compelled to produce it in trials, sentence proceedings, committal proceedings or proceedings relating to bail: ss 297, 298. The relevant definitions are found in ss 295 and 296.

See further **[5-500] Sexual assault communications privilege**.

[1-010] The trial process

Last reviewed: September 2023

If the accused is self-represented, the judge is obliged to explain the trial process to the accused before the jury is empanelled. See generally, **[1-800]**ff and **[1-820]**.

Any interpreter who is present to assist the accused must take an oath or make an affirmation (see *Evidence Act* 1995, s 22) and should be placed so that they may communicate with the accused.

Generally, all proceedings in connection with a criminal trial should be heard in open court. There are statutory provisions restricting publication of evidence, for example where children are involved either as an accused or a witness. The court also has power to have a witness referred to by a pseudonym. There are provisions relating to witnesses giving evidence by alternative means, as to which see below.

Empanelling the jury

Provisions concerning the jury are found in the *Jury Act* 1977.

A jury panel is summoned by the sheriff and brought into court when required. Practice varies as to whether the judge is on the Bench when the panel is brought into court. However, the accused must be in the dock (if bail refused) before the panel enters the courtroom.

It is suggested that, before the panel is brought into court, the judge discusses with counsel matters that should be raised with the panel at the outset because they may impact upon a juror's willingness to perform his or her duty, such as the length of the trial, pre-trial publicity and the particular nature of the charge.

The judge can determine whether to excuse any person in the panel: s 38 *Jury Act*.

It is suggested that the trial judge inquire of the panel whether any person wishes to be excused for some reason, even though an application may have been refused by the sheriff, based on any matter raised with counsel or otherwise. For example, the jury should be informed that the proceedings will be in English, the sitting times of the court and the need for attendance every day. It is a matter for the judge whether the prospective juror should be sworn or not when seeking to be excused.

It is possible to challenge the array before empanelment but this is very rarely done: s 41 *Jury Act*. This is a challenge against the processes of the sheriff in selecting the panel.

If pre-trial rulings have been made pursuant to s 130(2) the accused is to be arraigned again on the indictment before the jury panel: s 130(3); *DS v R* [2012] NSWCCA 159 at [63]. Otherwise, although it may not be strictly necessary for the accused to be re-arraigned before the jury panel (*R v Janceski* (2005) 64 NSWLR 10), it is good practice to do so.

After the accused is arraigned before the panel but before the selection of jurors, the judge requests the Crown to inform the jury panel members of the nature of the charge, the identity of the accused and of the principal witnesses to be called for the prosecution: s 38 *Jury Act*, see **[1-455]**. The defence counsel should be asked whether there is any matter that should be raised with the jury, such as the names of defence witnesses. It is suggested that the Crown and defence counsel should also be invited to provide the names of persons who will be mentioned during the trial, even though they are not, or may not be, witnesses.

See s 38(1) *Jury Act* and cl 6 *Jury Regulation* 2022 in relation to the non-disclosure of the identity of certain officers and protected witnesses.

The judge calls on the jury panel members to apply to be excused if they consider that they are not able to give impartial consideration to the case in light of what the prosecutor has said, and in particular whether a potential juror may know a witness personally: s 37(8) *Jury Act*. The judge should also invite excusal applications to be made for other reasons that may impact upon a person's ability to participate as a juror (eg because of the awareness of pre-trial publicity, oral and written English language skills, sitting times and the estimated duration of the trial).

In a trial where it is anticipated there will be a large number of witnesses, it may be desirable that the panel members be provided with a list of witnesses (and other people who may be mentioned). The jury panel may be sent to the jury assembly area

for members to have an opportunity to consider the list. They should be directed not to have discussions with other panel members. Those wishing to make an application to be excused may then be returned to the court room for it to be considered by the judge.

There are various ways in which applications to be excused may be received and considered. The person may be asked to come forward and inform the judge of the basis of the application. It is preferable that they do not speak in a manner audible to the balance of the jury panel. The person may make the request in writing if the circumstances relate to the person's health or may cause embarrassment or distress (s 38(3) *Jury Act*). Another option for the making of excusal applications is for writing material to be made available in the body of the court where the panel members are located for all applications to be made by way of a note. The sheriff or court officer can then provide the note, and the panel member's card, to the judge to consider the application. However the application is made, the judge may clarify with counsel whether the matter raised should warrant the person being excused (eg, in the case of the person knowing a witness).

There is no requirement for excusal applications to be made by way of oath or affirmation.

After the excusal applications have been determined and before proceeding with the empanelment it is wise to reiterate to the jury panel members the importance of raising any matter of concern at this time rather than thinking that the matter may not cause a problem but then to find out sometime during the trial that it is.

The jurors are selected by ballot in open court: s 48 *Jury Act*. The selection of the potential jurors is performed by the judge's associate withdrawing cards from the box provided. The jurors are referred to only by numbers given to them by the sheriff. The parties have no right to the names or any other personal information of prospective jurors: *R v Ronen* [2004] NSWCCA 176. As to the selection of the jury generally and challenges, see Pt 7 *Jury Act* and **[1-460]**ff. See also *Criminal Practice and Procedure NSW* at [7-450], [29-50,725].

As to the number of jurors and the selection of additional jurors where necessary, see s 19 *Jury Act* and **[1-440]**.

A challenge can be made by the accused or the legal representative: s 44 *Jury Act*. Defence counsel will usually ask to be permitted to assist the accused, and permission is inevitably given. The challenges are made before the juror is sworn. There is some opportunity to inspect the prospective juror before a challenge is made under s 44. See the discussion in *Theodoropoulos v R* (2015) 51 VR 1 at [49].

Practices as to empanelling can vary. One method is that the jury be advised that they will be permitted to take an oath or an affirmation as to the conduct of his or her duties as a juror. They should also be advised as to the right of the parties to challenge particular jurors. The 12 prospective jurors are called into the box. The accused is informed of the right to challenge by the clerk of arraigns. There is a pause as the prospective juror stands so as to allow time for a challenge to be made. If challenged, the juror is asked to leave the jury box. Further jurors are called and challenges taken until the required number of jurors is obtained.

After members of the jury have been chosen, the jury is sworn by oath or affirmation: s 72A *Jury Act*. It is a matter for the practice of the individual judge whether the

jury is sworn as a group or individually and also as to whether a religious text is to be held by those taking an oath: s 72A(5) *Jury Act*. It is not necessary for the accused to be arraigned again after the jury is selected: *DS v R* [2012] NSWCCA 159 at [64]. After the jurors are sworn the balance of the panel is returned to the sheriff and leaves the courtroom. The judge instructs the jury on any closed court, suppression or non-publication orders that are in place: see **Closed court, suppression and non-publication orders** at **[1-349]**ff.

After the jury is sworn, the accused is given or placed into the charge of the jury by the judge's associate. This is in effect indicating to the jury the charges in the indictment and the jury's duty to act according to the evidence.

It is suggested that where the indictment contains a number of counts or multiple accused, the Crown be requested to provide the jury with a copy of the indictment at this time or shortly thereafter. It can be helpful for the judge in opening for the jury to have a copy of the indictment where there are numerous or complicated charges.

It is suggested that after the jury has been charged, the judge tells the jury that: it does not have to elect a foreperson immediately, it can change the foreperson at any time, the major function of the foreperson is to deliver the verdict but they can be the person who communicates between the jury and the judge, but the foreperson has not more rights in respect of the conduct of the jury or the determination of the verdict than any other member of the jury.

Where, at any time during the trial, the accused wishes to plead guilty, they should be arraigned again. If there is a plea of guilty to the charge or an included charge and the plea is accepted by the Crown, the jury is to be discharged without giving a verdict: s 157 *Jury Act*.

After empanelment some judges think it appropriate for the court attendant to give a direction that potential witnesses leave the court and the hearing of the court.

Adjournment after empanelling

It is suggested that, immediately after the jury has been empanelled and charged, they are given a short break in order to orientate themselves as a group, familiarise themselves with the surroundings and overcome any nervousness that may have been occasioned by the procedure of empanelling. They might be informed that, when they return to the courtroom, an explanation of their role and function as jurors and an outline of the trial procedure will be given to them before the trial proper commences.

Judge's opening

See generally **[1-470]**, **[1-480]** and **[1-490]** for the suggested contents of the opening.

The trial judge should briefly describe to the jury the trial process, the role and obligations of jurors, the onus and standard of proof, the duties and functions of counsel and, where known, the issues to be raised in the trial. If appropriate, the judge can briefly explain the nature of the charge or charges in the indictment. These remarks should be tailored to the particular case that the jury is to try. For example, the trial judge may consider what, if anything, needs to be said about pre-trial publicity.

It is suggested that each member of the jury be provided with a written document which can be referred to in the course of the opening and left with the jury during the

trial (see the suggested written directions at **[1-480]**). It is a matter for the judge what issues should be addressed in the written document but it is suggested that it should at least include a brief explanation of the following:

- the respective role of a judge and a jury
- the nature of a criminal trial
- the onus and standard of proof
- the imperative of not discussing the trial with any person outside the jury room
- the duty of jurors to bring irregularities in the conduct of the trial to the judge's attention and report any juror misconduct
- the prohibition against making inquiries outside the courtroom including using the internet or visiting the scene of the crime and indicating that such conduct is a criminal offence
- that they should discuss the matter only in the jury room and when they are all assembled
- that they should ignore any media reporting of the trial
- the principal issues in the case if they are known.

The judge should make some oral reference in opening to the following practical matters:

- sitting hours
- breaks and refreshments
- selecting a foreperson
- introducing counsel
- the jury can request transcript at any time and in respect of any witness.

It should be made clear to the jury that any concern about the evidence or the conduct of the trial should be raised by a note with the judge and not with a court attendant.

[1-015] The course of the evidence

Last reviewed: September 2023

Opening addresses

The opening address of the Crown is a succinct statement of the nature of the charge and a brief outline of the Crown case. The Crown may refer to the witnesses it intends to call and what evidence it is anticipated that a particular witness will give: see *Criminal Practice and Procedure NSW* at [7-475]; *Criminal Law (NSW)* at [CLP.1780]. The Crown should indicate in opening whether it relies upon any statutory or common law alternatives to the offence charged in the indictment. The Crown can be asked not to open on evidence to which objection will be taken but where admissibility has not been determined.

Counsel for the accused can open but it should only be to indicate the issues in contention and not be a wide ranging discussion of the law: s 159(2) and *R v MM* (unrep, 9/11/2004, NSWCCA) at [50], [139], [188].

Witnesses in the Crown case

It is a matter for the Crown how it structures its case, what witnesses to call and the order of calling witnesses.

In a joint trial it is suggested that the judge ask the Crown Prosecutor to identify evidence which is admissible against one accused but not against another (or others) at the time the evidence is led. The judge should make clear to the jury how the evidence can be used or not used against each accused.

Procedures can be adopted to preserve the anonymity of witnesses where necessary: see *BUSB v R* (2011) 80 NSWLR 170. Generally the judge has no role to play in the calling of witnesses.

There are several statutory provisions that permit witnesses to give evidence by alternative means. See generally **[1-360]**ff. When these provisions are utilised, the judge is required by statute to explain the procedure to the jury. There are suggested warnings and directions contained in the chapter. In particular where the evidence of a witness is given by way of a recording, it is important to impress on the jury before they watch the recording, that evidence given in this way is evidence like that of any other witness so they should concentrate while the recording is being played as they should not assume they will have the opportunity to watch the evidence again.

It is suggested that these explanations and directions are given at the time the witness is to be called and before the witness is called. They may be given again in the summing up, if it appears necessary to do so to ensure the jury is aware of these matters before deliberating.

As to giving evidence by the use of a video recording, see **[1-372]**ff.

As to evidence by audio-visual link, see **[1-380]**.

If a witness is unfavourable within the terms of s 38 *Evidence Act* 1995, specific directions may be required, see **[4-250]**ff. Directions may be necessary if a relevant witness is not called by the Crown, see **Witnesses — not called** at **[4-370]**.

If a witness objects to giving particular evidence or evidence on a particular matter under cross-examination, the judge is required to explain to the witness in the absence of the jury the privilege against self-incrimination, see **[1-700]**ff.

As to the power to give the witness a certificate, see s 128 *Evidence Act* and **[1-710]**.

As to expert evidence see **[2-1100]**ff.

In the rare case where there is complexity in the expert evidence, it is suggested that the jury be given the opportunity to raise any matter they would like to be further explained or clarified. The jury could be asked to retire to the jury room to consider whether there is anything they wish to raise before the expert is excused and to send a note which the judge will then discuss with counsel.

As to jury questions generally, see **Jury questions for witnesses** at **[1-492]** and **Expert evidence** at **[1-494]**.

Directions and warnings

During the course of the Crown case a witness or a particular type of evidence may be called in respect of which it may be necessary to give a direction or warning to the jury, generally see s 165 *Evidence Act*. A direction is "something which the law requires the trial judge to give to the jury and which they must heed": *Mahmood v State of WA* (2008) 232 CLR 397 at [16]. A direction may contain warnings or caution the jury about the care needed in assessing evidence or about how it can be used: *Mahmood* at [16].

The usual instance where a warning is required is the categories of evidence found in s 165(1). These are addressed in the following sections of this Book:

(a) hearsay evidence, see **[5-020]** or admissions see **[2-000]**ff

(b) identification evidence including visual, see **[3-000]**ff, or voice, see **[3-110]**

(c) evidence which may be affected by age, see **[1-135]**ff

(d) evidence given by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding, see **[4-380]**ff

(e) evidence given by a witness who is a prison informer, see **[3-750]**ff

(f) oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant, see **[2-120]**.

The matters referred to in s 165(1) are not exhaustive. A warning may be given (where there is a jury and a party so requests) in relation to evidence "of a kind that may be unreliable" (s 165(1)) ie evidence of a kind that the courts have acquired a special knowledge about: *R v Stewart* (2001) 52 NSWLR 301 at [86]. A warning under s 165 is not required for evidence which relates to the truthfulness of a witness such as evidence of a motive to lie, bias, concoction, or a prior inconsistent statement. Such matters are within the common experience of the community and thus capable of being understood by the jury: *R v Fowler* [2003] NSWCCA 321. This proposition does not of course apply to a witness who falls into one of the categories mentioned in s 165.

Section 165(5) preserves the power of a judge to give a warning or to inform the jury about a matter arising from the evidence, whether or not a warning is requested under s 165(2): *R v Stewart* at [86].

Warnings and exculpatory evidence

A warning under s 165 will rarely be applicable to a witness who does not give evidence implicating the accused: *R v Ayoub* [2004] NSWCCA 209 at [15]. A warning is not appropriate or required if the evidence is favourable to the accused because "the aspect of the witness's status that gives rise to the possibility of unreliability is no longer relevant": *R v Ayoub* at [16].

However there are some types of evidence, such as identification evidence and hearsay evidence, that are potentially unreliable no matter whether they exculpate or inculpate an accused: *R v Rose* (2002) 55 NSWLR 701 at [297]. Some warning is required about the potential unreliability of the evidence: *R v Rose* at [297]. The judge should exercise care before giving a s 165 warning to evidence led by the defence.

Section 165A *Evidence Act* also addresses judicial warnings in relation to the evidence of children, see **[1-135]**ff. Section 165B *Evidence Act* provides for a warning where there is a delay in prosecution, see **[5-070]**ff.

A direction is usually required in relation to:

(a) visual identification: s 116 *Evidence Act*, see **[3-000]**ff.

(b) the right to silence where the accused refuses to answer questions of police, see **[4-110]**.

(c) the impermissible use of evidence as tendency, see **[4-200]**ff.

A direction or warning is not the same as a comment and generally a comment will be inadequate if a warning or direction is required.

It is suggested that directions and warnings about particular types of evidence or witnesses be given at the time the evidence is called before the jury. If the evidence is very prominent in the trial it may be appropriate to give the direction or warning immediately after the opening addresses, for example where the Crown case is solely or substantially based upon visual identification. Directions and warnings should also be repeated in the summing up. It may be appropriate to give a direction or warning in writing at the time it is given orally to the jury, or for it to be included in the written directions in the summing up depending upon the significance of the evidence to the Crown case.

The trial judge should be seen as impartial and must take care not to become too involved in the conduct of the trial, in particular in questioning witnesses: *Tootle v R* (2017) 94 NSWLR 430 at [46]. It is for the parties to define the issues to be determined by the jury. A cardinal principle of criminal litigation is that the parties are bound by the conduct of their counsel: *Patel v The Queen* (2012) 247 CLR 531 at [114].

A judge should generally not reject evidence unless objection is taken to it: *FDP v R* (2009) 74 NSWLR 645. However a judge is required to reject a question asked in cross-examination that is improper within the terms of s 41 *Evidence Act* even where there is no objection taken to the question, see **[1-340]**.

The Crown must call all its evidence in the Crown case and cannot split its case by calling evidence in reply where it could have anticipated the evidence to be called by the defence: *Shaw v R* (1952) 85 CLR 365. The Crown may be permitted to reopen its case in order to supplement a deficiency in its case that was overlooked or is merely technical: *Wasow v R* (unrep, 27/6/85, NSWCCA). This can occur at any time provided it does not result in unfairness: *Pham v R* [2008] NSWCCA 194 (after the Crown had started to address); *Morris v R* [2010] NSWCCA 152 at [26].

Where there is more than one accused, cross-examination occurs in the order in which the accused are named in the indictment unless counsel come to some other arrangement.

Views

As to the procedure in respect of carrying out a view, see **[4-335]**ff. It is usual to appoint a "shower", being a person who will indicate various aspects of the scene to the jury in accordance with the evidence. This may be the police officer in charge of

the investigation. The accused does not have to be present at the view but they have the right to attend: *Jamal v R* [2012] NSWCCA 198 at [41]. It often occurs that the accused chooses not to because of the prejudicial effect if the accused is in custody.

The Reporting Services Branch will record all that is said by the shower at the view and any questions asked by the jury and the shower's answers. Consideration should be given to requesting a video recording, though this will not be evidence and will only be marked for identification. Jurors must not be video recorded and should be reassured of this.

Transcript

The jury may be supplied with the transcript or part of it, including addresses and, if available, the summing up or part of it: s 55C *Jury Act*: *R v Medich (No 24)* [2017] NSWSC 293. The provision of the transcript is a discretion exercised by the trial judge, but there may be cases where the nature of the charges, the volume of evidence and the fragmented nature of the hearing require that the jury be provided with the transcript where they request it: *R v Bartle* (2003) 181 FLR 1 at [670]–[672], [687].

It is suggested that, where a daily transcript service is being provided, a clean copy of the transcript on which agreed corrections are recorded should be kept in a folder by the judge's associate in case the jury later request the transcript or part of it. It is helpful to have the transcript tabbed according to the name of witnesses.

Practices differ as to whether the jury is provided with the transcript daily as a matter of course or only when the jury requests the transcript. It can be provided at any time, even during deliberations. Where the jury is provided with part of the transcript, fairness may require that they be provided with some other part of the transcript. A suggested direction in regard to the use of transcripts is given at **[1-530]**.

It is suggested that before the transcript is given to the jury, counsel should be requested to ensure that the copy to be handed to them does not contain any material arising from applications or discussion that took place in the absence of the jury.

Close of Crown case

At the conclusion of the Crown case, if the evidence taken at its highest is defective such that the Crown cannot prove the charge to the requisite degree, the judge has a duty to direct an acquittal, see **[2-050]**ff. For a recommended direction to the jury, see **[2-060]**. The judge has no power to direct an acquittal because they form the view that a conviction would be unsafe: *R v R* (1989) 18 NSWLR 74; *Doney v R* (1990) 171 CLR 207.

As the Crown has the right of an appeal against an acquittal by direction, full reasons should be given at the time of the acquittal or immediately thereafter.

In *Director of Public Prosecutions Reference No 1 of 2017* (2019) 267 CLR 350, the High Court held that a "Prasad direction" (so named from *R v Prasad* (1979) 23 SASR 161) should never be given. The direction, which it was intended would be sparingly given, was that a jury could acquit at any time without hearing any more evidence or the addresses. A Prasad direction should not be given in any case.

Defence case

Where the accused intends to give or tender evidence or call witnesses, defence counsel may open the accused's case to the jury: s 159.

The accused may call evidence as to character generally or in a particular aspect, see s 110 *Evidence Act*, the discussion and suggested directions at **[2-350]**ff. The Crown can adduce evidence to rebut the accused's claim that they are a person of good character either generally or in a particular respect: s 110(2), (3). Cross-examination on character can only be with leave: s 112 *Evidence Act*. As to cross-examination of the accused generally, see **[1-343]**.

The accused should not be prevented from giving evidence on a particular topic simply because the matter was not raised with the Crown witnesses in cross-examination: *Khamis v R* [2010] NSWCCA 179. A non-exhaustive list of possible responses by a court to a breach of the rule in *Browne v Dunn* appears in *Khamis v R* at [43]–[46]. If the accused's evidence is allowed and there has been a breach of the rule, the trial judge may fashion appropriate and careful directions to the jury: see also *RWB v R* [2010] NSWCCA 147 at [101], [116]. See further commentary at **[7-040]** at [7].

There is no requirement that the accused give evidence before calling other witnesses although there is a general practice to that effect: *RPS v The Queen* (2000) 199 CLR 620 at [8]–[9] and see the discussion in *R v RPS* (unrep, 13/8/97, NSWCCA).

See defences from **[6-050]**ff.

As to intoxication, see **[3-250]**ff.

Case in reply

Because of the rule against the Crown splitting its case, the circumstances in which the Crown will be permitted to call evidence in reply must be very special or exceptional having regard to all the circumstances, including whether the Crown could reasonably have foreseen the issue before the close of its case: *Morris v R* [2010] NSWCCA 152.

The Crown can call evidence in reply to evidence given by the accused of alibi or substantial impairment: ss 150(5), 151(3). However, in practice the Crown calls rebuttal evidence in the Crown case. The judge can direct the Crown to call the evidence in its case: *R v Fraser* [2003] NSWSC 965.

Discharge of the jury

Part 7A of the *Jury Act* deals with the discharge of jurors. The trial judge has a discretion to discharge a juror and, if the juror is discharged, a separate and distinct discretion whether to continue with the trial with less than 12 jurors (s 53C): *BG v R* [2012] NSWCCA 139 at [91]. These discretions should be exercised independently. As to the discharge of individual jurors, see **[1-505]**, and a suggested direction following a discharge, see **[1-515]**. For further information in relation to the discharge of the whole jury, see **[1-520]**. As to questioning jurors in relation to prejudicial material, see s 55D *Jury Act*. If the judge is required to examine a juror in respect of alleged misconduct, see s 55DA *Jury Act*.

It may be necessary to question a juror or jurors about the matter giving rise to the issue of discharge. It is suggested that this should be carried out by the judge after consultation with counsel, but counsel not be permitted to question the juror. Any questioning should not enter into the area of the jury's deliberations.

[1-020] Addresses

Last reviewed: September 2023

It is suggested that before addresses the judge should discuss with counsel the issues that have been raised and what warnings or directions will be sought in the summing up. In particular, the Crown should indicate whether it relies upon any alternative counts in light of the evidence given during the trial.

It is suggested that, unless the case is a legally simple one, written directions be given to the jury before counsel addresses as to the elements of the offence and any relevant legal issues with some short oral directions explaining these matters without reference to the evidence. This course relieves counsel from having to deal with the law, and gives the jury written guidance on the legal issues to which counsel can refer when addressing. The written directions should be shown to counsel before being given to the jury.

It is suggested that counsel be asked to break up their addresses into sections lasting no more than 40 minutes and that the jury be given a short break at the end of each section.

Crown address

The Crown addresses first and may be permitted a further address where factual matters have been misstated in the defence address: s 160. This is rarely permitted having regard to counsel having an opportunity to correct errors and/or the judge doing so.

There is a practice that the Crown will not address where the accused is unrepresented, but there is no rule that prohibits the Crown from doing so, see **[1-835]**. The accused should not be able to achieve a tactical advantage by dismissing defence counsel before addresses.

As to the contents of the Crown address, see *Criminal Practice and Procedure NSW* at [7-600]; *Criminal Law (NSW)* at [CLP.1780].

[1-025] Summing up

Last reviewed: September 2023

As to summing up the case to the jury, see **[7-000]**ff. As to the provision of written directions, see **[1-535]**. The summing up should be concerned only with issues actually raised at the trial. The jury should be directed on only so much of the law that is necessary to determine the charge or charges before them: *Huynh v The Queen* [2013] HCA 6 at [31].

Suggested directions are contained in the Bench Book under particular topics. They should be adapted where necessary to deal with particular factual situations arising in the trial. A trial judge is not required to give directions in accordance with those contained in the Bench Book: *Ith v R* [2012] NSWCCA 70 at [48].

It is generally useful to provide the jury with a document containing the elements of the offence(s) and relevant definitions.

It is suggested that the summing up be delivered in sections of no more than 40 minutes and the jury be given a short break between each section. It is suggested that when the jury retires for a break that counsel be asked whether there is anything they wish to say about the section of the summing up that has just been given.

Before the jury are sent out to deliberate, the judge should ask both counsel (and in the absence of the jury if necessary) whether there are any errors or omissions to be corrected. If counsel wish to have a particular direction given, counsel should frame the direction sought.

Where there are multiple accused and/or multiple counts it may be desirable for a "verdict sheet" to be provided to the jury upon which the verdicts may be recorded to assist the foreperson in announcing each of them.

When the jury retires to deliberate, exhibits should be sent to the jury room. Where the evidence of a child has been given by a video recording, the recording is not an exhibit and should not be sent to the jury room, see a discussion of *R v NZ* (2005) 63 NSWLR 628 at **[1-378] Pre-recorded interview by witness — preferred procedure**. The judge has a discretion to withhold an exhibit from the jury room.

It is suggested that counsel should check the exhibits being sent to the jury to ensure that only exhibits find their way into the jury room and not extraneous material that has inadvertently found its way into the exhibits.

[1-030] Jury deliberations

Last reviewed: September 2023

As to jury questions during deliberations, see **[8-000] Unanswered questions or requests by the jury**. It is imperative that a verdict not be taken until the judge has addressed all the questions from the jury: *R v McCormack* (unrep, 22/4/96, NSWCCA). Where a question manifests confusion, it is important that this be removed by answering the question even where the jury has apparently resolved the issue: *R v Salama* [1999] NSWCCA 105 at [71].

It is normal practice to re-assemble the court shortly before 4 pm in order to inquire of the jury whether they wish to continue to sit or to retire for the day and return the following morning. The jury should indicate the time at which they wish to recommence their deliberations.

An order should be made permitting the jury to separate if the jury wish to return the next day: s 54 *Jury Act*.

It is suggested that it be stressed to the jury that, although they are being permitted to separate, they should not discuss the matter with any other person nor with fellow jurors until after they have all reassembled in the jury room the next day.

Where the jury indicates it is unable to agree it may be necessary to give a "Black direction", see **[8-050]**ff.

Return of the jury

As to taking the verdict of the jury, see **[8-020]** for Commonwealth offences and **[8-030]** for State offences.

A jury should not be questioned as to the basis of its guilty verdict, for example where manslaughter has been left on different bases, see **[8-020]** at [4].

As to prospects of disagreement and the taking of majority verdicts, see **[8-050]**.

The jury is to be discharged immediately after delivering its verdict: s 55E *Jury Act*.

It is suggested that the jury be advised as to the existence of the offence under s 68A of the *Jury Act* in relation to soliciting information from or harassing a juror. It should also be warned of the offences under s 68B as to the disclosure of information as to the deliberations of the jury.

The verdict should be entered by the judge's associate on the back of the indictment noting the date and time of the verdict.

Some judges have the allocutus given to the accused by the associate after a verdict of guilty, see **[8-020]** at [7]. This is not essential. The trial judge will usually formally convict the accused where a guilty verdict has been returned and before adjourning the matter for sentencing proceedings, if such an adjournment is sought.

The exhibits and MFI's (Marked for Identification) should be returned to the relevant party.

[The next page is 1]

Judge-alone trials

Section 131 of the *Criminal Procedure Act* 1986 requires criminal proceedings in the Supreme or District Court to be tried by a jury. The exception to this is judge-alone trials — the procedural requirements for which are set out in ss 132–133.

This chapter provides an overview of the relevant statutory provisions and case law applying to judge-alone trials as well as the general principles of procedural fairness and bias. Unless otherwise stated, the section numbers below refer to the provisions of the *Criminal Procedure Act* 1986.

[1-050] Section 132 — Orders for a judge-alone trial

Last reviewed: September 2023

An accused or the prosecutor may make an application for a judge-alone trial: s 132(1). Section 132(2)–(6) set out the manner in which the court should address an application for a trial by judge order made under s 132(1):

- The court must make a trial by judge order if the accused and prosecutor agree to the accused being tried by a judge alone: s 132(2).
- If the accused does not agree to a judge-alone trial, the court must not make such an order: s 132(3).
- If the prosecutor does not agree to a judge-alone trial, the court may make such an order if it is considered in the interests of justice to do so: s 132(4).
- The court may refuse to make a trial by judge alone order if it considers the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness: s 132(5).
- An order can only be made if the court is satisfied the accused has received legal advice as to the effect of such an order: s 132(6).
- The court may make an order in circumstances where there is a risk of a commission of an offence involving an interference with a witness, judge or juror. This subsection expressly operates "despite" s 132A: s 132(7); *Alameddine v R* [2022] NSWCCA 219 at [23]. See **[1-055] Section 132A — Applications for trial by judge alone in criminal proceedings**.

Although the accused person carries an evidentiary onus in relation to an application for a judge-alone trial, they are not required to displace any "presumption" of a jury trial. The court should not give particular weight to the fact that, absent an application for a judge-alone trial, the accused will be tried by jury, nor should it assume either form is more desirable than the other. The question for the court is whether it is in the interests of justice to make the order: *DPP (NSW) v Farrugia* [2017] NSWCCA 197 at [9]; *R v Belghar* [2012] NSWCCA 86 at [96]; *R v Stanley* [2013] NSWCCA 124 at [42].

Interests of justice — s 132(4)

Section 132(4) requires a binary decision, which depends upon an evaluation of potentially conflicting considerations including the interests of the parties and larger

questions of legal principle, the public interest and policy considerations: *DPP v Farrugia* at [8]; *Landsman v R* [2014] NSWCCA 328 at [69]. Once it is found to be in the interests of justice to order a judge-alone trial, the court should make the order: *Brown v DPP (NSW)* [2018] NSWCCA 94 at [12]–[13].

Factors relevant to the interests of justice

Below are some of the judicially accepted factors relevant to whether a judge-alone trial is in the interests of justice.

Application for order

The fact an accused has decided, on legal advice, to seek an order for a trial by judge and the accused's subjective views in dispensing with a jury trial are relevant matters to be considered when determining where the interests of justice lie: *R v Stanley* at [42]; *R v Belghar* at [99]; *Redman v R* [2015] NSWCCA 110 at [13]; *R v Simmons (No 4)* [2015] NSWSC 259 at [60]; *R v Qaumi (No 14) (Judge alone application)* [2016] NSWSC 274 at [22].

However, there must be more than a mere stated apprehension, without supporting evidence, that the accused will be prejudiced in a jury trial: *R v Stanley* at [42]; *R v Qaumi* at [22]. The judge must assess whether that apprehension is soundly based: *R v Belghar* at [101].

Efficiency and length of trial

While the likely length of the trial in a particular case, if conducted with a jury, compared with the likely length of trial by a judge alone is a matter that may form "part of the mix of issues" to be considered in a particular case, those efficiencies are of little weight in assessing where the interests of justice lies: *R v Belghar* at [110]–[111]; *R v Qaumi* at [24]; *R v Gittany* [2013] NSWSC 1503 at [43]–[44]; *R v Abdaly (No 3)* [2022] NSWSC 1511 at [21]. The difficulties that may attend the conduct of a jury trial, such as applications for discharge because of prejudicial evidence, are not generally major factors in the resolution of whether a judge-alone trial is in the interests of justice: *R v Qaumi* at [25], [27]. However, the obligation on prospective jurors to spend many months away from their normal activities, including their employment, may be a significant matter in a particular case when determining where the interests of justice lie: *R v Belghar* at [110].

During the period of restrictions as a consequence of the COVID-19 pandemic, efficiency emerged as a particularly relevant factor in ordering a judge-alone trial: see *R v Kerollos* [2020] NSWSC 1758, *R v Jaghbir (No 2)* [2020] NSWSC 955 and *R v Scott* [2021] NSWSC 1004 for decisions relating to judge-alone trials during this period.

Case complexity and comprehensibility

If the evidence expected to be adduced is of such complexity that it could not be comprehended by a jury, or there is something to suggest it will be of such length that a jury will not be able to understand the evidence or follow directions, this will support a judge-alone trial: *R v Qaumi* at [29]–[31]; *R v Belghar* at [110]; *DPP v Farrugia* at [11]. However, in some cases this may be overcome by proper explanation and presentation of the evidence: *R v Adams (No 2)* [2016] NSWSC 1359 at [43]–[45]; *R v Dean* [2013] NSWSC 661 at [63].

Reasons for verdict

The interests of justice are enhanced by the giving of reasons. This is particularly the case in trials involving complex engineering, scientific or medical issues. However, reasons remain but one factor to be considered in determining the interests of justice and the weight given to them depends on the issues in the trial: *R v Belghar* at [112]. A judge-alone trial order should not be made solely because a reasoned judgment is more transparent than a jury verdict or a "correct" result is more likely: *DPP v Farrugia* at [11].

Community standards

Section 132 gives weight to the importance of the application of objective community standards in the resolution of a range of factual issues. That is a consideration which favours trial by jury, in accordance with underlying principle: *DPP v Farrugia* at [10]. See also, s 132(5), discussed below.

Media publicity and prejudice

Many applications for trial by judge alone are based on the risk of prejudice arising from material contained in the evidence of the case itself, from the media publicity surrounding the proceedings or from the risk that a jury may interrogate the internet: *R v Simmons* at [84]. The significance of a risk of prejudice varies from case to case depending on the nature of the allegations, the nature of the defence and the character of the potential prejudice: *Redman v R* [2015] NSWCCA 110 at [16].

It should be assumed that jurors will undertake their duties in a fair and balanced way, informed only by the evidence adduced at trial: *R v Obeid* [2015] NSWSC 897 at [68]; *R v Jamal* (2008) 72 NSWLR 258 at [60]. To justify a judge-alone trial order, media coverage of a case must be "extraordinary" or "emotive": *R v Qaumi* at [77].

The lapse of time between publicity and the trial itself is a significant factor in determining the prejudicial effect of media coverage: *R v Obeid* at [61]; *Montgomery v HM Advocate* [2003] 1 AC 641 at 673; *R v McNeil* [2015] NSWSC 357 at [75]. A jury's memories of prejudicial material will fade with the passage of time: *R v Obeid* at [65].

Steps can be taken to reduce the impact of publicity and assist the conduct of a fair trial: *R v Obeid* at [75]. Jurors who might have a detailed recollection of relevant media coverage can be identified during pre-empanelment procedures and excused: *R v Qaumi* at [78]. Orders can be made to remove prejudicial material from the internet, and jury access to any remaining material can be alleviated by additional measures such as suppressing the accused's name from court lists and giving certain jury directions: *R v Qaumi* at [79]–[82]. Section 68C of the *Jury Act* 1977 also operates to prohibit jurors from making inquiries about trial matters: *R v Obeid* at [63], [74].

Community standards — s 132(5)

Where an alleged offence involves objective community standards, Parliament has made it clear that it may be preferable in the interests of justice that there be a trial by jury: *R v Belghar* at [100]. Section 132(5) provides that the court may refuse to make a judge-alone order if it considers the trial will involve a factual issue requiring the application of objective community standards, including an issue of reasonableness, negligence, indecency, obscenity, or dangerousness.

While the fact issues will arise requiring the application of objective community standards is a matter militating in favour of trial by jury, it is not determinative. The prevailing question is whether it is in the interests of justice to make an order: *R v Qaumi* at [116].

Intention

The authorities are divided on whether a jury is the preferable tribunal of fact for judging the formation of intent and whether intention is a matter raising objective community standards: *R v Abdaly (No 3)* [2022] NSWSC 1511 at [20]; see for example the discussions in *Stanley v R* at [55]–[59], [60]–[61]; *R v McNeil* at [93], [95]; *AK v State of Western Australia* (2008) 232 CLR 438 at [95]; *R v King* [2013] NSWSC 448 at [48]–[53]; *R v Dean* at [58]; *R v Belghar* at [100]; *R v Qaumi* at [36]–[37]. In *R v Simmons* at [65] Hamill J applied *R v Abrahams* [2013] NSWSC 729 at [73]–[77], concluding there is a qualitative difference between the application of community standards to questions such as whether an act is obscene, reasonable or negligent and a factual inquiry as to whether a particular accused formed the necessary intention to constitute a specified criminal offence. His Honour observed that if the Parliament was of the view that intention was one involving the application of community standards, it would have been very easy to include that issue within the non-exhaustive list of matters identified in s 132(5).

Credibility

Generally, the fact a trial involves issues of credibility is a neutral factor in determining whether it is in the interests of justice for the trial to be by judge alone: *R v Qaumi* at [39], [42]; *R v Simmons* at [82]; *Redman v R* at [14]; *R v Kerollos* at [44]. Whether it is in the interests of justice for credibility disputes to be determined by a jury is a matter to be assessed on a case-by-case basis and, in some cases, jury determination may be desirable: *R v Kerollos* at [44]; see also *R v McNeil* at [102]–[104]; *R v Obeid* at [93]; *R v Mackie (No 2)* [2018] NSWSC 1654 at [25]. The training and experience of a judge in deciding matters of credibility putting aside matters of emotion must be assessed against the benefit of the range of experience and training of each of the 12 members of the jury who can discuss together and are required to reach a unanimous verdict. Further, bias, especially unconscious bias, may be less likely to affect a decision made by a group rather than a decision made by a single decision maker: *R v McCloskey (No 2)* [2019] NSWSC 1176 at [71].

Substantial impairment

While the question of substantial impairment involves an application of community standards and is generally best suited to determination by a jury, this does not preclude the making of an order for a judge-alone trial: *R v Scott* at [47]; *R v Gokhan Eyuboglu* [2019] NSWSC 181 at [13]; *R v Kerollos* at [51]; *R v Scott* at [47].

[1-055] Section 132A — Applications for trial by judge alone in criminal proceedings

Last reviewed: September 2023

Section 132A sets out the requirements for applications for trial by judge-alone in criminal proceedings. Where an application under s 132 for a judge-alone trial is made less than 28 days before the trial date, leave of the court is required: s 132A(1).

If the Crown opposes the application, the Crown should give careful consideration to opposing an application for leave to apply out of time, particularly where the application is made on the day fixed for trial if there is any possible perception of "judge shopping": *DPP v Farrugia* [2017] NSWCCA 197 at [12]; *R v Perry* (1993) 29 NSWLR 589 at 594. The appearance of judge shopping can be dispelled by the provision of an explanation for the delay that discloses some reason for making the application, other than knowing the identity of the trial judge: *Alameddine v R* at [20]. If the Crown consents to a judge-alone application, this consent will be a strong factor in favour of the grant of leave. However, it is not determinative, and the court may still refuse leave under s 132A: *Alameddine v R* [2022] NSWCCA 219 at [12], [23]–[24], [26]–[27].

An application must not be made in a joint trial unless:

(a) all other accused persons apply to be tried by a judge alone, and

(b) each application is made in respect of all offences with which the accused persons in the trial are charged that are being proceeded with in the trial: s 132A(2).

An accused person or prosecutor who applies for an order under s 132 may, at any time before the date fixed for the accused person's trial, subsequently apply for a trial by a jury: s 132A(3).

[1-060] Section 133 — Verdict of a single judge

Last reviewed: September 2023

Section 133 provides requirements for verdicts handed down by a single judge. The requirements of s 133 were summarised by the High Court in *Fleming v The Queen* (1998) 197 CLR 250 and in the CCA in *W v R* [2014] NSWCCA 110 at [108]. A judge trying criminal proceedings alone may make any finding that could have been made by a jury on the question of the accused's guilt. Such a finding has the same effect as a jury verdict: s 133(1).

Obligation to give reasons — s 133(2)

Any judgment in a judge-alone trial must include the principles of law applied and findings of fact on which the judge relied: s 133(2). The obligation to give reasons in a judge-alone trial is imposed by statute and by common law, the latter being a broader requirement: s 133(2); *Decision Restricted* [2023] NSWCCA 89 at [92]; *AK v State of Western Australia* (2008) 232 CLR 438 at [89]–[98], [101]; *Garay v R (No 3)* [2023] ACTCA 2 at [137].

The judge must state findings on the main grounds critical to the contest between the parties, and on which the verdict rests and expose the reasoning process by linking the relevant principles of law to the facts as found: *Fleming v The Queen* at [28]; *Douglass v The Queen* [2012] HCA 34 at [8]; *Toohey v R* [2020] NSWCCA 166 at [204]–[208]; *R v BK* [2022] NSWCCA 51 at [137], [141]; *R v Lazarus* [2017] NSWCCA 279 at [149]; *Wade v R* [2018] NSWCCA 85 at [103].

Ordinarily this will involve a trial judge identifying the elements of the offence, summarising the crucial arguments of the parties, resolving any issues of law and fact which needed to be determined, explaining any resolutions arrived at, applying

the law to the facts found, and explaining how the verdict followed: *AK v State of Western Australia* at [44], [85]; *DL v The Queen* (2018) 266 CLR 1 at [33]; [81]–[82]. In a circumstantial evidence case, the judge should address any defence hypotheses consistent with innocence: *R v Becirovic* [2017] SASCFC 156 at [271].

The obligations on the judge to give reasons are often too onerous to be discharged by what may, effectively, be a single draft. Section 133 requires the preparation of well-ordered, comprehensive reasons. This task can rarely be satisfactorily accomplished in an *ex tempore* fashion, which is apt to result in error: *Decision Restricted* [2023] NSWCCA 89 at [98].

The approach of adopting prosecution submissions where they coincide with the analysis of the trial judge and are comprehensive, may be sufficient to satisfy the terms of s 133(2) where the submissions comprehensively and cogently analyse the central issues at trial, however it is preferable to articulate a separate analysis: *Garay v The Queen (No 3)* [2023] ACTCA 2 per McCallum CJ at [153].

Exchanges with counsel during addresses do not form part of the reasons. Even where a judge provides substantial reasons for rejecting an argument during the course of addresses, the judge must address that argument in the formal reasons if the argument is not entirely lacking in substance: *AK v State of Western Australia* at [14]–[16].

Warnings — s 133(3)

The judge is to consider any warnings required to be given to a jury: s 133(3). It is sufficient if, as a matter of implication, it can be seen from the judgment that the judge took into account the requisite warnings. Properly construed, what the judge must take into account is the subject matter of any required warning: *GBB v R* [2019] NSWCCA 296 at [33]; *Filippou v The Queen* (2015) 256 CLR 47 at [52]. Section 133(3) only relates to warnings, not every direction given: *W v R* at [111]; *Filippou v The Queen* at [52]. The section's purpose may appear to be subverted where the judge's findings precede the warnings: *Toohey v R* at [9]. It is, however, important that the reasons of the trial judge be read as a whole and not taken to be the order in which the trial judge approached the task: *Decision Restricted* [2023] NSWCCA 89 at [234].

Interaction between s 133 and the Mental Health and Cognitive Impairment Forensic Provisions Act 2020, s 31

Section 31 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (MHCIFP Act) permits the court to enter a special verdict at any stage in proceedings provided:

(a) the defendant and prosecutor agree the proposed evidence in the proceedings establishes a defence of mental health impairment or cognitive impairment,

(b) the defendant is legally represented and

(c) the court, after considering that evidence, is satisfied the defence is established.

In a judge-alone trial, the judge is open to proceed, pursuant to s 31, without formally considering the applicable legal principles and explaining the matters referred to in s 29 of the MHCIFP Act. Although the court is exercising the powers and functions of the tribunal of fact, it retains the powers and functions of the tribunal of law, one of which is the function provided by s 31: *R v Tonga* [2021] NSWSC 1064 at [99]–[100].

A s 31 hearing is not a "trial" and it is therefore unnecessary to comply with s 133. However, there is a general law requirement in performing a judicial function to expose reasoning: *R v Sands* [2021] NSWSC 1325 at [4]; *R v Jackson* [2021] NSWSC 1404 at [7]; *R v Lailna* [2023] NSWSC 48 at [24].

[1-065] Procedural fairness

Last reviewed: September 2023

The "bedrock rule" for judge-alone trials is the necessity for the judge to ensure that a fair trial takes place and to ensure procedural fairness extends to both the prosecutor and the defence: *DPP (NSW) v Wililo* [2012] NSWSC 713 at [52]. While one of the advantages of a judge-alone trial is that it may be more efficient, excessive telescoping of the procedures in such cases can lead to a sense of disquiet or unfairness on the part of the accused, and of objective observers whose attitudes, where relevant, must be represented: *Antoun v the Queen* [2006] HCA 2 at [28]. The procedural fairness obligations in a judge-alone trial will depend upon the circumstances. For example, in *Decision Restricted* [2023] NSWCCA 89, an appeal from a judge-alone trial, the applicant was denied procedural fairness in circumstances where the judge took into account the applicant's demeanour in the dock in an unspecified manner to make adverse findings as to his credibility without giving notice: see [134], [144]–[145].

If a matter is to be taken into account which is not evidence (such as demeanour in the dock), then procedural fairness requires the judge to draw it to the attention of the parties in a timely manner so the affected parties have an opportunity to address that matter: *Decision Restricted* [2023] NSWCCA 89 at [134], [137]. Where a finding is to be made as to credit, based on a difference in evidence between what an accused states and what is put on behalf of an accused, the judge will usually be obliged to raise any inconsistency with the parties: *Decision Restricted* [2023] NSWCCA 89 at [156]–[160]; *R v Abdallah* [2001] NSWCCA 506; *Hofer v R* [2019] NSWCCA 244 at [120]–[132].

A judge should not sit silent throughout the trial without raising issues and technical problems until final conclusions: *Vakauta v Kelly* (1989) 167 CLR 568 at [26]. While it is preferable for a judge to express tentative or preliminary views to the parties to allow them to address on such matters, care must be taken not to transgress into an impermissible indication of prejudgment or apprehended bias: see *Antoun v The Queen* and **[1-070] Apprehension of bias** below.

Where an accused is self-represented at their trial, additional procedures may need to be adopted to ensure procedural fairness: see **Self-represented accused** at **[1-800]**.

[1-070] Apprehension of bias

Last reviewed: September 2023

Particular care must be taken to avoid an apprehension of bias in judge-alone trials. A judge should recuse themselves if a fair-minded lay observer might reasonably apprehend the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. The question is one of possibility, not probability: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]–[7]; applied in the judge-alone trial context in *Antoun v The Queen* [2006] HCA 2 at [1], [51], [80]–[85].

However, it is necessary to keep in mind that a judge should not automatically or lightly accede to an application that they are subject to a reasonable apprehension of bias and so recuse themself too readily from hearing a matter: *Livesey v NSW Bar Assn* (1983) 151 CLR 288 at 294; *Johnson v Johnson* (2000) 201 CLR 488 at [45]; *McIver v R* [2020] NSWCCA 343 at [72] per Davies J; cf *Antoun v The Queen* at [35].

[1-075] Commonwealth offences

Last reviewed: September 2023

All Commonwealth offences on indictment must be tried by jury: s 80 of the Constitution (which provides that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury […]"); *Alqudsi v The Queen* (2016) 258 CLR 203 at [120]. Verdicts for Commonwealth offences must be unanimous: *Fittock v The Queen* (2003) 217 CLR 508 at [23].

[1-080] Additional resources

Last reviewed: September 2023

The Judicial College of Victoria's publication "Judge alone trials — proceedings" provides a summary of the helpful practical advice provided by Justice McCallum (as her Honour then was) on 13 May 2020, during a Webinar entitled "Judge Alone Trials: A NSW Judge's Reflections":

1. Formality — it is important to maintain the same atmosphere in court as if a jury were present. Relaxing the normal sense of decorum may lead to a laxness in the performance of proper procedure. The importance of this may be doubled in cases that proceed electronically as the institutional authority of the court will need to be conveyed to distant participants.
2. Publicity — the media reporting, particularly in electronic trials, will be intensive and tend to emphasise the salacious. For that reason, care should be taken with the release of exhibits and it might be worth considering having the media enter into an undertaking regarding the materials released.
3. Judgment writing — start from the beginning with the very first witness and ruling. Being disciplined from the outset will allow a judge to create the chronological bare bones of a judgment and serve as a memory prompt. Be certain to state enough to demonstrate a knowledge of the principles that apply. Try to carve out time after trial to go "on verdict" and take a few days to prepare the reasons for judgment, this should be prioritised and a judge should not proceed directly to the next case.
4. Addressing counsel should be done with care during their final address. It should be done respectfully, fairly, openly and without arguing about the submission being put.
5. It is important to be mindful of the heavy burden that being both the judge and the jury will entail, reach out to colleagues for support.

Extracted from Judicial College of Victoria, "Judge-alone trials/proceedings".

[The next page is 19]

Child witness/accused

[1-100] Definition of "child"

Last reviewed: September 2023

Part 6 *Criminal Procedure Act* 1986 provides for the giving of evidence by vulnerable persons. Section 306M(1) in Pt 6 defines a "vulnerable person" to mean "a child or a cognitively impaired person". In the absence of a contrary intention, Pt 6 applies to evidence given by a child who is under the age of 16 years at the time the evidence is given: s 306P(1). Where the provisions of the *Criminal Procedure Act* do not apply because the witness is over the age of 16, the court can still utilise s 26(a) *Evidence Act* 1995 if necessary: *R v Hines (No 2)* [2014] NSWSC 990. Section 26(a) permits the court to control the way in which a witness can be questioned.

The Table and text in **Evidence given by alternative means** at **[1-360]**ff addresses the *Criminal Procedure Act* provisions and directions for:

- giving of evidence by CCTV and the use of alternative arrangements, at **[1-362]–[1-366]**
- support persons, at **[1-368]–[1-370]**
- pre-recorded interviews, at **[1-372]–[1-378]**
- evidence given via audio visual link, at **[1-380]–[1-382]**

The *Children (Criminal Proceedings) Act* 1987, defines "child" to mean a person who is under the age of 18 years: s 3(1). The *Evidence Act* 1995 defines "child" in the Dictionary to mean "a child of any age".

[1-105] Competence generally

Last reviewed: September 2023

Competence is the capacity of a person to function as a witness. Section 12 *Evidence Act* 1995 provides:

> Except as otherwise provided by this Act:
>
> (a) every person is competent to give evidence, and
>
> (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

[1-110] Competence of children and other witnesses

Last reviewed: September 2023

If a question arises about whether the presumption of competency of a witness to give evidence, or competency to give sworn evidence, has been displaced, the procedural framework for deciding that question is found in s 189(1) *Evidence Act* 1995. It is a preliminary question decided in the absence of the jury, unless the court orders that the jury should be present: s 189(4). Neither the defence nor the prosecution carries an onus. It is for the court to determine whether it is satisfied on the balance of probabilities

that there is proof that a person is incompetent: *RA v R* [2007] NSWCCA 251 at [11] referred to in *RJ v R* [2010] NSWCCA 263 at [24]. The *Evidence Amendment Act* 2007 recast the s 13 *Evidence Act* competence provisions as follows:

> **13 Competence: lack of capacity**
>
> (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
>
> (a) the person does not have the capacity to understand a question about the fact, or
>
> (b) the person does not have the capacity to give an answer that can be understood to a question about the fact,
>
> and that incapacity cannot be overcome.
>
> **Note:** See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.
>
> (2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.
>
> (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.
>
> (4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.
>
> (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:
>
> (a) that it is important to tell the truth, and
>
> (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and
>
> (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.
>
> (6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.
>
> (7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.
>
> (8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

The logical starting point of s 13 is the presumption of competency established by s 12 and s 13(6): *RJ v R* at [16]. The s 13(6) presumption applies to both competence to give evidence and competence to give sworn evidence. In either case, the presumption will be displaced where the court is satisfied on the balance of probabilities (s 142 *Evidence Act*) of the contrary: *The Queen v GW* (2016) 258 CLR 108 at [14]. From there, the provision as a whole is expressed in obligatory terms and compliance requires a sequential mode of reasoning explained in *RJ v R* at [14]–[23] and *MK v R* [2014] NSWCCA 274 at [70].

Section 13(1) enacts a general test for competence to give sworn and unsworn evidence based on the witness' "capacity to understand a question" and "give an answer that can be understood". Sections 13(1) and (2) recognise that a person may be competent to give evidence about one fact, but not competent to give evidence about another fact. Accordingly, the question of competence to give evidence must be decided on a fact-by-fact basis, or by reference to classes of facts, unless there is reason to believe that the person is not competent in respect of any facts, and that incapacity cannot be overcome: *RJ v R* at [18].

[1-115] Sworn evidence

Last reviewed: September 2023

If s 13(1) does not apply, the court is required to first determine whether the witness is competent to give sworn evidence: *MK v R* [2014] NSWCCA 274 at [70]. Section 13(3) provides the witness is not competent to give sworn evidence "if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence". Notwithstanding the position of the parties, it is necessary for the court to be satisfied that the witness does not have the requisite capacity under s 13(3) before proceeding to s 13(5) and receiving the evidence unsworn: *The Queen v GW* (2016) 258 CLR 108 at [28].

The "obligation" in s 13(3) is to be understood in its ordinary, grammatical meaning as the condition of being morally or legally bound to give truthful evidence: *The Queen v GW* at [26].

There are many ways to explore whether a child understands what it means to give evidence in a court and the obligation referred to in s 13(3): *The Queen v GW* at [27]. The decision of *R v RAG* [2006] NSWCCA 343 remains of assistance in determining the s 13(3) issue: *MK v R* at [69]. The questions asked need to be framed in a way that young children, with their limited language skills, can understand: *R v RAG* at [25]–[27], [43]–[45]. The court should use simple and concrete terminology and avoid complicated and abstract questioning of a child witness. Latham J said at [26]:

> Assessing a child or young person's understanding of the difference between the truth and a lie can only be reliably undertaken by posing simple questions, preferably after putting the child at ease by a series of questions concerning their age, schooling and favourite pastimes. Simple questions assume that the language within the question is as simple and direct as possible. Phrases including "regarding" or "concerning" should be avoided, along with phrases which suggest agreement, or include the use of the negative, for example, "it's true isn't it?" or "is that not true?" Hypothetical questions, questions involving abstract concepts, multi-faceted questions (questions incorporating more than one proposition), legal jargon and passive speech should also be avoided: see Cashmore, *Problems and Solutions in Lawyer-Child Communication* (1991) 15 Crim L J 193–202.

It may be prudent, in some cases, for the court to ask the prosecution whether there would be any problem if the child discloses personal details such as where they live or the school they attend.

The court, in *R v RAG* at [43], referred to the Judicial Commission of NSW publication *Equality before the Law Bench Book* 2006–, "Oaths, affirmations and declarations" at 6.3.2 as providing "practical guidance". A question "Do you know why it's important to tell the truth?" by itself was insufficient: *MK v R* at [69].

It is erroneous for a court to reach a conclusion that a witness cannot give sworn evidence without asking the questions addressing the matters referred to in s 13(3): *MK v R* at [70]. The judicial officer's view of the reliability of the child's evidence is not relevant to the inquiry: *R v RAG* at [38].

The determination requires a matter of judgment and inevitably includes assessment and impression: *Pease v R* [2009] NSWCCA 136 at [11]. There is no fixed rule at common law or by statute as to the age a child will be presumed to be incompetent to give sworn evidence: *R v Brooks* (1998) 44 NSWLR 121; *Pease v R* at [7]. It is wrong to assume incapacity only by reason of age but it is relevant for the purpose of assessing maturity: *R v JTB* [2003] NSWCCA 295; *Pease v R* at [11]; and see *The Queen v GW* at [31].

Competence testing and other issues relating to child witnesses generally is also discussed in J Cashmore "Child witnesses: the judicial role " (2007) 8(2) *TJR* 281.

[1-118] Unsworn evidence — conditions of competence

Last reviewed: September 2023

Where it is found, in accordance with s 13(3), that a person does *not* have the capacity to give sworn evidence about a fact they may, subject to s 13(5), be competent to give unsworn evidence about the fact: s 13(4). Further steps must be taken before that person is competent to give unsworn evidence about that fact: *RJ v R* [2010] NSWCCA 263.

Although s 13(4) uses the term "may", there is no residual discretion to decline to allow unsworn evidence to be given once the terms of s 13(4) have been met: *SH v R* (2012) 83 NSWLR 258 at [26].

Section 13(5) created a new test for unsworn evidence and introduced "the idea of a condition of competence": *SH v R* at [19]. A witness is only competent to give unsworn evidence "if" the court has told the person the matters referred to in s 13(5)(a)–(c). Careful and strict compliance by the court with s 13(5) is required: *SH v R* at [35]. The court must give full directions to the prospective witness: *SH v R* at [35]. The directions need not be given in a particular form but must give effect to the terms of s 13(5)(a)–(c): *SH v R* at [22]. The specific instruction in s 13(5)(c) must be provided by the court and not the person likely to be doing the questioning: *SH v R* at [13]. A failure to comply strictly with s 13(5)(c), by omitting to tell the witness that she should feel no pressure to agree with statements that she believed were untrue, resulted in convictions being set aside in *SH v R* and in *SC v R* [2023] NSWCCA 111. Similarly, in *MK v R* [2014] NSWCCA 274, the failure to instruct the child witnesses that they should agree with statements they believed to be true was also regarded as a failure to comply with s 13(5)(c).

[1-120] Jury directions — unsworn evidence

Last reviewed: September 2023

Where a witness is a young child there is no requirement to direct the jury to take into account the differences between sworn and unsworn evidence in assessing the reliability of unsworn evidence: *The Queen v GW* (2016) 258 CLR 108 at [56]. The fact that the child in that case did not take an oath or make an affirmation (and was not

exposed to the consequences of failing to adhere to either) was held to be not material to the assessment of whether the evidence is truthful and reliable: *The Queen v GW* at [54]. Nor is there a requirement under the common law to warn the jury of the need for caution in accepting evidence and in assessing the weight to be given to it because it is unsworn: *The Queen v GW* at [56]. The *Evidence Act* does not treat unsworn evidence as a kind of evidence that may be unreliable. If a direction is requested under s 165(2), there is no requirement to warn the jury that the evidence may be unreliable because it is unsworn: *The Queen v GW* at [56].

Different considerations may apply in the case of a witness other than a young child: *The Queen v GW* at [57]. Depending on the circumstances, the court may need to give some further directions: *The Queen v GW* at [57].

[1-122] Use of specialised knowledge

Last reviewed: September 2023

Section 13(8) provides that the court "may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge" in determining competence. Section 79(2)(a) also provides that "specialised knowledge" for the purposes of s 79(1) includes "knowledge of child development". Section 79(2)(b)(i) provides that a reference in s 79(1) to an opinion includes one relating to "the development and behaviour of children generally". Section 108C(2)(a) specifically provides that this type of opinion evidence is not subject to the credibility rule.

[1-125] Evidence in narrative form

Last reviewed: September 2023

Section 29(2) *Evidence Act* 1995 permits the court to make a direction, on its own motion, for a witness to give evidence partly or wholly in narrative form. The previous form of the section required an application to be made by the party that called the witness. The Australian Law Reform Commission envisaged this provision may have some application to child witnesses: ALRC, *Uniform Evidence Law*, ALRC Report 102 (Final Report), 2005 at [5.18]–[5.36].

[1-135] Warnings about children's evidence

Last reviewed: September 2023

Section 165A *Evidence Act* 1995 governs warnings in relation to children's evidence, as follows:

> **165A Warnings in relation to children's evidence**
>
> (1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:
>
> (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses,
>
> (b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults,

(c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child,

(d) in the case of a criminal proceeding — give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

(2) Subsection (1) does not prevent the judge, at the request of a party, from:

(a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable, and

(b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it,

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

(3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

Section 165(6) provides:

> Subsection [165](2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with section 165A(2) and (3).

A discussion of warnings concerning the evidence of children under the *Evidence Act* can be found in *The Queen v GW* (2016) 258 CLR 108 at [32]–[35], [50]. Generally speaking, a trial judge should refrain from suggesting to the jury how to approach the assessment of a child's evidence in a manner that has the appearance of a direction of law: *RGM v R* [2012] NSWCCA 89 at [97]. The exception to this is where s 165A(2) is engaged and there is a need for the jury in the particular case to exercise caution in assessing the child's evidence: *RGM v R* at [97]. Any warning can only focus on matters relevant to the particular child complainant in the particular circumstances of the case and not upon the mere fact that the witness is a child or an inherent feature of children more generally: *AL v R* [2017] NSWCCA 34 at [77]. A warning of the latter kind contravenes s 165A and s 294AA *Criminal Procedure Act* 1986: *AL v R* at [78]. It is within the judge's discretion to decline to give a warning for matters evident to the jury which the jury can assess without assistance: *AL v R* at [81] (see specific matters listed in *AL v R* at [83]) citing *The Queen v GW* at [50]. There is a distinction between the need for a warning about matters of which the jury have little understanding or appreciation, but where the court would have such an understanding, and matters which the jury are able to assess without particular assistance: *AL v R* at [81].

The comments of the judge about children in *RGM v R* (extracted at [94]) were capable of breaching the prohibition in s 165A(1). Other comments about the child deflected the jury from its task of assessing the complainant's credibility: *RGM v R* at [95], [102]. It is not appropriate for a prosecutor to offer an opinion concerning his or her own experience and expertise with children giving evidence in court to suggest that children are generally truthful: *Lyndon v R* [2014] NSWCCA 112 at [43]. The trial judge may be put in the awkward position of needing to correct any inappropriate or distracting statement without infringing the prohibition in s 165A(1): *Lyndon v R* at [44].

In *RELC v R* [2006] NSWCCA 383 at [77]–[83], the court applied the previous version of s 165A concerning warning about children's evidence. The court held that the trial judge had erred by warning the jury that the evidence of an eight-year-old witness called by the defence was potentially unreliable by reason of the child's age. There was nothing in the evidence given by either the defence witness or the complainant that, by reason of their age, justified a warning to the jury: *RELC v R* at [83]. The other matters (apart from age) relied upon by the judge to give the warning (that the witness was giving evidence for her father; had given inconsistent accounts of the events; had told the police that she had lied to them; and, that she had given untrue answers in cross-examination) were not "matters … within the kind or type of evidence which may be unreliable as contemplated in s 165": *R v RELC* at [81]–[82]. The court in *ML v R* [2015] NSWCCA 27 rejected a submission that the judge erred by failing to warn the jury under s 165A(2) of the forensic disadvantage the appellant suffered by not being able to cross-examine the complainant (aged six years) due to her lack of memory.

As to warnings in relation to forensic disadvantage: see further **Complaint evidence** at **[5-070]**–**[5-080]**.

[1-140] Directions where general reliability of children in issue

Last reviewed: September 2023

Trial counsel for the appellant in *CMG v R* [2011] VSCA 416 submitted to the jury that it should regard aspects of a child's evidence as unreliable or unworthy of weight given the different cognitive functioning of children, their susceptibility to suggestion, desire to appease adults and their tendency to confuse reality and fantasy. The court in *CMG v R* held that the judge needed to instruct the jury that counsel's views were not evidence and that the experience of the courts is that the age of a witness is not determinative of his or her ability to give truthful and accurate evidence (see a discussion of the case in *RGM v R* [2012] NSWCCA 89 at [100]ff.) However, the trial judge's instructions to the jury (quoted in *CMG v R* at [11]) in response to the submissions "were not properly within the scope of directions of law": *CMG v R* per Harper JA at [18]. The court in *CMG v R* observed, however, that had the judge repeated the essence of the direction suggested in *R v Barker* [2010] EWCA Crim 4, no complaint could have been made. The relevant passage from *R v Barker* at [40] was quoted in *CMG v R* at [10] as follows:

> Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children, carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child ... In [a] trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.

[1-150] Other procedural provisions applicable to children

Last reviewed: September 2023

As to the:

- general public being excluded from hearing criminal proceedings to which a child is a party
- restrictions on disclosure of evidence in prescribed sexual offence proceedings, and
- publication and broadcasting of names,

see **Closed court, suppression and non-publication orders** at **[1-349]**ff, in particular **Closed courts** at **[1-358]**; and **Self-executing prohibition of publication provisions** at **[1-359]**.

[1-160] Alternative arrangements when the accused is self-represented

Last reviewed: September 2023

In any criminal proceedings in which the accused is not represented by a lawyer, a child who is a witness is to be examined in chief, cross-examined or re-examined by a person appointed by the court instead of by the accused or defendant: s 306ZL(1), (2) *Criminal Procedure Act* 1986.

The court may choose not to appoint such a person if the court considers that it is not in the interests of justice to do so: s 306ZL(5).

The section applies whether or not CCTV is used to give evidence, or alternative arrangements have been made, although the appropriate warnings must be given where this has occurred: s 306ZL(6).

For proceedings in respect of a prescribed sexual offence, however, s 294A *Criminal Procedure Act* outlines the alternative arrangements that are to be made for a complainant giving evidence where an accused is self-represented. The important difference is that s 294A(5) provides that the court *does not* have a discretion to decline to appoint a person to ask questions of the complainant. Section 306ZL(5) applies to complainants/alleged victims in respect of offences other than prescribed sexual offences: s 294A(5). See also **Self-represented accused** at **[1-840]**–**[1-845]**.

[1-180] Court to take measures to ensure child accused understands proceedings

Last reviewed: September 2023

Section 12(1) *Children (Criminal Proceedings) Act* 1987 was amended by the *Children (Criminal Proceedings) Amendment Act* 2008 to provide:

> **12(1)** If criminal proceedings are brought against a child, the court that hears those proceedings must take such measures as are reasonably practicable to ensure that the child understands the proceedings.

The phrase "understands the proceedings" could include, inter alia, the nature of the allegations and the facts the prosecution must prove. An accepted "measure" where a child is represented, is for the trial judge to request the child's barrister or solicitor to

assure the court that the child understands the proceedings. A court is to give the child the fullest opportunity practicable to be heard, and to participate, in the proceedings: s 12(4).

[The next page is 33]

Contempt, etc

[1-250] Introduction

This section focuses on contempt in the face of the court with a brief discussion of other forms of contempt and the offence of disrespectful behaviour. Justice Whealy in "Contempt: some contemporary thoughts" (2008) 8 *TJR* 441 described the objects of contempt law in the following terms "The law of contempt has at least three fundamental objects — providing a fair trial, ensuring compliance with the court's orders and generally protecting the administration of justice". Contemptuous conduct in criminal proceedings may include misbehaviour in the courtroom such as insulting the presiding judicial officer, conduct of an accused, interfering with the proceedings, the refusal by a witness to answer questions (contempt in the face of the court), or by the publication of material that has a real prospect of interfering with the administration of justice in a matter before the court (sub judice contempt or contempt by publication).

Contempt in the face of the court

Prosecutions for contempt in the face of the court generally arise where there is an allegation of misbehaviour in the courtroom. The legislative provisions governing the form of contempt refer to actions being "in the face of the court or in the hearing of the court": Pt 55 r 2 Supreme Court Rules 1970, s 199(1) *District Court Act* 1973.

There is a divergence of views (all obiter) as to the meaning of "contempt in the face of the court … or in the hearing of the court". In *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682, the Court of Appeal held that the phrase was not restricted to events which occurred in the courtroom and were personally witnessed by the judge. The court considered that the power to punish for contempt in the face of the court depended upon whether immediate intervention was necessary to end the disruption and to establish the court's authority. This required, inter alia, "such proximity in time and space between the conduct and the trial of the proceedings that the conduct provides a present confrontation to the trial then in progress", but this did not entail drawing geographic boundaries. In the circumstances of that case, the power extended to the footpath outside the court building.

However, in *Fraser v R* (1984) 3 NSWLR 212, the majority (Kirby P and McHugh JA) considered that the addition of the reference to contempt "in the hearing of the court" indicated an intention that jurisdiction was restricted to conduct seen or heard by the judge. Kirby P confirmed these views in *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 saying he considered that this view was consistent with the historical origins of the power which enabled a judge to deal with conduct seen, heard or otherwise sensed, and which, for that reason, did not require further evidence. His Honour emphasised the exceptional nature of the procedure and the "embarrassing concatenation of functions" presented to the judge in preferring a charge. Glass JA refrained from expressing a view. Priestley JA considered (at 463) that, pending authoritative decision, it was open for a judge to adopt either view. Mahoney JA dissented, expressing the view that the principle enunciated in *Registrar, Court of Appeal v Collins* should be followed.

In the circumstances it is suggested that the safer course is to apply the narrower test enunciated in *Fraser v R* until the matter is authoritatively determined.

Examples of contempt in the face of the court include:

- A witness, the victim in the prosecution of an accused on a charge of shooting with intent to murder, refusing to take the oath or make an affirmation: *R v Razzak* (2006) 166 A Crim R 132.

  Other cases involving contempt of court arising from a refusal to give evidence or a refusal to answer a subpoena requiring attendance to give evidence include: *Smith v The Queen* (1991) 25 NSWLR 1; *Registrar of the Court of Appeal v Raad* (unrep, 9/6/92, NSWCA); *In the matter of Daniel James Ezold* [2002] NSWSC 574; *NSW Crime Commission v Field* [2003] NSWSC 5; *R v Taber and Styman; Re Shannon Styman* [2005] NSWSC 1329 and *Principal Registrar of the Supreme Court of NSW v Tran* (2006) 166 A Crim R 393; *Prothonotary of the Supreme Court of NSW v Jalalabadi* [2008] NSWSC 811.
- A plaintiff in civil proceedings throwing a bag containing yellow paint at the judge, and another at the judge's associate and court reporter: *Prothonotary v Wilson* [1999] NSWSC 1148.
- Refusing to leave court having been ordered to do so by the judge and refusing to obey the lawful direction: *In the matter of Bauskis* [2006] NSWSC 908. Bauskis was one of a number of people who appeared in court wearing t-shirts bearing the slogan "Trial by jury is democracy". Many of the people were shouting offensive statements about corruption at the judge. The judge ordered that the people not remain in court whilst wearing the t-shirt but they refused to leave. Bauskis was placed in custody and given the opportunity to apologise and acknowledge his wrongdoing. He refused.
- Insulting remarks made by the offender to the jury after delivery of a guilty verdict: *Prothonotary of the Supreme Court of NSW v Katelaris* [2008] NSWSC 389.
- A heated exchange in the District Court between counsel and the trial judge, *Toner v Attorney General for NSW* (unrep, 19/11/91, NSWCA), where trial counsel was convicted of contempt. The conviction was overturned on appeal. The appellant conceded that, in shouting at the judge he had acted discourteously and incorrectly but had apologised. The court accepted that, by his conduct, the appellant was not seeking to insult the judge nor was there anything personal in counsel's conduct directed at the judge or at his relations with the judge. The court, citing *Izuora v The Queen* [1953] AC 327, 336 (PC), confirmed that, of itself, "mere 'acts of rudeness', discourtesy or even extreme discourtesy" on the part of legal practitioners would not amount to contempt. The court concluded that the power to institute contempt proceedings to deal with cases of perceived discourtesy by a legal practitioner should be used sparingly: see *John Fairfax and Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 370. See discussion of *Toner v Attorney General for New South Wales* in the Honourable Justice Whealy, "Contempt: some contemporary thoughts" (2008) 8 *TJR* 441, 443–444.

Contempt by publication

Contempt by publication refers to two main areas of misconduct: sub judice contempt and scandalising the court.

Sub judice contempt is typically committed where there is a publication or comment through media organisations relating to proceedings currently before the court that has the potential to interfere with the proper running of the proceedings.

Prosecutions of this type of contempt are often brought by the Attorney General, after a referral by the trial judge, under powers arising from provisions in Sch 3 and s 316 *Criminal Procedure Act* 1986. Although the Attorney General may bring proceedings, this power does not prohibit the court from bringing an action under its own inherent power.

For examples of contempt by publication see:

- *Attorney General for NSW v Radio 2UE Sydney Pty Ltd* (unrep, 11/03/98, NSWCA) — On the third day of a murder trial, John Laws made comment on air about the trial, discussing the evidence, insisting that the accused was guilty of murder and criticising the way in which the prosecution had run the case. The jury was discharged and John Laws and Radio 2UE were each charged with contempt. They were ordered to pay costs and substantial fines.
- *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 — The appellant detailed the prior convictions of an accused person. The appellant and Macquarie Broadcasting Holdings Ltd were convicted of contempt. The appellant was sentenced to a term of imprisonment. Mason CJ held that the courts have always taken a serious view of any published disclosure of the prior conviction of a person accused of a criminal offence when proceedings for that offence are pending.
- *R v The Age Co Ltd* [2006] VSC 479 — The Age published an article detailing the accused's driving antecedents during committal proceedings for alleged dangerous driving offences. The respondent was convicted of contempt: see also *R v The Age Company Ltd* [2008] VSC 305.
- *Hearne v Street* (2008) 235 CLR 125 — Civil proceedings were brought by local residents against Luna Park Sydney Pty Ltd, Multiplex Ltd and associated companies, alleging nuisance involving the Luna Park site. During the proceedings a managing director and chief executive officer of Luna Park Pty Ltd and development manager of Multiplex Developments Aust Pty Ltd provided the Daily Telegraph and the relevant Minister with copies of pleadings and affidavits filed in support of the plaintiff's case. The High Court held that it was a contempt of court to breach an implied undertaking by parties in civil proceedings not to use documents produced during the discovery process for a purpose not connected with the proceedings.

Scandalising the court

Scandalising the court refers to conduct which denigrates judges or the court so as to undermine public confidence in the administration of justice (also known as "scandalising the court"). For examples: see *The King v Dunbabin; Ex p Williams* (1935) 53 CLR 434; *Attorney-General Ex p; Re Goodwin* (1969) 70 SR (NSW) 413; *Gallagher v Durack* (1983) 152 CLR 238.

Under modern conditions, the jurisdiction of the court to deal with contempt which consists of scandalising the court will be exercised only in exceptional cases because ordinarily the good sense of the community is a sufficient safeguard in curbing undue and improper criticisms of judges. An exceptional case might be where a letter is

published alleging against a judge that his judgment in a case contained a malicious attack upon the character of one of the parties and that there was an ulterior motive behind such attack: *Attorney-General Ex p; Re Goodwin*.

Disobedience of court orders

Contempt may also arise where there is disobedience of court orders: see *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98; *Witham v Holloway* (1995) 183 CLR 525 and *O'Shane v Channel Seven Sydney Pty Ltd* [2005] NSWSC 1358.

[1-253] Jurisdiction

Jurisdiction of the Supreme Court

The power to punish contempt in the face of the court is part of the inherent jurisdiction of the Supreme Court: *The King v Metal Trades Employers' Association; Ex p Amalgamated Engineering Union* (1951) 82 CLR 208 at 241–243.

Section 53(3)(a) *Supreme Court Act* 1970 (SCA) assigns to each Division of the Supreme Court proceedings for the punishment of contempt of the court, if the contempt consists of contempt in the face of, or in the hearing of, the court in that Division. This is subject to the Supreme Court Rules 1970 (SCR).

Part 55 Div 2 SCR sets out the procedure to be followed by the court where it is alleged, or appears to the court on its own view, that a person is guilty of contempt of court or any other court.

Rule 1 defines a "contemnor" as a person guilty or alleged to be guilty of contempt of "the Court", or of any other court.

Rule 2 sets out the procedure by which a person alleged to be guilty of contempt is brought before the court.

Rule 3 concerns the procedure for informing the contemnor of the details of the charge and the procedure for the hearing.

Rule 4(1) permits the court to direct that the contemnor be held in custody or be released while a contempt charge is pending. If released, the court may make directions as to the terms of release which can include a requirement that the contemnor give security for a nominated amount.

Jurisdiction of the District Court

The power of the District Court to deal with proceedings for contempt in the face of, or hearing of the court arises from Pt 7 *District Court Act* 1973 (DCA). Sections 199–203 DCA detail the procedure to be followed by the court in contempt proceedings.

Section 199(1) DCA defines a "contemnor" as a person "guilty or alleged to be guilty of contempt of Court committed in the face of the court or in the hearing of the Court". Section 199(2)–(5) DCA deal with the conduct of contempt proceedings and those provisions are, in substance, identical to Pt 55 Div 2 SCR.

Unlike the Supreme Court, where the penalty that can be imposed is not defined, s 199(7) DCA provides that the maximum penalty that can be imposed by the District Court is a fine not exceeding 20 penalty unit or 28 days imprisonment. Section 199(8) DCA permits the court to suspend a sentence with security.

Section 199(6) DCA permits the judge to issue a warrant for the arrest or detention of the contemnor.

Section 200 DCA concerns the payment and enforcement of fines imposed under s 199 DCA.

Section 201 DCA provides that a contemnor can appeal to the Supreme Court against a ruling, order, direction or decision of the District Court under s 199 DCA except where the contemnor was discharged.

Section 202 DCA enables the court, at any stage, to order a stay of the proceedings under s 199 or 200. Section 202(3) DCA states that except as provided by s 202 DCA an appeal under s 201 DCA does not operate as a stay.

Section 203 DCA provides for the referral of contempt matters, whether committed in the face or hearing of the court or not, to the Supreme Court for determination.

The power of the District Court to deal directly with contempt proceedings is limited to proceedings alleging contempt in the face of, or hearing of the court. Prosecutions for all other kinds of contempt should be referred to the Supreme Court under s 203(1) DCA or to the Attorney General for the exercise of power under the s 316 *Criminal Procedure Act*: see further **District Court — Reference to the Supreme Court** at **[1-265]**.

[1-255] Alternative ways of dealing with contempt in the face of the court

Where the judge has formed the view that there has been a contempt in the face of or in the hearing of the court, he or she should first consider the following alternatives to charging, bearing in mind the seriousness of the conduct and the degree of urgency involved, namely whether:

(a) a warning or reprimand would be sufficient,

(b) in cases of disruption of proceedings, a judge has the power to exclude the person from the court: *Ex p Tubman; Re Lucas* (1970) 72 SR (NSW) 555. This power extends in an appropriate case to the exclusion of the accused from the courtroom during the trial generally: *R v Vernell* [1953] ALR 1139; *R v McHardie* [1983] 2 NSWLR 733; *R v Eastman* (1997) 158 ALR 107. This power is very rarely used,

(c) if the conduct involves a legal practitioner, the conduct should be made the subject of a complaint under the *Legal Profession Act* 2004,

(d) the matter should be referred to the Director of Public Prosecutions for consideration if a statutory offence has been committed; for example, perjury where the conduct consists of a constructive refusal to answer questions by an alleged inability to remember: *Keeley v Brooking* (1979) 143 CLR 162; or offences involving the threatening of jurors — ss 320–326 *Crimes Act* 1900.

When a determination is made that the matter is to proceed by way of a charge of contempt, the judge must consider whether the matter is to be dealt with in the present court or transferred to another jurisdiction.

Where the judge is currently involved in criminal proceedings and a jury has been empanelled, the judge should consider the impact of the contempt proceedings on that jury. For a discussion about questions involving the effect of such conduct and referrals on the jury: see **Adjournment for defence to charge** at [1-290].

[1-260] Supreme Court — reference to the registrar or another Division

Where it is alleged, or it appears to a judge that a person is guilty of contempt of any type, the judge or magistrate may deal with the matter directly or direct the registrar to commence proceedings under Pt 55 Div 3 r 11(1) Supreme Court Rules 1970 (SCR). The power to refer the matter under this Rule has been described as "Ministerial" or Executive and not judicial in character: *Killen v Lane* [1983] 1 NSWLR 171; *Capaan v Joss (No 2)* (unrep, 6/6/94, NSWCA); *Maddocks v Brown* [2002] NSWSC 111. The alleged contemnor should be given an opportunity to show why the contempt should not be referred: *Registrar of the Court of Appeal v Maniam (No 1)* (1991) 25 NSWLR 459 per Mahoney JA at 469 (cited by the High Court in *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435 at [17]) and Hope AJA at 480. It was held in *Prothonotary of the Supreme Court of NSW v Dangerfield* [2015] NSWSC 1895 that the magistrate failed to afford procedural fairness to the defendant and the referral under Pt 55 r 11(3)(c) SCR was void for want of jurisdiction: at [19], see also [6], [11]. The contemnor is not obliged to exercise the right to be heard.

Examples of contempt in the face of the court dealt with pursuant to Pt 55 r 11(1) SCR include: *Principal Registrar of the Supreme Court of NSW v Jando* (2001) 53 NSWLR 527; *Principal Registrar of the Supreme Court of NSW v Drollet* [2002] NSWSC 490; *Prothonotary v Wilson* [1999] NSWSC 1148; [1999] NSWSC 1114; [1999] NSWSC 1115 and, on appeal, *Wilson v The Prothonotary* [2000] NSWCA 23.

In the Supreme Court, if the trial judge is not completely satisfied that there has been a contempt, the judge should refer the matter to the Registrar of the Common Law Division requesting that the registrar obtain the advice of the Crown Solicitor on whether proceedings for contempt are warranted: Pt 55 r 11(6) SCR. Such reference would necessarily contain the relevant transcript or other documentation and the judge's reasons for concluding that consideration of contempt proceedings was warranted.

[1-265] District Court — reference to the Supreme Court

Where it is alleged, or it appears to a judge that a person is guilty of contempt in the face of, or in the hearing of, the court, the judge may deal with the matter directly: s 199 *District Court Act* 1973 (DCA). If the contemptuous conduct is of another type, or where jurisdiction under that section is not available or is doubtful, the matter should be referred to the Supreme Court for determination: s 203 DCA. Such proceedings are assigned to the Common Law Division of the Supreme Court: ss 48(2)(i), 49, 53(1)(d), 54(4) *Supreme Court Act* 1970.

If the court has not formed its own view as to whether conduct amounts to contempt, the matter is dealt with under Pt 55 r 11(6) Supreme Court Rules 1970 (SCR) which enables the registrar to take advice from the Crown Solicitor as to whether proceedings should be commenced.

If the referring judge expresses a view that a contempt has been committed, no independent discretion is available to the Supreme Court and the registrar is required by Pt 55 r 11(3) SCR to commence proceedings.

The power to make a reference under s 203 DCA is executive and not judicial in nature, and there is no right in a party or any other person to make a formal application for such a reference. Compare: Pt 55 r 11(2) SCR; *Killen v Lane* [1983] 1 NSWLR 171.

A reference is made by forwarding a report to the prothonotary which should identify the contemnor and the circumstances of the conduct complained of and also specify whether the reference is made on the basis of an alleged contempt or whether the judge has formed a view that it constitutes contempt.

There is no need to charge a contemnor for the purposes of a reference under s 203 DCA: see **Supreme Court — Reference to the registrar or another Division** at **[1-260]** which concerns the procedure to be followed in the case of references to the Supreme Court under s 203 DCA.

[1-270] Why transfer — the court as prosecutor, judge and jury

Contempt proceedings may be dealt with by the judge before whom the contempt was committed, and it is recognised that there are instances of contempt which need to be dealt with swiftly: *Killen v Lane* [1983] 1 NSWLR 171.

An important consideration for the trial judge in determining whether he or she should personally deal with the contempt charge is whether the subject's conduct has involved the judge in some way: *Attorney General (NSW) v Davis and Weldon* (unrep, 23/7/80, NSWCA) at 11; *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 452.

It is preferable that, wherever possible, the court not appear to be both prosecutor and judge: *European Asian Bank AG v Wentworth*. There Kirby P said:

> For when a judge deals summarily with an alleged contempt he may at once be a victim of the contempt, a witness to it, the prosecutor who decides that action is required and the judge who determines matters in dispute and imposes punishment. The combination, in the judge, of four such inimical functions is not only unusual. It is so exceptional that, though it may sometimes be required to deal peremptorily with an emergency situation, those occasions will be rare indeed. Especially will they be rare where, as in this State, a facility is provided in the Court of Appeal to relieve the judge of such an embarrassing concatenation of functions.

There is ample authority to the effect that the summary jurisdiction of the court to punish for contempt is exceptional and should be exercised with restraint and only in a clear and serious case. This is especially so of the power of a trial judge to deal summarily with contempt in the face of the court on the judge's own motion. Stephen J in *Keeley v Brooking* (1979) 143 CLR 162 at 174 said this procedure:

> … should rarely be resorted to except in those exceptional cases where the conduct is such that "it cannot wait to be punished" because it is "urgent and imperative to act immediately" to preserve the integrity of a "trial in progress or about to start".

[1-275] Procedure for summary hearing before trial judge

Part 55 Div 2 Supreme Court Rules 1970 (SCR) and s 199 *District Court Act* 1973 (DCA) set out the procedure for dealing with a summary charge of contempt in the face of, or in the hearing of the court by the trial judge. Suggested steps for dealing with such a matter are set out below.

In the Supreme Court, proceedings for contempt in the face of, or in the hearing of, the court are commenced by either motion or summons. Proceedings for contempt should only be commenced by motion if the contemnor is a party to the principal

proceedings: *Abram v National Australia Bank Ltd* (unrep, 1/5/97, NSWCA) at 3; *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 25; *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545 at 564. For prosecution of other kinds of contempt associated with proceedings, the proceedings are commenced in those proceedings by notice of motion. If not directly connected with proceedings, proceedings for punishment for contempt must be commenced by summons: Pt 55 r 6 SCR.

In the District Court proceedings for contempt in the face of, or in the hearing of, the court commence by oral order or warrant: s 199(2) DCA.

[1-280] Initial steps

1. Where appropriate, the contemnor should be warned of the risk that the conduct, if persisted in, may constitute contempt, and that the possible penalty may be a fine or imprisonment.
2. The contemnor should be provided an opportunity to apologise and, where possible, (particularly in relation to a refusal to be sworn or to give evidence) an opportunity to reflect and to obtain legal advice.
3. If the contemnor is not present, an oral order should be made directing that the contemnor be brought before the court or, if necessary, a warrant issued for the contemnor's arrest: Pt 55 r 2 Supreme Court Rules 1970; s 199(2) *District Court Act* 1973.
4. If an alleged contempt arises during a jury trial, the jury should be sent out to avoid a risk of prejudice to the accused. In such circumstances, the media should be requested not to report that part of the proceedings conducted in the absence of the jury and warned that to do so may be a contempt.

[1-285] The charge

5. The contemnor should be orally charged with contempt by the trial judge: Pt 55 r 3 Supreme Court Rules 1970; s 199(3)(a) *District Court Act* 1973. The charge should be distinctly stated. Where a common law contempt is involved, it may, depending on the circumstances, not be necessary to formulate the charge in a series of specific allegations, provided the contemnor is given a clear indication of the "gist of the accusation". Where a specific statutory offence is involved, it must be identified in the charge, which must set out the elements of that which is alleged against the contemnor: *Coward v Stapleton* (1953) 90 CLR 573 at 579, 580; *Macgroarty v Clauson* (1989) 167 CLR 251 at 255–256.

[1-290] Adjournment for defence to charge

6. The contemnor must be permitted an opportunity to make a defence to the charge: Pt 55 r 3 Supreme Court Rules 1970 (SCR); s 199(3)(b) *District Court Act* 1973 (DCA). An adjournment may be required to enable a proper defence to be obtained.
7. In a jury trial, it may be appropriate to adjourn the hearing of the contempt charge until after the trial, to avoid any disruption to the trial and reduce the risk of prejudicial media coverage. In other cases, for example, the refusal of an important witness to give evidence after previous warnings, it may be appropriate to hear

the contempt charge in the absence of the jury and adjourn proceedings on penalty until after the trial. Still other cases may require a virtually immediate summary hearing to prevent continued disruption to the proceedings, though such disruption may be avoided if the contemnor is taken into custody pending the hearing of the charge.

8. When adjourning a matter, a contemnor should be informed that if he or she is unable to afford legal representation, legal aid may be available from the Legal Aid Commission.

9. If the trial judge wishes to obtain the assistance of an amicus curiae for the conduct of the summary hearing, the Crown Solicitor should be contacted for this purpose. The Crown Solicitor will then seek the approval of the Attorney General to brief counsel to appear amicus curiae: see *In the Matter of Daniel James Ezold* [2002] NSWSC 574; *The Hon Mr Acting Justice Ireland v Renee Ann Russell* [2001] NSWSC 468 for recent examples of this procedure.

10. Pending disposal of the charge, the court may direct that the contemnor be kept in custody or that the contemnor be released subject to conditions such as the giving of security: Pt 55 r 4 SCR; s 199(4), (5) DCA: see also s 90 *Bail Act* 2013.

[1-295] Conduct of summary hearing

11. Proceedings on a charge of contempt are not to be regarded as the equivalent of a criminal trial: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at [43]. The power to punish for contempt "is an exercise of judicial power *by the courts*, to protect the due administration of justice": *Re Colina; Ex p Torney* (1999) 200 CLR 386 at 429, Hayne J at [112] (emphasis in original) quoted in *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622 at [41].

12. A trial judge may rely upon his or her own observations of the conduct, and upon hearsay evidence. The contemnor has no right of unrestricted cross-examination: *Fraser v The Queen* (1984) 3 NSWLR 212 at 227. It is appropriate, however, that the judge inform the contemnor of such observations. It may also be possible to call witnesses to give evidence of their observations so that they may be cross-examined: see, for example, *R v Herring* (unrep, 03/10/91, NSWSC); *R v Rudd* (unrep, 10/11/94, NSWSC). This may be done by counsel appearing as amicus curiae.

13. In dealing with a summary charge of contempt, the accused must be given a reasonable opportunity of putting forward a defence and "placing before the court any explanation or amplification of his evidence, and any submissions of fact or law", which is considered bear upon the charge itself or upon the question of punishment: *Coward v Stapleton* (1953) 90 CLR 573 at 580.

14. In requiring a contemnor to make a defence to the charge, it should be made clear that the contemnor is not obliged to give evidence: *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309.

15. At common law, a contemnor was entitled to make a defence by way of an unsworn statement. Query whether s 31 *Criminal Procedure Act* 1986 has the effect of removing this right.

16. The standard of proof for all charges of contempt is proof beyond reasonable doubt: *Witham v Holloway* (1995) 183 CLR 525 at 534; *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622 at [42].
17. After hearing the contemnor, the court determines the matter of the charge and makes an order for the punishment or discharge of the contemnor: Pt 55 r 3 Supreme Court Rules 1970; s 199(3)(d) *District Court Act* 1973.

[1-300] Penalty

As a common law offence, there is no specific maximum penalty for contempt and punishment is said to be "at large" subject only to the restriction in the Bill of Rights 1688 (UK) upon cruel punishments: *Wood v Galea* (1997) 92 A Crim R 287 at 290. An offender dealt with in the District Court for contempt in the face of the court may receive a fine not exceeding 20 penalty units or imprisonment not exceeding 28 days: s 199(7) *District Court Act* 1973. The provisions of the *Crimes (Sentencing Procedure) Act* 1999 apply when sentencing an offender to imprisonment for contempt: *Principal Registrar of the Supreme Court of NSW v Jando* (2001) 53 NSWLR 527 at [38]–[45]. Any monetary penalty imposed by a court for contempt of court is a fine for the purposes of the *Fines Act* 1996: s 4(1)(a1). Under s 6 of that Act, the court gives consideration to an accused's means to pay.

The Court of Appeal in *Field v NSW Crime Commission* [2009] NSWCA 144 at [21] identified several factors to be taken into account when punishing for a contempt in the context of a deliberate refusal to give evidence and take an oath or affirmation: see also *Principal Registrar of the Supreme Court of NSW v Tran* (2006) 166 A Crim R 393; *R v Razzak* (2006) 166 A Crim R 132; *In the Matter of Steven Smith (No 2)* [2015] NSWSC 1141 at [36]ff.

[1-305] Further reading

For further discussion on the law of contempt see:

- The Honourable Justice Whealy, "Contempt: some contemporary thoughts" (2008) 8 *TJR* 441.
- The New South Wales Law Reform Commission review on sub judice contempt in their report *Contempt by Publication*, Report 100, 2003.
- The Civil Trials Bench Book **Contempt** at [**9-0000**]ff. The Sentencing Bench Book also discusses the offence of contempt in **Common law contempt of court** at [**20-155**]ff and collects various cases on the subject including refusals to attend on subpoena or give evidence.

Note

The assistance provided in the preparation of the original version of this chapter by Mr David Norris of the Crown Solicitor's Office is gratefully acknowledged.

[1-320] The offence of disrespectful behaviour

The *Courts Legislation Amendment (Disrespectful Behaviour) Act* 2016 commenced on 1 September 2016 (s 2, LW 24.8.2016). It provides that an accused person, defendant, party to, or person called to give evidence in proceedings before the court

is guilty of an offence if they intentionally engage in behaviour in the court during the proceedings and that behaviour is disrespectful to the court or presiding judge: s 200A *District Court Act* 1973 (DCA), s 131 *Supreme Court Act* 1970 (SCA), s 67A *Land and Environment Court Act* 1979 (LECA) and s 103A *Coroners Act* 2009 (CA). See [48-180] **Offence of disrespectful behaviour** in the Local Court Bench Book for commentary in relation to s 24A *Local Court Act* 2007.

The phrase "behaviour" is defined as any act or failure to act. The question of whether behaviour is disrespectful to the court is determined according to established court practice and convention. In *Elzahed v Kaban* [2019] NSWSC 670, Harrison J considered the elements of an offence of disrespectful behaviour offence and concluded that although the offender must intentionally engage in the particular behaviour giving rise to the offence, the prosecution was not also required to prove that the offender intended the behaviour to be disrespectful: *Elzahed v Kaban* at [37]-[38]. The test for determining whether the behaviour was disrespectful is an objective one: *Elzahed v Kaban* at [45].

The offence does not apply to police prosecutors, Australian legal practitioners or persons assisting the coroner, when they are acting in those capacities. The maximum penalty for the offence is 14 days imprisonment and/or 10 penalty units.

[1-325] Disrespectful behaviour — procedure

In the case of adult offenders, proceedings for the offence are to be dealt with summarily before the Local Court; s 200A(4)(b) *District Court Act* 1973 (DCA); s 131(4)(b) *Supreme Court Act* 1970 (SCA); s 67A(4)(b) *Land and Environment Court Act* 1979 (LECA); and s 103A(4)(b) *Coroners Act* 2009 (CA)).

If the accused is a child, the offence is to be dealt with in the Children's Court (s 200A(4)(a) DCA; s 131(4)(a) SCA; s 67A(4)(a) LECA; and s 103A(4)(a) CA). If the person is not a child, proceedings against the person can be dealt with in the Supreme Court in its summary jurisdiction, where the offence is alleged to have been committed in the Supreme Court: s 131(4) SCA.

Proceedings for an offence of disrespectful behaviour may be brought:

- at any time within 12 months of the date of the alleged offence
- with the authorisation of the Attorney General and
- by a person or member of a class of persons authorised, in writing, by the Secretary of the Department of Justice for that purpose.

A judge can refer disrespectful behaviour in proceedings over which they have presided to the Attorney General. The Attorney General can authorise proceedings for an offence whether or not the behaviour has been referred by a judge or magistrate.

An official transcript or official audio or video recording of the proceedings in the court is admissible in evidence and is evidence of the matter included in the transcript or audio or video recording: (s 200A(9) DCA; s 131(9) SCA; s 67A(9) LECA; and s 103A(9) CA).

The judge who presided over the relevant proceedings cannot be required to give evidence in proceedings for the offence (s 200A(10) DCA; .s 131(10) SCA; s 67A(10) LECA; and s 103A(10) CA).

The offence of disrespectful behaviour does not affect any power with respect to contempt. Proceedings for contempt may be brought in respect of behaviour that constitutes a "disrespectful behaviour" offence, but a person cannot be prosecuted for both contempt and this offence in respect of essentially the same behaviour (s 200A(12) DCA; s 131(12) SCA; s 67A(12) LECA; and s 103A(12) CA).

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Cross-examination

[1-340] Improper questions put to witness in cross-examination

Section 41 *Evidence Act* 1995 empowers the court to disallow improper questions put to a witness in cross-examination. It applies to criminal and civil proceedings and is not restricted to sexual assault matters. Section 41 provides:

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "***disallowable question***"):

(a) is misleading or confusing, or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

(2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:

(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and

(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and

(c) the context in which the question is put, including:

(i) the nature of the proceeding, and

(ii) in a criminal proceeding—the nature of the offence to which the proceeding relates, and

(iii) the relationship (if any) between the witness and any other party to the proceeding

…

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

…

[1-341] Notes

1. Section 41 imposes a mandatory duty on the court to disallow a question if the court forms the opinion that the question is a disallowable question: see further

Uniform Evidence Law, ALRC Report 102 (Final Report), 2005 at [5.90], [5.114]. The Court of Criminal Appeal confirmed that the repealed s 275A(5) *Criminal Procedure Act* 1986, which had materially similar language to s 41(5), imposed an *obligation* on a court to disallow an improper question. This was the case regardless of whether an objection was taken by a party to the question: *FDP v R* (2009) 74 NSWLR 645 at [26]–[28]; *Gillies v DPP* [2008] NSWCCA 339 at [65].

2. Spigelman CJ said when dealing with a previous statutory form of s 41 in *R v TA* (2003) 57 NSWLR 444 at [8]:

> Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

3. Section 41 is premised on an assumption that the question will elicit relevant evidence: *R v TA* at [12]. The court must balance the probative value of the (relevant) evidence sought to be elicited with the effect of the cross-examination upon the witness: *R v TA* at [8], [13]. If the probative force of an anticipated answer is likely to be slight, even a small element of harassment, offence or oppression would be enough for the court to disallow the question: *R v TA* at [12].

4. Section 41 is not the only source of law for improper questions. In *Libke v The Queen* (2007) 230 CLR 559, Heydon J detailed the law governing cross-examination generally, including the powers of a cross-examiner: at [118]; offensive questioning: at [121]; comments by a cross-examiner during the course of questioning: at [125]; compound questions (simultaneously pose more than one inquiry and call for more than one answer): at [127]; cutting off answers before they were completed: at [128]; questions resting on controversial assumptions: at [129]; argumentative questions: at [131] and the role of the judge: at [133]. The court held the judge should have intervened to control persistently inappropriate commentary by the prosecutor to prevent any later suggestion of unfairness: at [41], [53], [84], [133]. Hayne J discussed the role of the judge at [84]–[85].

   See also P Johnson, "Controlling unreasonable cross-examination" (2009) 21(4) *JOB* 29.

[1-343] Cross-examination of defendant as to credibility

Section 104 of the *Evidence Act* 1995 provides for further protections in relation to cross-examination as to credibility in addition to those prescribed in ss 102 and 103. The section outlines the circumstances where leave is, and is not, required to cross-examine a defendant as to his or her credibility. Section 104 provides:

> (1) This section applies only to credibility evidence in a criminal proceeding and so applies in addition to section 103.
>
> (2) A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave.
>
> (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:
>
> (a) is biased or has a motive to be untruthful, or

(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates, or

(c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:

(a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and

(b) is relevant solely or mainly to the witness's credibility.

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:

(a) the events in relation to which the defendant is being prosecuted, or

(b) the investigation of the offence for which the defendant is being prosecuted.

(6) Leave is not to be given for cross-examination by another defendant unless:

(a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine, and

(b) that evidence has been admitted.

[1-345] Notes

1. Section 104 applies "only to credibility evidence in a criminal proceeding": s 104(1). If the evidence is relevant for some other purpose and admissible under Pt 3.2–3.6, s 104 does not apply: s 101A; *R v Spiteri* (2004) 61 NSWLR 369 at [35]; *Davis v R* [2017] NSWCCA 257 at [64]–[66]. The issue of whether a particular item of evidence is relevant only to the credibility of a witness or not will depend upon the facts and circumstances of each individual case: *Peacock v R* [2008] NSWCCA 264 at [51].

2. A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave: s 104(2). Leave to cross-examine a defendant by the prosecutor is *not* required where it is directed to whether the defendant: is biased or has a motive to be untruthful; is unable to recall matters to which his or her evidence relates; or, has made a prior inconsistent statement: s 104(3). There is a general discussion of the credibility provisions in *Tieu v R* (2016) 92 NSWLR 94 at [26]–[47], [135]–[136].

3. Where leave is required under s 104(2), it is essential that the court give proper attention to the requirements of s 104 and make a specific determination as to leave: *Tieu v R* at [142], [136], [139]. The court should ask the prosecution to address in submissions the gateway provisions in ss 104(4), 103 and 192: *Tieu v R* at [141]–[143]. The general leave provision under s 192(2) is engaged: *Tieu v R* at [36], [135]. The court must take into account the non-exhaustive list of matters in s 192 in deciding whether to grant leave: *Stanoevski v The Queen* (2001) 202 CLR 115 at [41] (also discussed in **Character** at **[2-350]**); *R v El-Azzi* [2004] NSWCCA 455 at [270]. The evidence must also satisfy the requirements of both s 104(4) and s 103: *R v El-Azzi* at [250]. The common law resistance to allowing evidence of prior criminal history is also relevant in guiding the exercise of the s 104(2) discretion: *R v El-Azzi* at [199]–[200]. Ordinarily the danger of unfair

prejudice created by evidence of a serious criminal conviction would substantially outweigh its probative value: *R v El-Azzi* at [199]–[200]. The judge did not err in the particular case by permitting cross-examination of the defendant about a corruption offence: *R v El-Azzi* at [200]–[201].

4. Section 104(6) addresses cross-examination by another defendant. The provision "applies only to credibility evidence": s 104(1). To that extent it does not cover the field on the topic of cross-examination by another defendant. The court in *R v Fernando* [1999] NSWCCA 66 at [287]–[290] made reference to the (common) law on the subject of cross-examination by another defendant. Although leave was not sought under s 104(6), the court noted at [287] that the purpose of s 104(6) is to create a "restriction of cross-examination of an accused person directed to the issue of credibility".

   For commentary and directions on the accused's right to silence see **Silence — evidence of** at **[4-100]–[4-130]**.

[The next page is 57]

Closed court, suppression and non-publication orders

[1-349] Introduction

The powers of a court to make closed court, suppression and non-publication orders are primarily contained in the *Court Suppression and Non-publication Orders Act* 2010 ("the *Suppression Act*") which commenced on 1 July 2011. Provisions commonly relevant in criminal proceedings are also in the *Criminal Procedure Act* 1986 and the *Children (Criminal Proceedings) Act* 1987.

Consideration of whether orders should be made under any of the relevant statutory provisions should, where practicable, be dealt with at the outset of proceedings. A checklist of the matters to be considered is at the end of this Chapter: see **Checklist for suppression orders**.

The onus is on the parties to make an application for appropriate orders at the hearing. Such orders may include an application for a pseudonym order or the suppression of certain evidence, such as evidence related to assistance given during the proceedings: *Darren Brown (a pseudonym) v R (No 2)* [2019] NSWCCA 69 at [13]–[14]. Note the observations of the court concerning the approach usually taken to assistance at [31]–[34], although these must be read in light of *HT v The Queen* [2019] HCA 40: see *Sentencing Bench Book* at **[12-210] Procedure** (in **Power to reduce penalties for assistance to authorities**).

When a prohibition is to remain in force (as it often does) advise everyone, including the entire jury panel, of the legal position.

Consistent with the general rule that costs are not awarded in criminal proceedings, a court does not have jurisdiction to award costs in respect of applications for suppression and non-publications orders in such proceedings — nothing in the *Suppression Act* suggests otherwise: *R v Martinez (No 7)* [2020] NSWSC 361 at [33]ff.

See the Supreme Court of NSW, "Identity theft prevention and anonymisation policy" for guidance as to the publication of personal or private information in court judgments.

See also Supreme Court Practice Note CL 9 and District Court Criminal Practice Note 8, both titled "Removal of judgments from the internet".

Common law and suppression and non-publication orders

The *Suppression Act* does not limit or otherwise affect any inherent jurisdiction a court has to regulate its proceedings or deal with contempt of court: s 4.

The implied powers of a court are directed to preserving its ability to perform its functions in the administration of justice: *BUSB v R* (2011) 80 NSWLR 170 per Spigelman CJ at [28].

[1-350] The principle of open justice

The principle of open justice is a fundamental aspect of the system of justice in Australia and the conduct of proceedings in public is an essential quality of an Australian court of justice. There is no inherent power of the court to exclude the public:

John Fairfax Publications Pty Ltd v District Court of NSW (2004) 61 NSWLR 344 per Spigelman CJ at [18]. However, in appropriate cases courts have jurisdiction to modify and adapt the content of general rules of open justice and procedural fairness and to make non-publication orders for particular kinds of cases: *HT v The Queen* (2019) 269 CLR 403 at [44], [46].

Section 6 of the *Suppression Act* requires a court deciding whether to make a suppression or non-publication order, to take into account that "a primary objective of the administration of justice is to safeguard the public interest in open justice". Section 6 must be considered even if one of the grounds of necessity under s 8 (see further below) is established: *DRJ v Commissioner of Victims Rights* [2020] NSWCA 136 at [30]. Decisions since the commencement of the Act confirm the continuing importance of the open justice principle: *Rinehart v Welker* (2011) NSWLR 311 at [26], [32]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [9]; *Liu v Fairfax Media Publications Pty Ltd* [2018] NSWCCA 159 at [52]–[53]. Section 6 also reflects the legislative intention that orders under the Act should only be made in exceptional circumstances: *Rinehart v Welker* at [27].

The public interest in open justice is served by reporting court proceedings and their outcomes fairly and accurately: *AB (A Pseudonym) v R (No 3)* (2019) 97 NSWLR 1046 at [101]; *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324 at [20]. In some cases, where reporting of particular proceedings is misleading, emotive and encourages vigilante behaviour, the message disseminated may be "antithetical to institutionalised justice" and a non-publication order may not compromise the public interest in open justice: see, for example, *AB (A Pseudonym) v R (No 3)* at [102]–[110].

The principle of open justice may require publication of a judgment confirming the making of non-publication or suppression orders with appropriate redactions to maintain the anonymity of parties or particular aspects of proceedings as have been determined to be necessary. Although the parties may reach agreement as to appropriate redactions, the court must determine for itself whether the proposed redactions should be the subject of a suppression order, having regard to, in particular, the emphasis in s 6 on the need to safeguard the public interest in open justice: *D1 v P1 (No 2)* [2012] NSWCA 440 at [6]. The redacted judgment must remain intelligible, particularly as to the matters of principle justifying the decision to suppress the particular information: *D1 v P1 (No 2)* at [7]. For an example where this course was taken see *Medich v R (No 2)* [2015] NSWCCA 331.

[1-352] Court Suppression and Non-publication Orders Act 2010

The *Suppression Act* confers broad powers on courts to make suppression or non-publication orders: s 7. Such orders may be made at any time during proceedings or after proceedings have concluded: s 9(3). The power in s 7 is broad and may, depending on the particular circumstances, extend to a judicial officer in one court (for example, the District Court) making non-publication orders with the capacity to affect proceedings in another (for example, the Supreme Court): *Munshizada v R* [2021] NSWCCA 307 at [31]–[33]; cf *Sultani v R* [2021] NSWCCA 301 at [15]–[16].

A "non-publication order" and a "suppression order" are defined in s 3. A "party" is broadly defined in s 3.

A court can make a suppression or non-publication order on its own initiative or on application by a party to the proceedings or by any other person considered by the court to have sufficient interest in the making of the order: s 9(1). Those persons entitled to be heard on an application are set out in s 9(2)(d) and include news media organisations.

While at common law there were conflicting views as to whether a court could make non-publication orders which were binding on third parties (see *Hogan v Hinch* (2011) 243 CLR 506 at [23]), a concern to resolve that issue underlies the enactment of s 7: *Rinehart v Welker* (2011) NSWLR 311 at [25]; see also the "Agreement in Principle Speech" for the Court Suppression and Non-publication Orders Bill 2010, NSW, Legislative Assembly, Debates, 29 October 2010, p 27195. This seems to be put beyond doubt by the decision in *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 where Basten JA (with whom Bathurst CJ and Whealy JA agreed) concluded that, provided they do not purport to bind the "world at large" and that certain conditions are met, orders *can* be made which are binding on third parties: [92]–[102].

[1-354] Grounds for and content of suppression or non-publication orders

Section 8(1) of the *Suppression Act* sets out the grounds upon which an order can be made and each is prefaced in terms of whether the order is "necessary". That term should not be given a narrow construction: *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [8], [45]. What is necessary depends on the particular grounds relied upon in s 8 and the factual circumstances giving rise to the order: *Fairfax Digital* at [8]. It is sufficient that the order is necessary to achieve at least one of the objectives identified in s 8(1)(a)–(e): *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97 at [20]. The word "necessary" describes the connection between the proposed order and the identified purpose; its meaning will depend on the context in which it is used: *Fairfax Digital* at [46]. Mere belief that an order is necessary is insufficient: *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 477. Nor is it enough that it appears to the Court that the proposed order is convenient, reasonable or sensible. Whether necessity has been established depends on the nature of the orders sought and the circumstances in which they are sought: *D1 v P1* [2012] NSWCA 314 at [48]; *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [31].

Delay in making an application for an order is a relevant consideration when determining whether an order should be made: *Darren Brown (a pseudonym) v R (No 2)* [2019] NSWCCA 69 at [28]–[30]. Where there has been a delay, the way the proceedings were originally conducted should be considered, although delay of itself does not preclude making an order. For example, in *Darren Brown (a pseudonym) v R (No 2)*, at [38]–[39], the court referred to the "gross delay" in making the application but concluded the particular orders sought should be made because of the serious potential risk to the appellant's physical safety.

An order may be made even though it has limited utility or may be ineffective: *AB (A Pseudonym) v R (No 3)* (2019) 97 NSWLR at [116]–[117]; *Dowling v Prothonotary of the Supreme Court of NSW* [2018] NSWCA 340 at [25]. Once a ground under s 8(1) is established, an order must be made: *AB (A Pseudonym) v R (No 3)* at [117]–[118]; *Hogan v Australian Crime Commission* at [33].

The expression "administration of justice" in s 8(1)(a) extends to the protection of confidential police methods as well as the investigation and detection of crime: *R v Elmir* [2018] NSWSC 308 at [19]–[20], [23].

In *R v Elmir*, Davies J made suppression orders with respect to protected images, the methods used to obtain those images and a messaging application used during a police investigation of foreign incursion offences, on the basis those orders were necessary to prevent prejudice to the administration of justice (s 8(1)(a)), the interests of the Commonwealth in relation to national security (s 8(1)(b)) and otherwise necessary in the public interest (s 8(1)(e)): at [23]–[25]. An order preventing publication of a complainant's name was found to be necessary within s 8(1)(e) in *Le v R* [2020] NSWCCA 238. It encouraged victims of crime, such as sex workers, who may otherwise be humiliated by reason of their occupation, to report crimes: at [227]–[229]. In such a case, where all other facts could be read by the public, anonymising the complainant's name encroached on the principle of open justice to a very limited degree: at [229].

In *SZH v R* [2021] NSWSC 95, a bail application, Garling J made suppression orders relying on s 8(1)(a) to ensure the applicant's fair trial as the court was required to consider evidence relied on by the Crown, which may not have been admitted in the trial, to determine the strength of the Crown case. Other remedies are available. For example, orders may be made at the beginning of the trial for such decisions to be removed from NSW Caselaw for the duration of any trial, or publication of the judgment deferred until the trial is complete.

Another relevant consideration is whether "the order is necessary to protect the safety of any person": s 8(1)(c). "Safety" includes psychological safety, including aggravation of a pre-existing mental condition as well as the risk of physical harm, by suicide or other self-harm as a result of the worsening of a psychiatric condition: *AB (A Pseudonym) v R (No 3)* at [59]. The person's safety must be considered in the context of all the circumstances, including the nature and severity of the psychological condition and the severity of any possible aggravation. In the context of a risk of self-harm, there should be some expert evidence enabling the court to assess the likelihood and gravity of the risk. Mere embarrassment, discomfort, reputational damage or even financial loss are not sufficient: *A Lawyer (a pseudonym) v Director of Public Prosecutions NSW* [2020] NSWSC 1713 at [55], [84], [97]. When considering s 8(1)(c), the "calculus of risk approach" should be adopted, which requires consideration of the nature, imminence and degree of likelihood of harm occurring to the person. If the prospective harm is very severe, it may be more readily concluded the order is necessary even if the risk does not rise above a mere possibility: *AB (A Pseudonym) v R (No 3)* at [56], [59]; *Darren Brown (a pseudonym) v R (No 2)* at [37].

In *A Lawyer (a pseudonym) v Director of Public Prosecutions NSW*, the possible further exacerbation of the appellant's mother's psychological state was not of such gravity and prejudice to her safety that the risk was above the level that might reasonably be regarded as acceptable, having regard to the competing interest in open justice.

In *Lacey (a pseudonym) v Attorney General for New South Wales* [2021] NSWCA 27 the court concluded that the "otherwise necessary" requirement in s (8)(1)(e) could, in circumstances involving cultural issues, operate to extend the effect of s 8(1)(d)

to proceedings involving matters other than offences of a sexual nature: at [27]–[31]; [41]–[43]; [85]. The offender, an Aboriginal teenage girl, sought an order prohibiting men from viewing video footage of her being strip-searched. The court found a magistrate may have the power to make such an order.

It may be necessary to make separate (and different) orders in respect of different types of information in the same proceedings. See for example, *Bissett v Deputy State Coroner* [2011] NSWSC 1182 where RS Hulme J concluded that the nature of the medium, publication of which was sought to be suppressed, was a relevant matter to be taken into account. In that case, his Honour concluded that a DVD of relevant events was likely to have a greater impact than the transcript of evidence and that publication of the DVD should therefore be suppressed: at [25]–[27].

Limited non-publication orders may be appropriate in some cases. For example, in *State of NSW v Williamson (No 2)* [2019] NSWSC 936, limited orders, that there be no publication of his address or his employer's identity or location, were made in respect of the defendant, a high risk offender who had served his sentence. Those orders were necessary so his rehabilitation and ability to refrain from re-offending would not be jeopardised. Given the limited scope of the order, it only infringed any interest in open justice to the smallest extent: *State of New South Wales v Williamson (No 2)* at [42]–[43].

In some cases, consideration may be required of the interaction between orders made under the *Suppression Act* and statutory protections provided under other Acts. Orders under the *Suppression Act* should not conflict with orders or directions made under other Acts: *Medich v R (No 2)* [2015] NSWCCA 331 at [25]. In *Medich v R (No 2)*, the court considered that, in the particular circumstances, a partial non-publication order was required for a judgment dealing with whether a compulsory examination justified a permanent stay, to avoid nullifying a non-disclosure direction under s 13(9) of the *New South Wales Crime Commission Act* 1985 (rep): at [26]–[27]. See also *R v AB (No 1)* (2018) 97 NSWLR 1015 where the court concluded that orders under the *Suppression Act* were not necessary since s 15A of the *Children (Criminal Proceedings) Act* 1987 applied and non-compliance with s 15A did not meet the requirements of necessity in s 8 of the *Suppression Act*: at [39]–[40]. See also **[1-359] Self-executing prohibition of publication provisions**.

It is important that the right of certain persons to waive a statutory protection, such as in ss 15D and 15E of the *Children (Criminal Proceedings) Act* 1987, not be foreclosed by the unnecessary making of an order under the *Suppression Act*.

As to necessity at common law see: *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 per Spigelman CJ at [40]–[45]; *O'Shane v Burwood Local Court (NSW)* [2007] NSWSC 1300 at [34]. See also *BUSB v R* (2011) 80 NSWLR 170 per Spigelman CJ at [33] which addressed the test of necessity in the context of a screening order.

Take-down orders

A take-down order will fail the necessity test under s 8(1) if it is futile. However, an order will not necessarily be futile merely because the court is unable to remove all offending material from the internet or elsewhere, or the material is available on overseas websites: *AW v R* [2016] NSWCCA 227 at [17]; *Nationwide News*

Pty Ltd v Quami (2016) 93 NSWLR 384 at [83]; *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [76]. Where the application for a take-down order relates to proceedings before a jury, the test of necessity will not readily be satisfied without considering whether the jury is likely to abide by the judge's directions to decide the matter only by reference to the evidence: *Fairfax Digital* at [77]. However, full effect should be given to the received wisdom that jurors act responsibly and in accordance with their oath, including complying with directions of the trial judge: *AW v R* at [16]; *Nationwide News Pty Ltd v Quami* at [90].

Content of the order

An order *must* specify:

- the grounds on which it was made: s 8(2)
- any exceptions or conditions to which it is subject: s 9(4)
- the information to which it applies: s 9(5)
- the place to which it applies, which may be anywhere in the Commonwealth. An order can only apply outside NSW where the court is satisfied that is necessary to achieve the order's purpose: s 11
- the period for which the order applies: s 12.

It is preferable to specify a particular period and not to make an order that remains in force "until further order". Such an order is difficult to reconcile with the statutory obligation in s 12(2) to ensure an order operates for no longer than is reasonably necessary: *DRJ v Commissioner of Victims Rights* [2020] NSWCA 136 at [46]–[47].

When information on the internet is involved, relevant internet service providers must be identified and given the opportunity to remove relevant material before an order is sought. This could be done by the Director of Public Prosecutions. If the requested action was not taken within a reasonable time, the Director could seek an order in respect of that material: *Fairfax Digital* at [94]. The test of necessity will not usually be satisfied unless such a request has been made and the parties, after a reasonable opportunity, have failed, or have indicated they do not intend, to remove the relevant material: *Fairfax Digital* at [98].

See *R v Perish* (2011) NSWSC 1102; *R v Perish* [2011] NSWSC 1101; *R v DEBS* [2011] NSWSC 1248; *X v Sydney Children's Hospitals Specialty Network* [2011] NSWSC 1272 for examples of types and forms of orders made under the Act and those parts of s 8(1) relied upon by the court making the relevant order.

It may be necessary to take appropriate steps to ensure the media is notified of either a suppression or non-publication order. In the Supreme and District Courts this is done by the associate notifying the Supreme Court's Public Information Officer.

Review and appeals

Orders made under the Act are subject to review and appeal: ss 13–14. Section 13 is confined to a review by the original court which granted the relevant order while s 14 deals with an appeal by leave, either in respect of the original order or the order of that court on a review: *D1 v P1* [2012] NSWCA 314 at [42]. Given the powers under s 14(5) to admit additional or substituted evidence, together with the fact that, subject to leave, a review under s 13 and an appeal under s 14 appear to be alternatives, the

hearing on the appeal is a hearing de novo: *D1 v P1* at [43]; *Fairfax Digital* at [6]. As to who may make an application under s 13 for review of an order see *JB v R* [2019] NSWCCA 48 at [25]–[27]. In that case the court concluded the NSW Bar Council had standing to make an application for review.

[1-356] Other statutory provisions empowering non-publication or suppression

The *Suppression Act* does not limit the operation of a provision under any other Act permitting a court to make orders of this kind: s 5. Other provisions fall into three broad groups: those conferring a power on a court to make suppression or non-publication orders in particular circumstances, those requiring or enabling the closing of a court and those that either require the making of an order for non-publication or prohibit publication of information.

See also **Non-publication and suppression orders** at [**62-000**]ff of the *Local Court Bench Book*, in particular [62-040], [62-060] and [62-080] for comprehensive lists of provisions for automatic non-publication or suppression orders and of those requiring a court order.

Following is a non-exhaustive list of specific provisions enabling a court to make suppression or non-publication orders. Many will not require consideration in the context of a criminal trial.

- *Crimes (Domestic and Personal Violence) Act* 2007, s 45(2). Note s 45(1) which positively prohibits publication or broadcast in respect of children
- *Evidence (Audio and Audio Visual Links) Act* 1998, s 15(c)
- *Surveillance Devices Act* 2007, s 42(5)–(6)
- *Evidence Act* 1995, s 126E(b), relating to "Professional confidential relationship privilege". Such an order constitutes a diminution of the operation of the open justice principle, the justification for such an exception should be narrowly construed: *Nagi v DPP* [2009] NSWCCA 197 at [30]
- *Lie Detectors Act* 1983, s 6(3).

Commonwealth provisions

The relevant Commonwealth provisions include:

- *Director of Public Prosecutions Act* 1983 (Cth), s 16A
- *Service and Execution of Process Act* 1992 (Cth), s 96
- *Surveillance Devices Act* 2004 (Cth), s 47.

[1-358] Closed courts

Protection of complainants from publicity in proceedings for a "prescribed sexual offence"

Where proceedings are in respect of a prescribed sexual offence, as defined in s 3 *Criminal Procedure Act* 1986, ss 291, 291A and 291B of that Act require that certain proceedings, or parts of proceedings, for a prescribed sexual offence be held in camera.

When a complainant's evidence is being given or heard before the court (whether this is in person or via an audio visual or audio recording) proceedings are to be held in

camera unless otherwise ordered: s 291(1). Where a record of the original evidence of the complainant is tendered in proceedings by the prosecutor under Ch 3, Pt 5, Div 3 *Criminal Procedure Act*, the record does not need to be tendered in camera: s 291(6).

Media access to such proceedings is governed by s 291C of the Act. The court may make arrangements for media representatives to view or hear evidence or a record of it, in circumstances where the media is not entitled to be present in the courtroom: s 291C(2). For details of such procedures see District Court Criminal Practice Note 4, "Media access to sexual assault proceedings heard in camera".

Section 302(1) of the Act may also be relevant. That section empowers the court to order that all or part of evidence related to a protected confidence be given in camera.

Children in criminal proceedings

The court may exclude from proceedings involving children anyone not directly interested in the proceedings: s 10 *Children (Criminal Proceedings) Act* 1987. Any family victim is entitled to remain: s 10(1)(c). Media representatives may remain unless the court otherwise directs: s 10(1)(b). Section 15A of the Act prohibits the publication or broadcasting of the names of children involved as offenders, witnesses, or brothers and sisters of victims in criminal proceedings. (See further at [1-359] below.)

As to Children's Court proceedings: see ss 104–105 *Children and Young Persons (Care and Protection) Act* 1998.

Terrorism

Terrorism (Police Powers) Act 2002, s 26P requires that proceedings heard in the Supreme Court concerning applications making or revoking a preventative detention order or a prohibited contact order must be heard in the absence of the public. See also ss 27Y and 27ZA.

Witness protection

Witness Protection Act 1995, s 26 provides that where the identity of a participant in the witness protection program is in issue or may be disclosed, the court must, unless of the view that the interests of justice require otherwise, hold that part of the proceedings in private and make an order suppressing the publication of the evidence given to ensure the participant's identity is not disclosed. See also s 31E which concerns questioning, with leave, a witness that may disclose a protected person's protected identity.

Commonwealth provisions

The *Crimes Act* 1914 (Cth) and *Criminal Code* (Cth) contain provisions enabling a court to exclude all or some members of the public and make orders concerning the non-publication of evidence in particular proceedings. For example, s 15YP of the *Crimes Act* provides that a court may exclude people from the courtroom when certain witnesses, including child witnesses, vulnerable adult complainants or special witnesses (defined in s 15YAB) are giving evidence in particular proceedings. Publishing information identifying such witnesses is an offence: s 15YR(1).

Section 93.2 of the Code, in Pt 5.2 titled "Espionage and related offences", empowers a court to exclude members of the public from all or part of a hearing if satisfied it is in the interests of Australia's national security. Orders may also be made that no report of the whole or specified part of the hearing be published. The contravention of an order is an offence: s 93.2(3). See also the *National Security*

Information (Criminal and Civil Proceedings) Act 2004 (Cth) which establishes a regime for dealing with national security information in federal criminal proceedings. For a discussion of the operation of s 31, which governs non-disclosure orders that can be made under that Act, see *R v Collaery (No 7)* [2020] ACTSC 165 at [41]–[43], [102]–[110].

[1-359] Self-executing prohibition of publication provisions

A number of statutory provisions prohibit the publication of information in particular circumstances.

Note: Where a statutory protection automatically applies, it is important that court reporters endorse the transcript to this effect and do not attribute it to the court having made an "order".

See the following:

- *Bail Act* 2013, s 89(1) prohibits publication of association conditions in terms similar to *Crimes (Sentencing Procedure) Act* 1999, s 100H (see below).
- *Child Protection (Offenders Prohibition Orders) Act* 2004, s 18.
- *Children (Criminal Proceedings) Act* 1987, s 15A prohibits the publication or broadcast of the names of children involved as offenders, witnesses, or brothers and sisters of child victims in criminal proceedings (see below).
- *Crimes Act* 1900, s 578A prohibits the publication of matters identifying a complainant in proceedings in respect of a prescribed sexual offence. As to publication, once proceedings are finalised see: ss 578A(4)(a)–(f) and 578A(3).

  The prohibition in s 578A(2) extends to the reporting of appeals even if a prescribed sexual offence, which was part of the original proceedings, is not the subject of the appeal, because publication of the identity of the victim of the offence(s) the subject of the appeal would identify them as the complainant in the original proceedings: *Z (a pseudonym) v R* [2022] NSWCCA 8 at [56].
- *Crimes (Appeal and Review) Act* 2001, s 111.
- *Crimes (Domestic and Personal Violence) Act* 2007, s 45(1) prohibits the publication of names or identifying information concerning children in AVO proceedings.
- *Crimes (Sentencing Procedure) Act* 1999, s 100H prohibits the publication or broadcast of persons named in non-association orders (other than the offender) made under s 17A(2)(a), or any information calculated to identify any such person.
- *Evidence Act* 1995, s 195 prohibits the publication of prohibited questions, the nature of which are set out in that section.
- *Law Enforcement (Controlled Operations) Act* 1997, s 28.
- *Law Enforcement and National Security (Assumed Identities) Act* 2010, s 34.
- *Status of Children Act* 1996, s 25.

Publication of children's names in criminal proceedings

Children (Criminal Proceedings) Act 1987, s 15A prohibits the publication or broadcast of the names of children involved as offenders, witnesses, or brothers and sisters of child victims in criminal proceedings. Where there has been breach of an

order under s 15A(1), proceedings should be commenced under s 15A(7) instead of seeking a non-publication order under s 7 of the *Suppression Act*: *R v AB (No 1)* (2018) 97 NSWLR 1015 at [38]-[39].

Sections 15B–15F provide exceptions to the prohibition on publication or broadcast in certain circumstances including where:

(a) an order has been made by a court authorising the publication or broadcast of the name of a person convicted of a serious children's indictable offence: s 15C(1). The matters to be considered by the court are set out in s 15C(3).

(b) a person who is 16 years or above at the time of publication or broadcasting has consented: s 15D(1)(b). As to the circumstances in which a child of 16 or 17 years of age can consent see s 15D(3). A court has power to make orders under s 15D(1)(a). The matters to consider are set out in s 15D(2).

(c) the name of a deceased child is published or broadcast with the consent of the child's senior available next of kin: s 15E(1). See, for example, *R v ES (No 2)* [2018] NSWSC 1708 at [1] where the deceased child's mother consented to her child being referred to by the name Liana.

Note also that s 15E(5) enables the court to make an order for publication or broadcast of a deceased child's name if no senior next of kin is available to give consent and the court is satisfied the public interest requires it. In determining whether an order for publication should be made, the court must consider the circumstances of the particular case and the public interest. In assessing the "public interest", a broad concept, the court looks at the circumstances of the case: *R v Sam (No 1)* [2009] NSWSC 542 at [13]–[14]. In *R v Sam (No 1)*, which involved manslaughter by criminal negligence occasioned by the child's parents failing to obtain appropriate medical treatment, Johnson J was satisfied the public interest in open justice meant the child's name should be published. In *R v BW & SW (No 2)* [2009] NSWSC 595, R A Hulme J concluded that given the atrocious circumstances in which the child died and the evidence she was subject to severe neglect, dignity and respect for her life and memory warranted publication of her middle name "Ebony": *R v BW & SW (No 2)* at [19]–[26]. This addressed concerns associated with not identifying her siblings who were 16 years old and younger: at [26]–[27].

Commonwealth provisions

Section 15MK *Crimes Act* 1914 (Cth) makes provision for orders necessary or desirable to protect the identity of an "operative" for whom a witness identity protection certificate has been filed. The "necessary or desirable" test in s 15MK(1) has a lower threshold than that of necessity under s 8 *Suppression Act* or the common law as discussed in *BUSB v R* (2011) 80 NSWLR 170 at [30]–[33]; *R v Elmir* [2018] NSWSC 308 at [28]. See also **Evidence given by alternative means** at **[1-380]**ff.

Section 15YR(1) *Crimes Act* 1914 provides for an offence of publishing a matter which identifies a child witness or child complainant in a child proceeding or a vulnerable adult complainant in a vulnerable adult proceeding. Each proceeding is defined in ss 15Y, 15YA and 15YAA.

A person commits an offence if:

(a) the person publishes any matter; and

(b) the person does not have the leave of the court to publish the matter; and

(c) the matter:

(i) identifies another person, who is a person to whom subsection (1A) applies (the ***vulnerable person***) in relation to a proceeding, as being a child witness, child complainant or vulnerable adult complainant; or

(ii) is likely to lead to the vulnerable person being identified as such a person; and

(d) the vulnerable person is not a defendant in the proceeding.

Penalty: imprisonment for 12 months, or 60 penalty units, or both.

Section 28(2) *Witness Protection Act* 1994 (Cth) provides, inter alia, the court must make such orders relating to the suppression of publication of evidence given before it as, in its opinion, will ensure that the identity of a National Witness Protection Program participant is not made public.

Checklist for suppression orders

Relevant legislation: *Court Suppression and Non-publication Orders Act* 2010

Note: certain other legislation contain mandatory provisions that may obviate the need to make suppression or non-publication orders in particular proceedings or in relation to particular persons (eg children and complainants in prescribed sexual assault proceedings) or witnesses. See [1-356] *Other statutory provisions empowering no-publication or suppression*; [1-358] *Closed courts*; [1-359] *Self-executing prohibition of publication provisions.*

(1) Power to make a suppression or non-publication order (the order) arises under s 7 of the Act.

(2) The order may be made by the court on its own initiative or upon application by a party to the proceedings or any other person the court considers has a sufficient interest in the making of the order: s 9. The persons entitled to appear and be heard on an application are listed in s 9(2).

(3) The order can be made at any time during the proceedings or after they have concluded: s 9(3) (although if an application is made some time after the conclusion of the proceedings, the delay may be taken into account in determining whether it is appropriate to make the order).

(4) In determining whether to make the order the court must:

   (a) take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice: s 6; see further [1-350] *The principle of open justice*.

   (b) determine the ground/s on which the order may be made: s 8; see further [1-354] *Grounds for and content of suppression or non-publication orders.* In a case where s 8(1)(d) arises for consideration with respect to a defendant in criminal proceedings for an offence of a sexual nature note s 8(3).

(5) Upon making the order the court must specify:

   (a) the ground on which it was made: s 8(2);

   (b) the information to which it applies: s 9(5);

   (c) any exceptions or conditions to which it is subject: s 9(4);

   (d) the place to which it applies, which may be anywhere in the Commonwealth. However, an order can only apply outside NSW where the court is satisfied that is necessary to achieve the order's purpose: s 11; see further in [1-354] *Content of order*. The preferable approach is that the order operate throughout the Commonwealth.

   (e) the period of the order: s 12.

(6) Ensure a copy of the order is:

   (a) entered on Justicelink

   (b) disseminated to the relevant Court's Media Officer for circulation as appropriate.

[The next page is 71]

Evidence given by alternative means

[1-360] Introduction

This section addresses directions or warnings where evidence is given by alternative means particularly Closed Circuit Television (CCTV), alternative seating arrangements, the use of screens, support persons, the admission of pre-recorded out-of-court representations to police and evidence given via audio visual link. The following Table sets out in summary form many of the relevant provisions for a "vulnerable person", a complainant/sexual offence witness and a domestic violence complainant.

	Complainant/ sexual offence witness defined in s 294D in prescribed sexual offence proceedings: *Criminal Procedure Act* 1986	**Vulnerable persons defined in s 306M in personal assault proceedings: *Criminal Procedure Act* 1986**	**Domestic violence complainants: *Criminal Procedure Act* 1986, s 3 and Pt 4B**	**Children in Commonwealth sexual offence proceedings: *Crimes Act* 1914**
CCTV and similar technology				
"Entitled to" give evidence	s 294B(3)(a)	s 306ZB(1)	Only if ss 290(1) and 294B(2A) or ss 306P and 306M(1) apply	s 15YI
Criteria	s 294B(5)–(6) — court may order CCTV /other technology not be used based on special reasons in interests of justice	s 306ZB(4)–(5) — court may order CCTV /other technology not be used based on special reasons in interests of justice	Only if ss 290(1) and 294B(2A) or ss 306P and 306M(1) apply	s 15YI(1)–(2) — must give evidence by CCTV unless the vulnerable person (16 years or over) chooses not to or court orders if satisfied not in interests of justice
Warning required	s 294B(7)	s 306ZI(1)	Only if ss 290(1) and 294B(2A) or ss 306P and 306M(1) apply	s 15YQ(1)(b) — contrary warning prohibited
Other alternative arrangements (use of screens, seating arrangements, etc)				
"Entitled to" give evidence	s 294B(3)(b)	s 306ZH	Only if ss 290(1) and 294B(2A) or ss 306P and 306M(1) apply	s 15YL
Warning required	s 294B(7)	s 306ZI(4)	Only if ss 290(1) and 294B(2A) or ss 306P and 306M(1) apply	s 15YQ(1)(b) — contrary warning prohibited
Support person				
Right to support person	s 294C(1)	ss 306ZD(2)(b), 306ZK(2)	Only if ss 290(1) and 294B(2A) or ss 306P and 306M(1) apply	ss 15YJ(1)(c), 15YO

	Complainant/ sexual offence witness defined in s 294D in prescribed sexual offence proceedings: *Criminal Procedure Act* 1986	**Vulnerable persons defined in s 306M in personal assault proceedings: *Criminal Procedure Act* 1986**	**Domestic violence complainants: *Criminal Procedure Act* 1986, s 3 and Pt 4B**	**Children in Commonwealth sexual offence proceedings: *Crimes Act* 1914**
Warning required	None specified	s 306ZI(3)	Only if ss 290(1) and 294B(2A) or ss 306P and 306M(1) apply	s 15YQ(1)(d) — contrary warning prohibited
Pre-recorded interview				
May give evidence by pre-recorded interview/statement	N/A	ss 306S(2), 306U(1)–(2)	s 289F(1)	s 15YM
Criteria	N/A	s 306Y — court may order recording not be used if not in interests of justice	s 289G	s 15YM(1)(b), (2) — court required to grant leave; must not grant leave if not in interests of justice
Warning required	N/A	s 306X	s 289J	s 15YQ(1)(c) — contrary warning prohibited

[1-362] Giving of evidence by CCTV and the use of alternative arrangements

There are three NSW statutory schemes for evidence given via CCTV and other alternative arrangements: one relating to complainants in sexual offence proceedings; one relating to evidence given by "vulnerable persons" in criminal proceedings and one related to "government witnesses". Unless otherwise stated, statutory references are to the *Criminal Procedure Act* 1986. For statutory references to the repealed *Evidence (Children) Act* 1997: see overleaf.

Complainants in sexual offence proceedings

Where proceedings are in respect of a "prescribed sexual offence" (as defined in s 3), alternative arrangements may be made for a complainant giving evidence: s 294B(1).

The complainant is entitled to, but may choose not to, give evidence from a place other than the courtroom by means of CCTV or other technology that enables communication between that place and the courtroom: s 294B(3)(a). The complainant may instead choose to give evidence by making use of alternative arrangements, such as planned seating arrangements or the use of screens, to restrict contact (including visual contact) between the complainant and the accused person or any other persons in the courtroom: s 294B(3)(b).

Despite the entitlement of a complainant to give evidence by way of CCTV or other technology (s 294B(3)), the court may order that such methods are not to be used: s 294B(5). However, such an order can only be made where the court is satisfied that there are special reasons, in the interests of justice, for the complainant's evidence not to be given in such a manner: s 294B(6). It is generally not a sufficient reason

to deny the use of CCTV or other technology merely because the jury might form the impression that the accused is/was violent: *Sudath v R* (2008) 187 A Crim R 550 at [28]–[29]. Section 294B(2) provides that s 294B does not apply to the giving of evidence by a vulnerable person (within the meaning of Pt 6) if Div 4 of that Part applies to the giving of that evidence.

Sexual offence witnesses

The protections afforded to complainants extend to witnesses against whom an accused person is alleged to have committed a sexual offence: s 294D. A "sexual offence witness" is defined in s 294D.

Vulnerable persons in personal assault offence proceedings

Similar provisions apply in proceedings relating to the commission of a personal assault offence (as defined in s 306M(1)), for witnesses who fall within the definition of a "vulnerable person" following the passing of the *Criminal Procedure Amendment (Vulnerable Persons) Act* 2007. The transitional provision provided that amendments made to the *Criminal Procedure Act* by that Act do not extend to any proceedings commenced before the commencement of the amendments (12 October 2007) and any such proceedings are to be dealt with as if the amending Act had not been enacted: Sch 2, Pt 14, cl 55 *Criminal Procedure Act*.

A vulnerable person is defined to include a child: s 306M(1). The provisions apply to children under the age of 16 years at the time the evidence is given (s 306P(1)), or children under the age of 18 years at the time the evidence is given but who were under the age of 16 years at the time the charge was laid: s 306ZB(2).

The *Criminal Procedure Amendment (Vulnerable Persons) Act* 2007 initially defined a vulnerable person to be "an intellectually impaired person" in s 306M(1). However the *Crimes Amendment (Cognitive Impairment — Sexual Offences) Act* 2008, which commenced on 1 December 2008, omitted "an intellectually impaired person" and inserted instead "a cognitively impaired person". The provisions that previously applied to the evidence of "intellectually impaired persons" (including the various means by which "vulnerable persons" may give evidence) now apply to the evidence of "cognitively impaired persons" (ss 76, 91, 185, 306M, 306P, 306R, 306T and 306ZK): Sch 2.

A cognitively impaired person is defined in s 306M(2) to include any of the following:

(a) an intellectual disability

(b) a developmental disorder (including an autistic spectrum disorder)

(c) a neurological disorder

(d) dementia

(e) a severe mental illness

(f) a brain injury.

The 2008 Act did not have transitional provisions addressing whether the new cognitively impaired person definition extends to any proceedings commenced before the commencement of the amendments. This is apparently because the amendments

in the 2008 Act merely involved a change in the terminology used for this class of vulnerable persons. For this reason the transitional provision for the 2007 Act (referred to above) continues to have application.

The provisions apply to cognitively impaired persons "only if the court is satisfied that the facts of the case may be better ascertained if the person's evidence is given in such a manner": s 306P(2).

The key provisions corresponding to those for sexual offence complainants are:

- entitlement to give evidence by means of CCTV or other technology: s 306ZB
- judge may order vulnerable person must not give evidence by CCTV or other technology if there are special reasons, in the interests of justice, that such means not be used: s 306ZB(4)–(5)
- availability of other alternative arrangements (screens and planned seating arrangements): s 306ZH.

The court may make an order for an accused who is a vulnerable person to give evidence by alternative means: s 306ZC(2). With respect to a child, such an order may only be made if the court is satisfied that the child may otherwise suffer mental or emotional harm or that the facts may be better ascertained if an order is made: s 306ZC(3).

Commonwealth sexual offence proceedings

Part IAD *Crimes Act* 1914 (Cth) provides for evidence to be given by way of CCTV and the use of alternative arrangements with respect to vulnerable persons. The Table at [1-360] summarises the provisions. Assuming the facilities are available, a vulnerable person must give evidence by way of CCTV unless the court orders otherwise on the basis that it is not in the interests of justice: s 15YI(1)–(2). A vulnerable person (as defined in s 15YI(1A)) aged 16 years or over may choose not to give evidence by way of CCTV: s 15YI(1)(a). Other arrangements, such as the use of screens or planned seating, may be used as an alternative to CCTV: s 15YL.

Government agency witnesses

A "government agency witness", defined in s 5BAA(5) *Evidence (Audio and Audio Visual Links) Act* 1998 as including police witnesses who give corroborative evidence and staff of the NSW Health Service, must give evidence by audio link unless the court otherwise directs and subject to any relevant rules of the court: s 5BAA(1). The section does not apply unless the necessary links are available or can reasonably be made available: s 5BAA(2).

The DPP (NSW) Prosecution Guidelines remind prosecutors proposing to call government agency witnesses that the convenience of those witnesses must always be the paramount consideration, regardless of any perceptions that the evidence might be diminished because it is being given remotely: see Guideline 14.5 "Calling of expert evidence and the use of audio visual links (AVL)". It also states that the best practice to be adopted is that the court be advised of the need for AVL when the trial is fixed for hearing.

Practice Note No SC Gen 15 "Use of audio-visual links in criminal and certain civil proceedings", which commenced on 1 January 2009, establishes arrangements for the

use of AVL in criminal proceedings in NSW courts. Clause 5 provides that in the case of appearances by government agency witnesses, if they have not already done so, no less than 10 working days prior to a hearing, parties to the proceedings are to advise the court and each other if government witnesses are to give evidence by AVL. There is no equivalent practice note in the District Court.

[1-363] Implied power to make screening orders

In addition to the cited statutory provisions available for particular witnesses to give evidence by alternative means, including through the use of screens, the courts have implied powers related to the exercise of their jurisdiction. Such powers exist to serve the administration of justice: *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 481; *BUSB v R* (2011) 80 NSWLR 170 at [27], [34]. Such an order will only be made where it is necessary to do so: *Grassby v The Queen* (1989) 168 CLR 1 at [21]. "Necessary" in this context means that it should be "subjected to the touchstone of reasonableness": *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at [51] quoting *State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 477 at 452. The test of necessity should be applied with varying degrees of strictness and, where the relevant implied power impinges upon a fundamental principle of the administration of criminal justice, such as the right to confront accusers, the test must be applied with a higher level of strictness: *BUSB v R* at [33].

In *BUSB v R*, the scope of the power was discussed in connection with the power to make orders for the screening of witnesses. In that case, it was accepted that the District Court did have such a power: at [24], [51]. The court confirmed that such an order could be made for the purpose of protecting national security: at [42], [62]. The court distinguished between the existence of the power on the one hand and the "facts and matters pertinent to the exercise of the discretion" which will vary from case to case: at [42]–[44], [48]–[50].

The exercise of such powers should be "carefully circumscribed": *R v Ngo* (2001) 124 A Crim R 151 at [26]. See also *R v Ngo* (2003) 57 NSWLR 55 at pp 69ff which dealt with a similar issue in the context of witnesses being permitted to give evidence remotely without the accused being able to see them while they gave their evidence.

[1-364] Warning to jury regarding use of CCTV or alternative arrangements

New South Wales offence proceedings

The requirement to give the jury a warning where evidence is given via CCTV or other technology applies to complainants in prescribed sexual offence proceedings (s 294B(7)) and to vulnerable persons in personal assault offence proceedings: s 306ZI(1). In either case, the judge must:

(a) inform the jury that it is standard procedure for evidence in such cases to be given by those means or use of those arrangements, and

(b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because it is given by those means or by use of those arrangements.

A warning in similar terms is required where alternative arrangements (eg screens and seating) are employed: ss 294B(7), 306ZI(4).

In *R v DBG* (2002) 133 A Crim R 227, it was held at [23]:

> … it is highly preferable that a trial judge gives such information and warnings as are required in respect of a particular part of the evidence that is to be given in a trial before a jury either immediately before or immediately after the giving of that evidence rather than to wait to fulfil that obligation during the course of the summing up. Generally speaking, it would be expected that any information or warning that a jury is required to consider in their assessment of a particular piece of evidence would have considerably more impact upon the jury if given at a time proximate to the evidence. This does not mean that it would not be advisable, or even necessary in some cases, to convey that information or warning again during the course of the summing up. But whether such a course is necessary in order to ensure a fair trial and one according to law will depend upon all the circumstances of the particular case and the nature of the information or warning that must be given.

This passage in *R v DGB* was approved in *RELC v R* (2006) 167 A Crim R 484 at [43]–[44].

[1-366] Suggested direction — use of CCTV or other alternative arrangements

The complainant in this case has given [*or, will give*] evidence by CCTV [*or other alternative means*]. This is standard procedure in cases of this type. You should not draw any inference against the accused or give the evidence any greater or lesser weight simply because it is given in this manner. You should assess the evidence in the same way as you assess the evidence of any other witness in the case.

Commonwealth sexual offence proceedings

Section 15YQ(1)(b) *Crimes Act* 1914 (Cth) provides that the judge is *not* to warn the jury or suggest to the jury in any way that the law requires greater or lesser weight to be given to evidence that is given by way of CCTV or alternative arrangements. This does not appear to preclude a direction in the terms suggested above. If the full direction is not given, it may be considered appropriate to at least inform the jury that the giving of evidence in this fashion is standard procedure in cases of the type.

[1-368] Right to a support person

New South Wales offence proceedings

Complainants in sexual offence proceedings and vulnerable persons in criminal proceedings in any court are entitled to have a support person present when they give evidence: ss 294C(1), 306ZK(2). This applies even where the witness gives evidence by way of alternative means or arrangements: ss 294C(2)(a), 306ZD(3).

In the case of a vulnerable person, the judge must under s 306ZI(3):

(a) inform the jury that it is standard procedure in such cases for vulnerable persons to choose a person to be with them, and

(b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of those alternative arrangements.

There is no corresponding requirement in relation to complainants in sexual offence proceedings. Nevertheless, it may be considered appropriate to say something along the lines of what is said in the case of vulnerable persons.

[1-370] Suggested direction — presence of a support person

You may notice that there is person sitting beside the witness as he or she gives evidence. It is standard procedure for a [*child/intellectually disabled/cognitively impaired person*], when giving evidence, to be accompanied by a person of their choice. You should not draw any inference against the accused or give the evidence any greater or lesser weight simply because of the presence of this other person.

Commonwealth sexual offence proceedings

A vulnerable person may be accompanied by a support person when giving evidence in Commonwealth sexual offence proceedings, even if evidence is given by alternative means: ss 15YJ(1)(c), 15YO *Crimes Act* 1914 (Cth). The judge is *not* to warn the jury or suggest to the jury in any way that the law requires greater or lesser weight to be given to evidence because the child giving evidence is accompanied by an adult: s 15YQ(1)(d). This does not appear to preclude a direction in the terms suggested above.

[1-372] Giving evidence of out-of-court representations

Vulnerable persons

If a statement made by a vulnerable person to an investigating official regarding a criminal offence is recorded, the vulnerable person is entitled to give evidence in chief in the form of the recording: s 306U(1) *Criminal Procedure Act* 1986. In *R v NZ* (2005) 63 NSWLR 628 it was observed at [170]:

> One of the objectives of introducing this procedure was to reduce the trauma for children giving evidence, but it was also to aid in maintaining the reliability of the child's account from contamination or a failure of recollection over time.

With respect to children, the right applies to a child who was under the age of 16 years at the time the recording was made, regardless of his or her age at the time of giving evidence: s 306U(2). Unless the witness giving evidence is the accused, he or she, must be available for cross-examination and re-examination: s 306U(3). The cross-examination and re-examination may be conducted either orally in the courtroom or by means of alternative arrangements: ss 306U(3), 306W.

The hearsay and opinion rules under the *Evidence Act* 1995 do not prevent the admission or use of recorded evidence: s 306V: *Tikomaimaleya v R* (2017) 95 NSWLR 315 at [54]. The recording is not to be admitted unless it is proved that the accused person and his or her lawyer were given a reasonable opportunity to listen to, or view the recording, in accordance with the regulations: s 306V(2); Pt 5 *Criminal Procedure Regulation* 2017. However, s 306V(3) provides that a recorded statement may be admitted into evidence, despite a failure to comply with notice requirements in the regulations, where the parties consent or if the accused has been given a reasonable opportunity to access the recording and it would be in the interests of justice for it to be admitted. The trial judge retains a discretion to rule that the whole or any part of the contents of a recording is inadmissible: s 306V(4).

Competence and recorded interviews

If it is submitted at trial that at the time of the recorded interview the vulnerable person (in accordance with s 13(1) *Evidence Act* 1995) either lacked a capacity to understand a question about the fact, or had an incapacity to give an intelligible answer to a question about the fact, the trial judge is "obliged to make a finding" about the vulnerable person's capacity at the time of the interview: *Tikomaimaleya v R* (2017) 95 NSWLR 315 at [54], [56]. For that purpose the judge can observe the recording of the interview itself and also obtain information from other sources in accordance with s 13(8): *Tikomaimaleya v R* at [56].

See below at [1-378] for the preferred procedure for pre-recorded interviews.

A judge may order that a vulnerable person must not give evidence by means of a recording, but only if satisfied that it is not in the interests of justice for the vulnerable person's evidence to be given in that way: s 306Y.

Note that these provisions do not apply to complainants in sexual offence proceedings under NSW legislation per se, unless they fall within the definition of a vulnerable person.

Domestic violence complainants

Chapter 6, Pt 4B *Criminal Procedure Act* 1986 contains specific provisions governing the giving of evidence by domestic violence complainants. These are contained in summary form in the Table at [1-360]. Section 289F enables complainants in domestic violence proceedings to give evidence in chief wholly, or partly, in the form of a recorded statement. A complainant whose evidence in chief is wholly or partly in the form of a recorded statement must be available for cross-examination and re-examination: s 289F(5).

Part 4B operates in addition to the *Evidence Act* 1995, except where specific exception is made: s 289E. The key exception is the removal of the hearsay and opinion rules insofar as they apply to recorded statements of domestic violence complainants in criminal proceedings: s 289I.

A "recorded statement" is defined as "a recording made by a police officer of a representation made by a complainant when the complainant is questioned by a police officer in connection with the investigation of the commission of a domestic violence offence": s 289D. Section 3(1) defines a "domestic violence offence" as "a domestic violence offence within the meaning of the *Crimes (Domestic and Personal Violence) Act* 2007". A "domestic violence complainant" is defined as the person against whom the domestic violence offence is alleged to have been committed, but does not include a vulnerable person: s 3(1). A transcript of the recorded statement may be given to the jury: s 289K.

The preferred procedure for a pre-recorded interview of a witness is set out below at [1-378].

The judge must warn the jury not to draw any inference adverse to the accused or give the complainant's statement any greater or lesser weight because it is recorded rather than oral: s 289J. See **Suggested direction — evidence in the form of a recording** at [1-376], which includes a form of words for the warning and where the transcript of the recorded statement is provided to the jury.

Commonwealth sexual offence proceedings

Under s 15YM(1) *Crimes Act* 1914 (Cth), the court may grant leave for a vulnerable person (including a child witness for a child proceeding: s 15YM(1A)) to give evidence by way of a pre-recorded video in proceedings for Commonwealth sexual offences, as defined in s 15Y. The court must not grant leave if satisfied that it is not in the interests of justice for evidence to be received in this way: s 15YM(2). The person must be available for cross-examination and re-examination if he or she gives evidence in chief by way of video recording: s 15YM(4).

[1-374] Warning to the jury — evidence in the form of a recording

Vulnerable persons

Section 306X *Criminal Procedure Act* 1986 provides:

> If a vulnerable person gives evidence of a previous representation wholly or partly in the form of a recording made by an investigating official in accordance with this Division in any proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given in that way.

The giving of this warning is mandatory: *Galvin v R* (2006) 161 A Crim R 449 at [56]. In *R v NZ* at [208], the court expressed the view that the trial judge should also give a warning to the jury as to the caution with which they are to approach the re-playing of the videotape of the evidence in chief of a witness, in the manner suggested by McMurdo P in *R v H* (1999) 2 Qd R 283:

> The judge should also warn the jury that because they are hearing the evidence in chief of the complainant repeated a second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case.

If the jury is given a transcript of the recording (expressly permitted under s 306Z), the judge should also warn the jury that the transcript is not evidence and is provided only as an aide-memoir: *RELC v R* (2006) 167 A Crim R 484 at [32]–[33].

See [1-368] for the preferred procedure where the evidence in chief of a witness has been given by way of pre-recorded interview.

See the suggested direction at **[4-377]** where the complainant's evidence in an earlier trial is played in a retrial.

[1-376] Suggested direction — evidence in the form of a recording

The direction below should be adapted to the circumstances of the case.

> The law provides that [*children/intellectual disabled/cognitively impaired people/domestic violence complainants*] may give evidence in a certain way. [*This witness's*] evidence, or the main part of it, has been recorded, and we will shortly have the recording played to you.
>
> [*If appropriate:* after that's finished, [*the witness*] will give evidence by CCTV [*or other alternative means*]. [*He/she*] won't actually appear in the courtroom.]

This is standard procedure for [*children/intellectually disabled/cognitively impaired persons/domestic violence complainants*]. You should not draw any inference against the accused or give the evidence any greater or lesser weight simply because it is given in this manner. You should assess [*his/her*] evidence in the same way as you would assess the evidence of any other witness.

If a transcript of the recording is provided, add:

The transcript is being provided to you as an aid to your understanding of what you hear when the recording is being played to you and also to help you remember what is in the recording. The primary evidence is the recording itself. If there is any discrepancy between what you hear on the recording and what you see in the transcript, then you should act on what you hear. Transcripts are sometimes difficult to get completely accurate. Much depends upon the quality of the recording. In reality, a transcript is simply someone's opinion of what they thought they heard when they listened to the recording. As I say, if there is any discrepancy, act on what you hear in the recording and ignore what might well be an error in the transcript.

Warnings in Commonwealth sexual offence proceedings

Section 15YQ(1)(c) *Crimes Act* 1914 (Cth) provides that the judge is *not* to warn the jury or suggest to the jury in any way that the law requires greater or lesser weight to be given to evidence that is given by way of a video recording. This does not appear to preclude a direction in the terms suggested above.

[1-378] Pre-recorded interview by witness — preferred procedure

In *R v NZ* (2005) 63 NSWLR 628, the appellant was convicted of an offence under s 61J (aggravated sexual assault) *Crimes Act* 1900. At trial, the evidence in chief of the complainant and other child witnesses was given substantially by way of pre-recorded interviews with police officers. Further examination in chief and cross-examination were conducted by way of video link. The videotapes were given to the jury without objection, along with the other exhibits when they retired to consider their verdict.

Although the appeal was dismissed, the Court of Criminal Appeal held that the recording should not have been admitted into evidence and should not have been left with the jury during deliberations: *R v NZ* at [194]–[195]. The procedure generally to be followed where evidence is given in chief by way of a recording was set out in the following terms at [210]:

(a) The videotape evidence of a Crown witness should not become an exhibit and, therefore, should not be sent with the exhibits to the jury on retirement;

(b) Any transcript given to the jury under s 15A should be recovered from the jury after evidence of the witness has been completed;

(c) It is for the discretion of the trial judge how a jury request to be reminded of the evidence in chief of the witness should be addressed;

(d) It would be inappropriate for the judge to question the jury as to the purpose for which they wish to have the tape replayed;

(e) If the tape is to be replayed or the transcript of the tape provided to the jury, the judge should caution the jury about their approach to that evidence when the tape is being replayed to them or the transcript of the tape returned to them in terms to the effect that "because they are hearing the evidence in chief of the complainant repeated a

second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case";

(f) The judge should consider whether the jury should be reminded of any other evidence, for example the cross-examination of the witness at the time that the tape is replayed or sent to the jury room, if that step is considered to be appropriate.

The court emphasised that it did not intend by the above expression of views to lay down any rule of practice or procedure to be followed in every case where the evidence in chief of the witness has been given by the playing of a videotape: *R v NZ* at [210].

A similar approach was taken by the High Court with respect to corresponding Queensland legislation in *Gately v The Queen* (2007) 232 CLR 208. In that case it was held that the recording of a witness's interview with police should not have been admitted as an exhibit: *Gately v The Queen* at [3], [93]. The court also held that it would seldom be appropriate to give the jury unrestricted access to the recording in the jury room: at [3], [94], [96]. Rather, if the recording is to be replayed, this should take place in court in the presence of the trial judge, counsel and the accused: *Gately v The Queen* at [3], [96]. Hayne J added that, "depending on the particular circumstances, it may be necessary to warn the jury of the need to consider the replayed evidence in the light of countervailing evidence or considerations relied upon by the accused": *Gately v The Queen* at [96].

[1-380] Evidence given via audio visual link

The *Evidence (Audio and Audio Visual Links) Act* 1998 permits evidence to be taken via audio link or audio visual link from elsewhere in NSW, non-participating States and foreign countries (other than New Zealand) (Pt 1A), or from participating States (Pt 2). Links to New Zealand are dealt with in Pt 6 *Trans-Tasman Proceedings Act* 2010 (Cth).

The court must not make a direction for evidence to be received by audio link or audio visual link if (ss 5B(2), 7(2)):

- the necessary facilities are unavailable or cannot reasonably be made available
- the evidence can more conveniently be made in the courtroom, or
- the direction would be unfair to the party opposing the direction.

In the case of links from elsewhere in the State, non-participating States and foreign countries (other than New Zealand), an additional basis for refusing a direction is where the court is satisfied that the person in respect of whom the direction is sought will not give evidence: s 5B(2)(d). Furthermore, in cases where the link is proposed from elsewhere in NSW, the court must not make a direction unless the party making the application satisfies the court that it is in the interests of the administration of justice for the court to do so: s 5B(3). Even where none of the excluding circumstances is established, the court retains a discretion to refuse to make a direction: *Australian Securities and Investments Commission v Rich* (2004) 49 ACSR 578 at [12].

Evidence may be taken via video link or telephone from New Zealand provided the necessary facilities are available: ss 51 and 52 *Trans-Tasman Proceedings Act* 2010 (Cth); *Derbas v R* [2007] NSWCCA 118 at [35].

As long ago as 1993, Hunt CJ at CL observed that the use of video links "has proved to be very successful from a technical point of view in demonstrating the demeanour of

the witness": *DPP v Alexander* (1993) 33 NSWLR 482 at 498. The broad acceptance of the use of video-link facilities for taking evidence was more recently recognised in *R v Lodhi* (2006) 163 A Crim R 488 at [37]. In *R v Wilkie* [2005] NSWSC 794, Howie J said at [69]:

> The simple fact that the witness is not before the court and, therefore, cannot be confronted by the accused is not itself a sufficient reason to refuse to make a direction under the section in a criminal trial. Nor is the simple fact that the video link procedure is deficient to viva voce evidence from the witness in person a sufficient basis for not using the procedure. To reject the application on these grounds would be to act contrary to the intention of the legislature. Section 5A provides that the provisions apply in criminal proceedings and that fact has been specifically, although parenthetically, stated presumably in case any doubt arose about that fact.

In the same case, Howie J held that, in the case of an application for evidence to be received by way of audio visual link from a foreign country, there is no precondition to the making of a direction based on the witness having a good reason for not giving evidence in person: at [12].

Difficulties in transmission — for example, a delay in receipt between image and sound — will not necessarily result in the rejection of evidence sought to be received by way of audio visual link: *Derbas v R* at [39].

For an overview of the way in which some of the issues pertaining to the use of audiovisual evidence, including the materiality of the evidence, the assessment of credit, management of documents in cross-examination, technological difficulties and the length of cross-examination: see *Australian Securities and Investments Commission v Rich* at [19]–[43].

It was held in *R v Ngo* (2003) 57 NSWLR 55, that it was within the discretion of the trial judge to permit two Crown witnesses to give their evidence from outside the courtroom via audio visual link even though the accused was not permitted to view the witnesses while they gave evidence. In order to overcome any prejudicial inference that might be drawn against the accused, a subterfuge was contrived in the form of a non-operating monitor in front of the accused to give the jury the impression that the accused was seeing the same material as the jury. This, too, was held to have been permissible: at [135].

The court in *R v Ngo* also addressed the question of unfairness under s 5B(2)(c) at [108] (emphasis in original):

> Making a direction that the evidence of an accusing witness be received by audiovisual link external to the courtroom must, by its very nature, involve unfairness to the accused because it deprives him or her of a face-to-face confrontation with the witness. The provision cannot mean *any* unfairness, however small. The Court must consider the degree and effect of the unfairness. In a criminal trial, the best measure is whether the making of a direction will cause the trial to be an unfair one to the accused. An accused person has the fundamental right to a fair trial. A direction should not be made if it would mean that an accused could *not* have a fair trial.

The option of receiving evidence via audio visual link from outside Australia under s 5B extends to proceedings for Commonwealth offences and does not constitute a breach of s 80 of the Constitution: *R v Wilkie* (2005) 64 NSWLR 125.

Commonwealth offences

Part IAE *Crimes Act* 1914 (Cth) governs the taking of evidence by audio visual links in proceedings for Commonwealth terrorism and related offences (as defined in s 15YU). On application by the prosecutor, the court must permit evidence to be given by way of video link unless it would have a "substantial adverse effect on the right of a defendant in the proceedings to receive a fair hearing": s 15YV(1); *R v Lodhi* at [48]. The onus is on the defendant to establish that the prosecutor's application should be refused and there is no obligation on the prosecution to establish a good reason for evidence being taken by video link: *R v Lodhi* at [51], [61]. On application by the defendant, the court must permit evidence to be given by way of video link unless it would be "inconsistent with the interests of justice": s 15YV(2). In either case, reasonable notice of the application must be given and video-link facilities must be available. These provisions do not apply to the defendant: s 15YV(1)(d) and (2)(d). A direction or order for the receipt of evidence by audio visual link is subject to appellate review: s 15YZD.

There are also specific provisions in Div 279 *Criminal Code Act* 1995 (Cth) regarding proceedings for child sex tourism offences. The court may, on application by a party to the proceeding, direct that evidence from a witness (other than the defendant) be taken by video link from outside Australia if satisfied that facilities are available and it is in the interests of justice that evidence be taken in this way. The court must also be satisfied that attendance of the witness at court would cause unreasonable expense or inconvenience, cause the witness psychological harm or unreasonable distress, or cause the witness to become so intimidated or distressed that the witness's reliability would be significantly reduced: s 279.2. Sections 279.1–279.7 provide for the technical requirements for video link, the application of laws about witnesses, and the administration of oaths and affirmations.

[1-382] Directions/warnings regarding evidence given by audio/audio visual link

New South Wales legislation

There is no NSW legislative requirement for any direction or warning to be given when evidence is received by way of audio or audio visual link. However, in *R v Wilkie* [2005] NSWSC 794, a case in which the accused opposed the use of the audio visual links for two crucial Crown witnesses whose credit was in issue, Howie J said at [72]–[73]:

> It seems to me at this point in the proceedings against the accused that appropriate directions and warnings to the jury would cure much of the asserted prejudice that would flow from the use of audiovisual means of adducing the evidence of the two witnesses. For example, the jury would be told, if it were necessary to do so, that as the credit of the witnesses was a crucial issue in the resolution of the charges against the accused, any difficulty they might encounter in assessing the credibility of the witness by reason of the fact that the evidence was adduced before them by the use of a video link should be resolved in favour of the accused. So if they thought that demeanour might be important and they were having difficulty in properly assessing the demeanour of the witness by the restrictions or limitations placed upon that task because of the use of the video link, that might be a matter that would give rise to a doubt about whether they could rely upon the witness and, therefore, may give rise to a doubt that the prosecution had proved its case.
>
> These directions and any other that the accused thought necessary to address deficiencies in the evidence or the difficulties in cross-examination caused by the video link

> procedure would simply be to remind the jury of the practical limitations of the onus of proof in the circumstances of these two witnesses giving evidence by video link. Much of the criticism of the procedure overlooks the fact that deficiencies or difficulties encountered with the evidence of the witnesses caused by the use of the video link should rebound on the Crown and the jury simply need to be reminded of this fact in fair but forceful terms.

Proceedings for Commonwealth offences

If evidence is given by way of video link under s 15YV *Crimes Act* 1914 (Cth) for Commonwealth terrorism and related offences, the judge "must give the jury such direction as the judge thinks necessary to ensure that the jury gives the same weight to the evidence as if it had been given by the witness in the courtroom or other place where the court is sitting": s 15YZ(1). In *R v Lodhi*, Whealy J said at [67]:

> Section 15YX requires the Court to give such direction as the judge thinks necessary to ensure that the jury gives the same weight to the evidence as if it had been given by the witness in the courtroom or other place where the court is sitting. But in an appropriate case where, for particular reasons, there is a need to remind the jury of the importance of the demeanour of a witness this can be done. Moreover, again in an appropriate case, the jury may be directed to take into account in assessing demeanour any particular matters emerging from the manner in which evidence has been given through the video link. Such a direction would not conflict, in my view, with the direction required by s 15YZ.

There is no corresponding provision with respect to proceedings for child sex tourism offences.

[1-385] Complainant not called on retrial

When the Crown utilises s 306B *Criminal Procedure Act* 1986 and does not call the complainant in a retrial the judge should direct the jury that this is usual practice. See **[4-377] Suggested direction — complainant not called on retrial**. Proceedings will be held in camera unless otherwise ordered: s 291(1). The record does not need to be tendered in camera: s 291(6). See **[1-358] Closed courts**.

[The next page is 103]

Jury

The following discussion deals with issues relating to the jury. Unless otherwise stated a reference to a section of an Act is a reference to a section of the *Jury Act* 1977 (NSW). For further information about empanelling the jury see **[1-010]**.

[1-440] Number of jurors

Last reviewed: September 2023

The number of jurors in a criminal trial is determined by s 19. There is provision for the empanelment of additional jurors. That section applies to the trial of Commonwealth offences: *Ng v The Queen* (2003) 217 CLR 521.

The number of jurors can be reduced in accordance with s 22. That section applies to a trial of Commonwealth offences: *Brownlee v The Queen* (2001) 201 CLR 278; *Petroulias v R* (2007) 73 NSWLR 134.

[1-445] Anonymity of jurors

Last reviewed: September 2023

Potential jurors are not required to disclose their identities except to the sheriff: s 37. They are to be referred throughout the proceedings by numbers provided to them by the sheriff: s 29(4). The defence is not entitled to any information concerning any of the jurors: *R v Ronen* [2004] NSWCCA 176.

[1-450] Adverse publicity in media and on the internet

Last reviewed: September 2023

An adjournment of a trial or a stay of the prosecution may be granted because of adverse media publicity. The court proceeds on the basis that the jurors will act in accordance with their oaths and directions given against being prejudiced by media publicity and opinions disseminated in social media. A stay will only be granted where no action can be taken by the judge to overcome any unfairness due to publicity taking into account the public interest in the trial of persons charged with serious offences.

Generally see *The Queen v Glennon* (1992) 173 CLR 592 at 605–606; *Skaf v R* [2008] NSWCCA 303 at [27]; *R v Jamal* (2008) 72 NSWLR 258 at [16]; *Dupas v The Queen* (2010) 241 CLR 237 at [35]–[39]; *Hughes v R* (2015) 93 NSWLR 474 at [61]–[86].

[1-455] Excusing jurors

Last reviewed: September 2023

The trial judge must direct the prosecutor to inform the members of the jury panel of the nature of the charge, the identity of the accused and the principal witnesses to be called: s 38(7)(a). The judge then calls upon members of the panel to apply to be excused if they cannot bring an impartial consideration to the case: s 38(7)(b). The judge can determine such applications or any other application for a potential juror to be excused: s 38.

If the case is likely to involve non-verbal evidence (eg transcripts of recordings of conversations in a foreign language) that would be challenging for a person with less than optimal reading skills, members of the jury panel should be so informed and applications to be excused for this reason should be invited.

Note: s 38(10) and cl 6 *Jury Regulation* 2022 as to non-disclosure of certain identities. See *Criminal Practice and Procedure NSW* at [29-50,605.5]. See *Dodds v R* [2009] NSWCCA 78 at [61] as to the procedure in such a case.

[1-460] Right to challenge

Last reviewed: September 2023

The right of the parties to challenge jurors is contained in Pt 6 of the Act. Section 41 preserves the right to challenge the poll and array: see *Criminal Practice and Procedure NSW* at [29-50,725]ff, *Criminal Law (NSW)* at [JA.41.20].

Section 42 provides for peremptory challenges. These may be made by a legal practitioner on behalf of the accused: s 44.

A challenge for cause is to be determined by the trial judge: s 46. As to challenge for cause see *Criminal Practice and Procedure NSW* at [29-50,750]ff; *Criminal Law (NSW)* at [JA.46.20].

[1-465] Pleas

Last reviewed: September 2023

Pleading on arraignment is dealt with in Pt 3 Div 5 *Criminal Procedure Act* 1986 (CPA). This Division includes the various pleas available to an accused eg plea of autrefois, and a change of plea during the trial.

As to a plea of guilty in respect of an alternative count, whether or not included in the indictment, and the prosecutor's election to accept the plea, see s 153 CPA; *Criminal Practice and Procedure NSW* at [2-s 153.1]; *Criminal Law (NSW)* at [CPA.154.120].

[1-470] Opening to the jury

Last reviewed: September 2023

It is suggested that each member of the jury be provided with a written document which can be referred to in the course of the opening and left with the jury during the trial. It is a matter for the judge what issues should be addressed in the written document but it is suggested that it should at least include a brief explanation of the following:

- the respective role of a judge and a jury
- the nature of a criminal trial
- the onus and standard of proof
- the desirability of not discussing the trial with any person outside the jury room
- the duty of jurors to bring irregularities in the conduct of the trial to the judge's attention and report any juror misconduct

- the prohibition against making inquiries outside the courtroom including using the Internet or visiting the scene of the crime and indicating that such conduct is a criminal offence
- that they should discuss the matter only in the jury room and when they are all assembled
- that they should ignore any media reporting of the trial
- the principal issues in the case if they are known.

[1-475] Jury booklet and DVD

Last reviewed: September 2023

The jury members will already have been provided with some information about the trial process and their duties and responsibilities. The court and sheriff screen a DVD entitled "Welcome to jury service" to the jury panel prior to empanelment. The sheriff's officers have standing orders to do this at all court houses. It is suggested that judges should acquaint themselves with the content of this DVD. Judges wishing to obtain a copy should contact the Deputy Sheriff, Manager Jury Service.

A booklet "Observe, listen, decide — jury service: a rewarding responsibility" is also available at all court houses and may be distributed to jury members by the court or sheriff's officers after empanelment. The booklet provides information about the trial process, the jurors' duties and responsibilities, and a variety of practical matters (such as court hours and meals). Additionally, selected jurors are provided with an induction outlining attendance hours, security requirements and various administrative instructions.

[1-480] Written directions for the jury at the opening of a trial

Last reviewed: September 2023

Nature of a criminal trial

A criminal trial occurs when the Crown alleges that a member of the community has committed a crime and the accused denies the allegation. The parties determine the evidence to be placed before the jury and identify the issues that the jury needs to consider. The jury resolves the dispute by giving a verdict of guilty or not guilty of the crime charged, based only upon a dispassionate and fair assessment of the evidence and in accordance with the law as directed by the judge.

Role of judge and jury

The jury is to decide facts and issues arising from the evidence and ultimately to determine whether the accused is guilty of the crime alleged. Investigations or inquiries made outside the courtroom are prohibited. Before the jury is asked to deliberate on their verdict counsel will make their own submissions and arguments based upon the evidence. The jury must follow directions of law stated by the judge and take into account any warning given as to particular aspects of the evidence. Each juror is to act in accordance with the oath or affirmation made at the start of the trial to give "a true verdict in accordance with the evidence".

The judge is responsible for the conduct of the trial. The judge will give directions of law to the jury as to how they approach their task during their deliberations in a summing up before the jury commences its deliberations.

Jury foreperson

The jury foreperson is the spokesperson for the jury, responsible for delivering the verdict on the jury's behalf. They can be chosen in any way the jury thinks appropriate, at any time prior to the delivery of the verdicts, and can be changed at any time (see also **[1-540] — Verdict juries** concerning the process for forepersons where the jury exceeds 12 jurors). The foreperson has no greater importance or responsibility than any other member of the jury in its deliberations.

Onus and standard of proof

The Crown has the obligation of proving the guilt of the accused based upon the evidence placed before the jury. The accused is not required to prove any fact or to meet any argument or submission made by the Crown. The accused is to be presumed innocent of any wrongdoing until a jury finds their guilt proved by the evidence in accordance with the law.

The Crown has to prove the essential facts or elements that go to make up the charge alleged against the accused. Each of the essential facts must be proved beyond reasonable doubt before the accused can be found guilty.

No discussions outside jury room

A juror should not discuss the case or any aspect of it with any person other than a fellow juror. Any discussion by the jury about the evidence or the law should be confined to the jury room and only when all jurors are present.

Duties of a juror to report irregularities

It is the duty of a juror to bring to the attention of the judge as soon as possible any irregularity that has occurred because of the conduct of fellow jurors during the course of the trial. The matters to be raised include:

- a juror is making inquiries outside the courtroom
- a juror has been discussing the matter with a non-juror
- a juror is refusing to participate in the jury's functions
- a juror is not apparently able to comprehend the English language
- a juror's inability to be impartial because of the juror's familiarity with a witness or legal representative in the case, or for any other reason.

Criminal conduct by a juror during and after the trial

1. It is a criminal offence for a juror to make any inquiry during the course of a trial for the purpose of obtaining information about the accused or any matters relevant to the trial. The offence is punishable by a maximum of 2 years imprisonment.

   For this offence, "making any inquiry" includes:

   - asking a question of any person

- conducting any research including the use of the internet
- viewing or inspecting any place or object
- conducting an experiment
- causing another person to make an inquiry.

2. It is a criminal offence for a juror to disclose to persons other than fellow jury members any information about the jury's deliberations or how a juror or the jury formed any opinion or conclusion in relation to an issue arising in the trial, including any statements made, opinions expressed, arguments advanced or votes cast during the course of the jury's deliberations. The offence is punishable by a fine.
3. It as a criminal offence for a juror or former juror, for a reward, to disclose or offer to disclose to any person information about the jury's deliberations or how a juror or the jury formed any opinion or conclusion in relation to an issue arising in the trial, including any statements made, opinions expressed, arguments advanced or votes cast during the course of the jury's deliberations. The offence is punishable by a fine.

Media reports

Members of the jury should ignore any reports of the proceedings of the trial by the media. The report will obviously be a summary of the proceedings or some particular aspect of the evidence or arguments made by counsel. No importance should be attributed to that part of the evidence or any argument made simply because it happens to be reported in the media. Sometimes the material reported will be taken out of the context of the trial as a whole and may not be fair or accurate.

[1-490] Suggested (oral) directions for the opening of the trial following empanelment

Last reviewed: September 2023

Note: the headings in this direction are for the benefit of the judge. Headings are not intended to be read out to the jury.

Serving on a jury may be a completely new experience for some, if not all, of you, and so it is appropriate for me to explain a number of matters to you before the trial begins.

Other sources of information for jurors

Some of what I am about to say may sound familiar because it was referred to in the DVD that you were shown earlier by the sheriff's officers. Some of it will also appear in [*a booklet/a document*] that you will receive a little later.

There is a great deal of material that you are being asked to digest in a short period but the more you hear it the more likely you are to understand it and retain it.

The charge(s)

It is alleged by the Crown that the accused committed the offence of … [*give details of offence*]. [*Name of the accused*] will be referred to throughout the trial as "the accused"

as a matter of convenience and only because they have been accused of committing an offence. They have pleaded "not guilty" and it becomes your responsibility to decide whether the Crown is able to prove [*that charge/those charges*] beyond reasonable doubt.

[Where there are multiple charges, add

It is alleged by the Crown that the accused committed a number of offences. Those charges are being tried together as a matter of convenience. You will need to consider each charge separately. You will, in due course, be required to return a verdict in relation to each separate charge at the end of the trial.]

[Where appropriate, add

You must not be prejudiced against the accused because of the number of charges. The accused is to be treated as being not guilty of any offence].

[If there are any alternative charges, add

The offence/s charged in count/s [*insert*] are expressed as being in the alternative to count/s [*insert*]. You must firstly consider whether the Crown has proved the offence charged in the principal count.

If the Crown has proved the guilt of the accused for the offence charged in that count, then your verdict would be guilty and you would not be required to consider whether the Crown had proved the guilt of the accused for the offence charged in the alternate count. You would skip that count and no verdict would be taken in relation to that count.

If the Crown has failed to prove the guilt of the accused for the offence charged in the principal count, then your verdict would be not guilty and you would be required to consider whether the Crown has proved the guilt of the accused for the offence charged in the alternate count and you would be required to deliver a verdict in relation to that count**]**.

Roles and functions

Later in the proceedings I will have more to say to you about our respective roles and functions. From the outset, however, you should understand that you are the sole judges of the facts. In respect of all disputes about matters of fact in this case, it will be you and not I who will have to resolve them. In part, that means that it is entirely up to you to decide what evidence is to be accepted and what evidence is to be rejected. For that reason you need to pay careful attention to each witness as their evidence is given. You should not only listen to what the witnesses say but also watch them as they give their evidence. How a witness presents to you and how they respond to questioning may assist you in deciding whether or not you accept what that witness was saying as truthful and reliable. You are entitled to accept part of what a witness says and reject other parts of the evidence.

Each of you is to perform the function of a judge. You are the judges of the facts and that means the verdict(s) will ultimately be your decision. You will make that decision by determining what facts you find proved and by applying the law that I will explain.

Of course, I also have a role as a judge but I am the judge of the law. During the trial I am required to ensure that all the rules of procedure and evidence are followed. I

will give you directions about the legal principles that are relevant to the case and explain how they should be applied to the issues you have to decide. In performing your function you must accept and apply the law that comes from me.

Legal argument

During the trial a question of law or evidence may arise for me to decide. I may need to hear submissions from the lawyers before I make a decision. If that occurs, it is usually necessary for the matter to be debated in your absence and you will be asked to retire to the jury room. This is to ensure you are not distracted by legal issues so you can concentrate on the evidence once I have made my ruling. So, if a matter of law does arise during the course of the evidence, I ask for your patience and understanding. I assure you that your absence from the courtroom will be kept to the minimum time necessary.

Introduction of lawyers

Let me introduce the lawyers to you. The barrister sitting [.....] is the Crown Prosecutor. In a criminal case, the Prosecutor presents the charge(s) in the name of the State, and on behalf of the community. By tradition, the Crown Prosecutor is not referred to by their personal name but as, in this case, [*Mr/Ms*] Crown.

The barrister sitting [.....] is [*name of defence counsel*] and they appear for the accused, and will represent them throughout the trial.

Selection of foreperson

[*You have been told by my associate that*] you are required to choose a [*foreperson/representative*]. That person's role will simply be to speak for all of you whenever you need to communicate with me and will announce your verdict(s). The [*foreperson/representative*] does not have any more functions or responsibilities than these. You are all equals in the jury room.

How you choose your [*foreperson/representative*] is entirely up to you. There is no urgency to reach a final decision on that matter, and you can feel free to change your [*foreperson/representative*] if you wish to do so at any time.

[Where additional jurors are empanelled pursuant to s 19(2) of the *Jury Act*

There are normally 12 people on a jury so you may be wondering why we have selected more of you. The longer a trial proceeds the greater is the chance of one or more jurors being discharged. Having additional jurors maximises the prospect that we will have sufficient jurors by the time the jury commences its deliberations.

[***Note:*** *It is preferable for the judge not to mention the foreperson being immune from the ballot at the commencement of the trial*.]

Queries about evidence or procedure

If you have any questions about the evidence or the procedure during the trial, or you have any concerns whatsoever, you should direct those questions or concerns to me, and only to me. The Court officers are there to provide for your general needs, but are not there to answer questions about the trial itself. Should you have anything you wish to raise with me, or to ask me, please write a note, put it in a sealed envelope and give it to the officer who will pass it on to me.

Note taking

You are perfectly entitled to make notes as the case progresses. Writing materials will be made available to you. If you decide to take notes, may I suggest you be careful not to allow note taking to distract you from your primary task of absorbing the evidence and assessing the witnesses. I also suggest you not try to take down everything a witness says because that would become an impossible task. Notes to remind you of how you found the witnesses, for example whether you thought a witness was trying to tell you the truth, or was on the other hand being evasive, might be more useful during your deliberations than actually what the witness said.

This is because everything said in this courtroom is being recorded so there is the facility to check any of the evidence you would like to be reminded about. You should also bear in mind that after the evidence has been presented you will hear closing addresses from the lawyers and a summing-up from me in which at least what the parties believe to be the more significant aspects of the evidence will be reviewed. In that way you will be reminded of particular parts of the evidence.

A transcript of the evidence of every witness will become available only a daily basis. If you would like to have a copy of the transcript, either of all of the evidence, or just of the evidence of a particular witness, then you only need to ask.

**[*Where appropriate* — *prior media publicity*

If you have read or heard or have otherwise become aware of any publicity about the events with which this trial is concerned, or about the accused, it is of fundamental importance that you put any such publicity right out of your minds. Remember that you have each sworn an oath, or made an affirmation, to decide this case solely upon the evidence presented here in this courtroom and upon the basis of the legal directions I give to you. Before you were empanelled I asked that any person who could not be objective in their assessment of the evidence ask to be excused. None of you indicated you had a problem in that regard. You would be disobeying your oath or affirmation if you were to take into account, or allowed yourself to be influenced by, information that has come to you from something you have read, seen or heard outside the courtroom.]**

Media publicity during the trial

It may be that during the trial some report may appear on the internet or in newspapers or on the radio or television. You should pay no regard to those reports whatsoever. They will obviously be limited to some particular matter that is thought to be newsworthy by the journalist or editor. It may be a matter which is of little significance in light of the whole of the evidence and it may have no importance whatsoever in your ultimate deliberations. Do not let any media reports influence your view as to what is important or significant in the trial. Further do not allow them to lead you into a conversation with a friend or member of your family about the trial.

The nature of a criminal trial

There are some directions I am required to give to you concerning your duties and obligations as jurors but first let me explain a little about a criminal trial.

The overall issue is whether the Crown can prove the charge(s) alleged against the accused. The evidence placed before you on that issue is under the control of the

counsel of both parties. In our system of justice the parties place evidence before the jury provided that it is relevant to the questions of fact that you have to determine. The parties decide what issues or what facts are in dispute. I play no part in which witnesses are called. My task is only to ensure the evidence is relevant: that is, to ensure the evidence is of some significance to the issues raised and the ultimate question whether the Crown has proved the accused's guilt.

Onus and standard of proof

The obligation is on the Crown to prove beyond reasonable doubt that the accused is guilty of the [*charge(s)*] alleged against them. It is important you bear in mind throughout the trial and during your deliberations this fundamental aspect of a criminal trial. The accused has no obligation to produce any evidence or to prove anything at all at any stage in the trial. In particular the accused does not have to prove they did not commit the offence. The accused is presumed to be innocent of any wrongdoing until a jury is satisfied beyond reasonable doubt that their guilt has been established according to law. This does not mean the Crown has to prove every fact that is in dispute. What is required is that the Crown proves those facts that are essential to make out the charge(s) and proves those facts beyond reasonable doubt. These are sometimes referred to as the essential facts or ingredients of the offence. You will be told shortly what the essential facts are in this particular case.

[*If known, note the particular issue(s) in dispute and what the Crown has to prove*.]

The standard of proof that the Crown must meet if it is to prove the charge is proof beyond reasonable doubt. That is the highest standard of proof we have in Australia.

Prohibition against making enquiries outside the courtroom

It is of fundamental importance that your decision in this trial is based only upon what you hear and see in this courtroom: that is; the evidence, the addresses of counsel and what I say to you about the law. You must not, during the course of the trial, make any inquiries of your own or ask some other person to make them on your behalf. In particular you are not to use any aid, such as legal textbooks, to research any matter in connection with your role as a juror.

It is a serious criminal offence for a member of the jury to make any inquiry for the purpose of obtaining information about the accused, or any other matter relevant to the trial. It is so serious that it can be punished by imprisonment. This prohibition continues from the time the juror is empanelled until the juror is discharged. It includes asking a question of any person other than a fellow juror or me. It includes conducting any research using the internet.

You are not permitted to visit or inspect any place connected with the incidents giving rise to the charge(s). You cannot conduct any experiments. You are not permitted to have someone else make those enquiries on your behalf.

The result of your inquiries could be to obtain information that was misleading or entirely wrong. For example, you may come across a statement of the law or of some legal principle that is incorrect or not applicable in New South Wales. The criminal law is not the same throughout Australian jurisdictions and even in this State it can change rapidly from time to time. It is part of my function to tell you so much of the law as you need to apply in order to decide the issues before you.

Discussing the case with others

You should not discuss the case in any way, including in person or by phone or social media, with anyone except your fellow jurors and only when you are all together in the jury room. This is because a person with whom you might speak who is not a fellow juror would, perhaps unintentionally make some comment or offer some opinion on the nature of the charge or the evidence which is of no value whatever. That person would not have the advantage you have of hearing the evidence first-hand, the addresses of counsel on that evidence and the directions of law from me.

Any comment or opinion that might be offered to you by anyone who is not a fellow juror might influence your thinking about the case, perhaps not consciously but subconsciously. Such a comment or opinion cannot assist you but can only distract you from your proper task.

If anyone attempts to speak to you about the case at any stage of the trial it is your duty to report that fact to me as soon as possible, and you should not mention it to any other member of the jury. I am not suggesting that this is even remotely likely to happen in this case but I mention it simply as a precaution and it is a direction given to all jurors whatever the nature of the trial.

I must bring to your attention that it is an offence for a juror during the course of the trial to disclose to any person outside the jury room information about the deliberations of the jury or how the jury came to form an opinion or conclusion on any issue raised at the trial.

Bringing irregularities to the judge's attention

If any of you learn that an impermissible enquiry had been made by another juror or that another juror had engaged in discussions with any person outside the jury room, you must bring it to my attention. Similarly, if at any stage you find material in the jury room that is not an exhibit in the case, you should notify me immediately.

The reason for bringing it to my attention as soon as possible is that, unless it is known before the conclusion of the trial, there is no opportunity to fix the problem if it is possible to do so. If the problem is not immediately addressed, it might cause the trial to miscarry and result in the discharge of the jury in order to avoid any real or apparent injustice.

Reporting other misconduct and irregularities — s 75C Jury Act

If, during the trial, any of you suspect any irregularity in relation to another juror's membership of the jury, or in relation to the performance of another juror's functions as a juror you should tell me about your suspicions. This might include:

- the refusal of a juror to take part in the jury's deliberations, or
- a juror's lack of capacity to take part in the trial (including an inability to speak or comprehend English), or
- any misconduct as a juror, or
- a juror's inability to be impartial because of the juror's familiarity with the witnesses or legal representatives in the trial, or
- a juror becoming disqualified from serving, or being ineligible to serve, as a juror.

You also may tell the sheriff after the trial if you have suspicions about any of the matters I have just described.

Breaks/personal issues/daily attendance

It is not easy sitting there listening all day, so if at any stage you feel like having a short break of say five minutes or so, then let me know. Remember, I do not want you to be distracted from your important job of listening to the evidence. If you feel your attention wandering and you are having trouble focusing on what is happening in court then just raise your hand and ask me for a short break. I can guarantee that if you feel like a break out of the courtroom, then others in the courtroom will too. So please don't be reluctant to ask for a break if you want one.

If you are too hot or too cold, or you cannot hear or understand a witness or if you face any other distraction while in the courtroom let me know so I can try to attend to the problem.

If any other difficulty of a personal nature arises then bring it to my attention so I can see if there is some solution. If it is absolutely necessary, the trial can be adjourned for a short time, so that a personal problem can be addressed.

However, it is important that you understand the obligation to attend the trial proceedings every day at the time indicated to you. If a juror cannot attend for whatever reason then the trial cannot proceed. We do not sit with a juror missing because of illness or misadventure. Of course there is no point attending if you are too ill to be able to sit and concentrate on the evidence or if there is an important matter that arises in your personal life. But you should understand that by not attending the whole trial stops for the time you are absent, which will result in a significant cost and inconvenience to the parties and your fellow jurors.

Outline of the trial

Shortly I will ask the Crown Prosecutor to outline the prosecution case by indicating the facts the Crown has to prove and the evidence the Crown will call for that purpose. This is simply so you have some understanding of the evidence as it is called in the context of the Crown case as a whole. What the Crown says is not evidence and is merely an indication of what it is anticipated the evidence will establish.

[*If there is to be a defence opening add*

I shall then ask [*defence counsel*] to respond to the matters raised by the Crown opening. The purpose of this address is to indicate what issues are in dispute and briefly the defence answer to the prosecution's allegations. Neither counsel will be placing any arguments before you at this stage of the trial.]

Then the evidence will be led by way of witnesses giving testimony in the witness box. There may also be documents, photographs and other material that become exhibits in the trial.

At the end of all of the evidence both counsel will address you by way of argument and submissions based upon the evidence. You will hear from the Crown first and then the defence.

I will then sum up to you by reminding you of the law that you have to apply during your deliberations and setting out the issues you will need to consider before you can reach your verdict(s).

You will then be asked to retire to consider your verdict(s). You will be left alone in the jury room with the exhibits to go about your deliberations in any way you choose to do so. If your deliberations last for more than a day then you will be allowed to go home overnight and return the next day. We no longer require jurors to be kept together throughout their deliberations by placing them in a hotel as used to be the case some time ago.

When you have reached your verdict(s) you will let me know. You will then be brought into the courtroom and your [*foreperson/representative*] will give the verdict(s) on behalf of the whole jury. That will complete your functions and you will then be excused from further attendance.

[1-492] Jury questions for witnesses

Last reviewed: September 2023

It is impermissible for a judge to allow the jury to directly question a witness during a trial: *R v Pathare* [1981] 1 NSWLR 124; *R v Damic* [1982] 2 NSWLR 750 at 763; *R v Sams* (unrep, 7/3/1990, NSWCCA).

An indirect process is equally undesirable: *Tootle v R* (2017) 94 NSWLR 430. The trial judge in *Tootle v R* invited the jury to formulate questions for the witnesses. The questions were submitted to the judge, subjected to a voir dire process, and those deemed permissible were asked of the witness by the Crown prosecutor. The course taken was impermissible: *Tootle v R* at [63]. The mere fact of the jury's involvement in the eliciting of evidence compromised their function and altered the nature of the trial in a fundamental respect: *Tootle v R* at [63], [67].

An invitation to the jury to participate in the questioning of witnesses is incompatible with both the adversarial process and the customary directions to withhold judgment until evidence is complete: *Tootle v R* at [42]–[44], [58].

[1-494] Expert evidence

Last reviewed: September 2023

Where there is some complexity in the expert evidence it may be helpful, however, to give the jury the opportunity to raise with the judge any matter they would like to be further explained or clarified. The jury could be asked to retire to the jury room to consider whether there is anything they wish to raise before the expert is excused and to send a note which the judge will then discuss with counsel. It has been held that judges sitting alone are entitled to intervene within reasonable limits to clarify evidence: *FB v R* [2011] NSWCCA 217 at [90].

[1-495] Offences and irregularities involving jurors

Last reviewed: September 2023

There are a number of offences relating to the performance of a jury's functions contained in Pt 9 of the Act. These include:

- disclosure of information by jurors about their deliberations: s 68B
- inquiries by jurors to obtain information about the accused or matters relevant to the trial: s 68C. Section 68(1), with s 68C(5)(b), is directed to a juror making an

inquiry for the purpose of obtaining information about a matter relevant to the trial, not to inadvertent searching. What is a "matter relevant to the trial" will vary from case to case: see *Hoang v The Queen* [2022] HCA 14 at [32]–[36].

- soliciting information from, or harassing, jurors: s 68A.

A judge has power to examine a juror in relation to the following:

- the publication of prejudicial material during the trial: s 55D
- whether there has been a breach of the prohibition against making inquiries under s 68C: s 55DA. See *R v Wood* [2008] NSWSC 817; *Smith v R* (2010) 79 NSWLR 675 at [32]–[33]. The focus of the prohibition under s 68C is upon obtaining, or attempting to obtain, extraneous information about the accused or some other matter relevant to the trial: *Carr v R* [2015] NSWCCA 186 at [19].

Relevant only to appeals against conviction: as to the admission of evidence concerning jury deliberations such as a sheriff's report under s 73A and the exclusionary rule that "evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict", see *Vella v R* [2022] NSWCCA 204 at [89]–[104]; *Smith v Western Australia* (2014) 250 CLR 473 at [1], [54]; *Evidence Act* 1995, s 9(1), (2)(a).

[1-500] Communications between jurors and the judge

Last reviewed: September 2023

Notes between the jury and the judge should be disclosed to the parties unless they concern the jury's deliberation process, or where the communication concerns a matter unconnected with the issues to be determined, or where the subject was inappropriate for the jury to raise with the judge: *Burrell v R* [2007] NSWCCA 65 at [217], [263]–[268].

[1-505] Discharging individual jurors

Last reviewed: September 2023

The provisions concerning the discharge of jurors are found in Pt 7A.

Section 53A requires the mandatory discharge of a juror if they were mistakenly or irregularly empanelled, have become excluded from jury service, or have engaged in misconduct relating to the trial: s 53A(1).

Finding misconduct under s 53A(1)(c) involves a two-stage process. The court must find *on the balance of probabilities* the juror has *in fact* engaged in misconduct, *and* that conduct amounts to an offence against the Act (s 53A(2)(a)) *or* gives rise to the risk of a substantial miscarriage of justice (s 53A(2)(b)). Section 53A(2)(b) concerns actual conduct giving rise to a risk — not a risk actual conduct has occurred. The relationship to be examined is between the established conduct and whether it is potentially a risk causative of a miscarriage of justice: *Zheng v R* [2021] NSWCCA 78 at [65]–[69].

In *R v Rogerson (No 27)* [2016] NSWSC 152 at [10] a juror observed sleeping during the evidence was found to have engaged in misconduct. However, bringing a newspaper or clippings from the paper into the jury room (*Carr v R* [2015] NSWCCA 186 at [20]) or playing a word game in the jury room during breaks in the proceedings

(*Li v R* [2010] NSWCCA 40 at [151]) were both held not to be misconduct giving rise to a miscarriage of justice. Once a judge is affirmatively satisfied of misconduct by a juror, that juror must immediately be discharged: *Hoang v The Queen* [2022] HCA 14 at [41]. In *Hoang v The Queen*, the juror's internet inquiry about the Working with Children Check, which was evidence given at the trial and the subject of defence submissions and the judge's summing up, amounted to misconduct under s 53A(2). The fact the search was conducted out of curiosity was irrelevant: at [38].

Section 53B concerns the discretionary discharge of a juror for reasons such as illness, infirmity or incapacitation: see *Lee v R* [2015] NSWCCA 157 at [42] for ill health and illiteracy; *R v Lamb* [2016] NSWCCA 135 at [13] for contact with the accused; or, for the dragnet category in s 53B(d) "any other reason affecting the juror's ability to perform the functions of a juror" see *R v Qaumi (No 41)* [2016] NSWSC 857 at [41] for apprehended bias. The power under s 53B(d) is engaged only where the "reason" is specific to a particular juror or jurors, as opposed to circumstances where the relevant reason compromises *every* juror's ability to perform the functions of a juror: *Sun v R* [2023] NSWCCA 147 at [110]. Sufficient reasons should be given for a decision to discharge a juror: *Le v R* [2012] NSWCCA 202 at [67]–[68].

As to the discretionary discharge of a juror generally see: *Wu v The Queen* (1999) 199 CLR 99; *BG v R* [2012] NSWCCA 139; *Le v R* [2022] NSWCCA 141 at [151]–[154]; *Criminal Practice and Procedure NSW* at [20-50,955.5]; *Criminal Law (NSW)* at [JA.53B.20].

[1-510] Discretion to discharge whole jury or continue with remaining jurors

Last reviewed: September 2023

Section 53C provides that where a juror dies or is discharged during the trial, the court *must* discharge the whole jury if a trial with the remaining jurors would result in risk of a substantial miscarriage of justice or otherwise proceed under s 22. Section 22 permits the balance of the jury to continue after the discharge of a juror.

There is no rigid rule governing whether or not to discharge a whole jury for an inadvertent and potentially prejudicial event occurring during the trial. It depends on: the seriousness of the event in the context of the contested issues; the stage the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction to overcome its apprehended impact: *Zheng v R* [2021] NSWCCA 78 at [92]–[96]. However, the trial judge must be satisfied to a high degree of necessity before discharging the jury. The discretion is "to be exercised in favour of a discharge only when that course is necessary to prevent a miscarriage of justice": *Watson v R* [2022] NSWCCA 208 at [25], [34], [36]; *Crofts v The Queen* (1996) 186 CLR 427. An inquiry into a substantial miscarriage of justice focuses principally upon the impact of the irregularity on an accused person's ability to obtain a fair trial: *Watson v R* at [69].

A separate decision, with express orders and reasons, should be made for continuing with the balance of the jury: *BG v R* [2012] NSWCCA 139 at [101], [137]; *Le v R* [2012] NSWCCA 202 at [54]–[71].

As to continuing with the balance of the jury see: *Crofts v The Queen* at 432, 440; *Wu v The Queen* (1999) 199 CLR 99; *Criminal Practice and Procedure NSW* at [29-50,960.5].

[1-515] Suggested direction following discharge of juror

Last reviewed: September 2023

In criminal trials, justice must not only be done, but it must appear to be done. That means that nothing should be allowed to happen which might cause any concern or give the appearance that the case is not being tried with complete fairness and impartiality. Because of this great concern which the law has about the appearance of justice, even the most innocent of misadventures, such as a juror talking to someone who, as it turns out, is a potential witness in the case or is associated in some way with the prosecution or any one in the defence, can make it necessary for the whole jury to be discharged.

Fortunately, what has happened in the present case does not make it necessary for me to do that. It suffices that I have discharged as members of the jury the … [*give number: for example, two*] person(s) who, no doubt, you have noticed are no longer with you. In fairness to [*this/these*] person(s), I should indicate that no personal blameworthiness of any sort attaches to them. Nevertheless, the appearance of justice being done must be maintained. What now will happen is that the trial will continue with the … [*give number: for example, 10*] of you who remain, constituting the jury. [*It will be necessary, of course, for you to choose a new foreperson.*]

It is very easy for misadventures to occur. But I do ask you to please be careful to use your common sense and discretion to avoid any situation that might give rise to some concern as to the impartiality of the remaining members of the jury.

[1-520] Discharge of the whole jury

Last reviewed: September 2023

Where the trial judge considers it necessary to discharge the whole of the jury over the objection of one of the parties, in all but exceptional cases the judge should stay the decision, inform counsel in the absence of the jury and adjourn proceedings until the parties have considered whether to appeal against the decision under s 5G(1) *Criminal Appeal Act* 1912: *Barber v R* [2016] NSWCCA 125 at [49]; *R v Lamb* [2016] NSWCCA 135 at [35].

While there will be circumstances where the decision should be given effect immediately those cases will be the exception to the rule: *Barber v R* at [49]. If there is to be a review, the judge should give reasons for the decision and excuse the jury until the determination is made.

[1-525] Provision of transcripts

Last reviewed: September 2023

Section 55C provides that upon request the jury may be given a copy of the whole or part of the trial transcript. This can include addresses and the summing up: *R v Sukkar* [2005] NSWCCA 54 at [84]. See generally *R v Fowler* [2000] NSWCCA 142 at [91]; *R v Bartle* [2003] NSWCCA 329 at [687]. As to the directions to be given before providing the transcripts to the jury in respect of certain sexual assault trials see **[5-420] Suggested direction — pre-recorded evidence**, Note 2.

[1-530] Suggested direction — use of the transcripts

Last reviewed: September 2023

Members of the jury, you are to be given the [*transcript/part of the transcript*] of the evidence.

You should not give the evidence more weight than it deserves because it is now in written form and because you are, in effect, receiving that evidence a second time. It is important to recall the evidence as it was given during the trial and what, if anything, you thought about the reliability of the evidence as you heard it. You should also bear in mind what counsel had to say about the evidence and any criticisms made of it during addresses.

[*If appropriate the jury can be reminded of particular comments made about the evidence by counsel in addresses.*]

[*In the case of the transcript of evidence of the complainant it may be necessary to remind the jury of the evidence [if any] given by the accused or a defence witness in relation to specific matters in the complainant's evidence.*]

[1-535] Written directions

Last reviewed: September 2023

Section 55B provides that a direction in law may be given in writing. It is a matter for the exercise of discretion as to whether and when to give written directions. A fundamental factor informing the exercise of that discretion is whether providing written directions is likely to assist the jury in understanding the issues in the trial: *Trevascus v R* [2021] NSWCCA 104 at [66]. It is suggested that in an appropriate case, written directions on the elements of the offences (including question trails) and available verdicts and any other relevant matter be given to the jury before counsel address with a short oral explanation of the directions.

However, s 55B does not abrogate the trial judge's obligation to give oral directions concerning the elements of the offences: *Trevascus v R* at [65]; see also the discussion of the relevant cases at [52]–[63]; *Cook (a pseudonym) v R* [2022] NSWCCA 282 at [55]–[59]. Where written directions are given, the trial judge is required to give oral directions which, as a minimum, oblige the judge to read out and explain the written directions: *Cook (a pseudonym) v R* at [57]. The judge must emphasise to the jury that the written directions are not a substitute for the oral directions given: *Trevascus v R* at [67].

A written direction can be given at any stage: *R v Elomar* [2008] NSWSC 1442 at [27]–[30].

Further, any document, such as a chronology, or a "road-map" to aid the jury in understanding the evidence, can be provided with the consent of counsel, especially in complicated factual matters: *R v Elomar*, is an example.

[1-540] Verdict juries

Last reviewed: September 2023

Where the jury consists of more than 12 jurors (an "expanded jury"), immediately before the jury is required to consider its verdict, a "verdict jury" must be created,

comprising of 11 jurors selected by ballot plus the foreperson, if a foreperson has been chosen by the expanded jury: s 55G(2)(a). If there is no foreperson, 12 jurors must be selected by ballot: s 55G(2)(b). The same verdict jury will remain in place in trials where a verdict jury is required to consider some counts in an indictment first and then the other counts at a later stage in the trial (unless s 55G(5) applies): s 55G(4).

Immediately before conducting the ballot, the judge must inquire of the jury whether there is a foreperson (as defined in s 55G(2)(a)). If an expanded jury has chosen a foreperson that person, is not to be included in the ballot for selecting a verdict jury: *Fantakis v R* [2023] NSWCCA 3 at [375]–[378].

[1-545] Directed verdict juries

Last reviewed: September 2023

If a directed acquittal is being ordered in relation to only some accused persons or counts and the jury consists of more than 12 jurors immediately before the delivery of the directed acquittal/s, a ballot must be conducted in accordance with s 55G to select a verdict jury to deliver the directed acquittal/s (with the excluded jurors remaining in court but sitting out of the jury box) after which an order must be made that the excluded jurors re-join the jury (and return to the jury box) for the continuation of the trial in respect of the accused person/s or counts (as the case may be) that have not yet been the subject of a verdict accordance with s 55G(5)(a).

[The next page is 123]

Oaths and affirmations

[1-600] General oaths and affirmations

Last reviewed: September 2023

Provisions are made in ss 21–24A and Sch 1 *Evidence Act* 1995 for the oaths and affirmations to be administered to witnesses and interpreters. They are to be in accordance with the appropriate form in Sch 1, or in a similar form. A person appearing as a witness or interpreter may choose whether to take an oath or make an affirmation. The court is to inform the person that they have this choice, unless satisfied that the person has already been informed, or knows that there is a choice. It is not necessary that a religious text be used in taking an oath. The form of oath or affirmation taken by children's champions is set out in cl 111 *Criminal Procedure Regulation* 2017. See also generally Judicial Commission of NSW, *Local Court Bench Book*, 2010–, "Oaths" at **[64-000]**ff.

Oath/affirmation by a witness

[*Do you swear by Almighty God/Do you solemnly and sincerely declare and affirm*] that the evidence that you shall give will be the truth, the whole truth and nothing but the truth? If so, please say "I do".

Oath/affirmation by an interpreter

[*Do you swear by Almighty God/Do you solemnly and sincerely declare and affirm*] that you will well and truly interpret the evidence that will be given and do all other matters and things that are required of you in this case to the best of your ability? If so, please say "I do".

Oath/affirmation by a children's champion

[*Do you swear by Almighty God/Do you solemnly and sincerely declare and affirm*] that you will well and faithfully communicate questions and answers and make true explanation of all matters and things as may be required of you according to the best of your skill and understanding? If so, please say "I do".

[1-605] Procedure for administering an oath upon the Koran

Last reviewed: September 2023

1. Hand the witness the Koran (in its cover).
2. Ask the witness to remove the Koran from its cover.
3. Ask the witness if they recognise the book as a true copy of the Holy Koran.
4. Administer the oath.
5. Ask the witness to return the Koran to its cover.

[1-610] Oaths and affirmations for jurors

Last reviewed: September 2023

Section 72A *Jury Act* 1977 provides a prescribed manner for a juror's oath and affirmation. Section 72A(5) provides that if an oath is taken in the prescribed manner it is not necessary for a religious text (normally a bible) to be used. Section 72A(7) provides that an oath or affirmation not made in accordance with the prescribed manner is not by that reason illegal or invalid.

Oath for jurors

Do you swear by Almighty God that you will give a true verdict according to the evidence? If so, please say "so help me God".

Affirmation for jurors

Do you solemnly and sincerely declare and affirm that you will give a true verdict according to the evidence? If so, please say "I do".

Oath/affirmation for jurors sworn en masse

Members of the jury, do you swear by Almighty God, or do you solemnly and sincerely declare and affirm, that you will give a true verdict according to the evidence? If so, for those taking an oath please say "so help me God" and for those taking an affirmation please say "I do".

[1-615] Oaths and affirmations — view

Last reviewed: September 2023

There does not appear to be any prescribed manner and form for oaths and affirmations required in connection with a view. The following are suggested from past practice.

Oath/affirmation: sheriff's officer

[*Do you swear by Almighty God/Do you solemnly and sincerely declare and affirm*] that you will well and truly attend this jury to the place at which the offence for which the accused [*name*] stands charged is alleged to have been committed and that you will not allow anyone to speak to them [… except the person sworn and appointed to show you the place aforesaid] nor will you speak to them yourself [unless it is to request them to return with you] without the leave of the court? If so, please say "I do".

Oath/affirmation: shower

[*Do you swear by Almighty God/Do you solemnly and sincerely declare and affirm*] that you will attend the jury, and well and truly point out to them the place in which the offence for which the accused [name] stands charged is alleged to have been committed and that you will speak to them only as far as relates to describing the place aforesaid? If so, please say "I do".

[1-620] Oaths and affirmations for sheriff's officer upon sequestration of jury

Last reviewed: September 2023

Do you swear by Almighty God or do you solemnly and sincerely declare and affirm:

that you will well and truly attend to this jury and each of its members committed to your charge as they are escorted to and from this court and the place at which they are to be sequestered;

that you will not allow any of them to separate except for necessary purposes without the leave of the court;

that you will not allow any of them to communicate by any means with any other person or any other person to communicate with them except in relation to the provision of accommodation and refreshment at the place at which they are sequestered; and

that you will not speak to them yourself about any matter that you would not be permitted to speak with them about during the course of their deliberations.

If so, please say "So help me God" or "I do".

[The next page is 129]

Privilege against self-incrimination

ss 128, 132 *Evidence Act* 1995 (NSW)

[1-700] Introduction

Part 3.10 Div 2 *Evidence Act* 1995 enacts, inter alia, the privilege against self-incrimination in other proceedings. The privilege applies where a witness objects to "giving particular evidence", or "evidence on a particular matter", on the ground that the evidence may tend to prove that the witness has committed an offence against, or arising under, an Australian law or a law of a foreign country, or is liable to a civil penalty: s 128(1). The phrase "on a particular matter" was inserted by the *Evidence Amendment Act* 2007 (which applies to proceedings, the hearing of which commenced on or after 1 January 2009, see *R v GG* [2010] NSWCCA 230), so that s 128 could apply to a class of questions rather than each question: Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102 (Final Report), 2005 at [15.108]. Section 128 is only enlivened where the witness objects to giving particular evidence: *Cornwell v The Queen* (2007) 231 CLR 260 at [106]; *Bates trading as Riot Wetsuits v Omareef Pty Ltd* [1998] FCA 1472.

Where it appears to the court that a witness or a party may have grounds for making an application or objection under s 128, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision: s 132; *R v Parkes* [2003] NSWCCA 12 at [94]–[99]. As soon as a question is asked which raises the possibility of self-incrimination, the jury should be asked to retire and a voir dire held: *R v McGoldrick* (unrep, 28/4/98, NSWCCA) at pp 9–10; s 189 *Evidence Act*. The purpose of the explanation below is to inform a witness, who has objected, of the various scenarios stemming from that objection.

[1-705] Explanation to witness in the absence of the jury

[*Note:* *If it appears to the court that a witness may have grounds for making an objection under s 128, the court must satisfy itself that the witness is aware of the effect of that provision: s 132 Evidence Act. The court must do so in the absence of the jury.*]

You may object to answering that question [*and any directly related question*] on the ground that your answer may tend to prove that you have committed an offence [*or that you are liable to pay a penalty or otherwise be punished in non-criminal proceedings*]: ss 128(1), 132.

If you do not object to answering that question [*or any directly related question*] upon that basis, the trial will proceed: s 128(2).

If you do object to answering that question, it will become necessary for me to decide whether there are reasonable grounds for that objection.

If I decide that there are no reasonable grounds for your objection, the trial will proceed, and you will be required to answer the question.

If I decide in your favour, by finding that there are reasonable grounds for your objection, I will uphold that objection. You will then be given a choice as to whether you wish to answer the question. Whether or not you will be required to answer the question (if you do not wish to do so willingly) will depend, in turn, upon whether or not it is in the interests of justice that you be required to answer it: s 128(3), (4).

Before continuing to explain what may now happen, I need to consider some jurisdictional issues …

[*It is necessary for the judge at this stage to determine whether the possible offence or liability to which any objection relates arises under the laws of NSW, the ACT or the Cth.*

- *If the possible offence or liability arises under the law of some Australian jurisdiction other than NSW, the ACT or the Cth, then a certificate cannot be granted which protects the witness against prosecution or penalty in that jurisdiction, and a certificate must not be offered as an inducement to the witness to answer voluntarily: see Evidence Act 1995, s 128(2)–(7); Evidence Act 1995 (Cth), s 128(2)–(7), (10)–(15).*
- *If the possible offence or liability arises under the law of a foreign country, a certificate cannot be granted under s 128 Evidence Act 1995.***]**

[If it is found that the possible offence or liability arises other than under the laws of NSW, the ACT or the Cth, add

It is a matter for you as to whether you answer the question or not. If you do not wish to answer the question, you need not do so. However, you must clearly understand that if you decide to answer the question, the evidence which you give may be used against you in a prosecution [*or in proceedings to recover a penalty*].**]**

[If it is found that the possible offence or liability does arise under the laws of NSW, the ACT or Cth, and that it does not also arise under the laws of any other Australian jurisdiction, add

If you do answer the question willingly, a certificate will be granted to you by this court, the effect of which is that neither that evidence nor any information, document or thing obtained as a direct or indirect consequence of you having given that evidence can be used against you in other proceedings. However, if the evidence which you give is false, criminal proceedings for giving that false evidence may be brought against you: s 128(3)(c), (5), (7).

But, even if you say that you do not wish to answer the question, I have the power to order you to answer it if I am satisfied that the interests of justice require you to do so. I will hear what you want to say about that before any order is made that you answer the question. If I order you to answer the question, a certificate will still be granted to you by this court, the effect of which is that neither that evidence, nor any information, document or thing obtained as a direct or indirect consequence of you having given that evidence, can be used against you in other proceedings. However, if the evidence which you give is false, criminal proceedings for giving that false evidence may be brought against you: s 128(3)(c), (4), (5), (7).**]**

[1-710] Granting a certificate and certificates in other jurisdictions

If a certificate is to be granted, an appropriate order is:

> Pursuant to s 128(3) of the *Evidence Act* 1995, I direct the preparation of a certificate for my signature, and that the certificate thereafter be given to the witness.

Clause 7.1 *Evidence Regulation* 2020 provides that the form of the certificate may be in accordance with Schedule 1 Form 1 of that Regulation.

For administrative certainty, it is advisable to physically issue the form of the certificate at a time proximate to when the certificate is granted: *Cornwell v The Queen* (2007) 231 CLR 260 at [197].

The *Evidence Amendment Act* 2010 amends s 128 of the Act so that a certificate provided by another court of a prescribed State or Territory has the same effect as if it had been given under s 128: s 128(12)–(14).

[1-720] Notes

1. Section 128(10) (previously s 128(8)) provides that s 128 does not apply where the evidence given by the defendant is that he or she did an act, the doing of which is a fact in issue, or that he or she had a state of mind, the existence of which is a fact in issue. In *Cornwell v The Queen* (2007) 231 CLR 260, the court held that the former s 128(8) (now s 128(10)) is not limited to direct evidence that the accused did some act or had the state of mind the subject of the offence. It also denies the privilege for evidence given by an accused of facts from which the doing of the act or the having of the state of mind can be inferred. This includes, inter alia, circumstantial evidence of opportunity, means or motive that infer the doing of the act which is the fact in issue: at [84].
2. In *Cornwell v The Queen,* the High Court suggested the protection in s 128 applied to questions asked under cross-examination of a witness and did not extend to questions asked in-chief and in re-examination. The High Court also doubted, without finally deciding the issue, whether an accused can "object" in the relevant sense under s 128 when the accused is answering questions in-chief from his or her own counsel: at [112]–[113]. Given these comments were obiter and given apparently contradictory remarks by the Full Family Court in *Ferral v Blyton* (2000) 27 Fam LR 178, the Court of Appeal of NSW considered the issue afresh in *Song v Ying* [2010] NSWCA 237. The court concluded, consistently with the views above expressed by the High Court in *Cornwell v The Queen*, that when a witness who is a party to the proceedings is being asked questions by their own legal representative (whether in chief or re-examination) there would "rarely if ever be a question" that that evidence "was given under compulsion": at [24], [27]. The court held that a witness who "wishes" to give evidence but " is not willing to do so" except under the protection of a s 128 certificate does not "object" within the meaning of s 128(1).
3. In *Song v Ying*, the court identified the following propositions, at [24], [27]–[29], that:
   (a) unless a party to the proceedings is giving evidence in response to questions from their own legal representative, witnesses are compellable to give evidence
   (b) compellability of this nature makes sense of the word "objects" in s 128(1) and of "require" in s 128(4): see also *Cornwell v The Queen* at [112]. A motivation to give evidence which avoids a judgment being made against a defendant does not amount to relevant compellability
   (c) a party to proceedings who wishes to give particular evidence in response to questions from his or her own legal representative "but is not willing to do so" without a s 128 certificate does not "object" within the meaning of s 128(1)

(d) a witness who is compelled by a party to give evidence during the proceedings (for example under cross-examination) can raise an objection at any stage during their evidence: see, in particular, *Song v Ying* at [30].

4. If the witness in question is the accused, it is customary for him or her to be given an opportunity to consult with his or her legal representative prior to deciding whether to answer the question willingly. If the witness is not the accused, and therefore not legally represented, it may be appropriate to grant the witness the opportunity to obtain independent legal advice in relation to the matter.

5. The *Evidence Act* provides no guidance as to what might constitute "reasonable grounds" for an objection under s 128(2). In *R v Bikic* [2001] NSWCCA 537, Giles JA said that "it seems to me to be a matter of commonsense that reasonable grounds for an objection must pay regard to whether or not the witness can be placed in jeopardy by giving the particular evidence": at [15]. "Reasonable grounds" must be established on the balance of probabilities: s 142 *Evidence Act*. Some assistance may be obtained from s 130(5) *Evidence Act* in determining what factors may be taken into account in determining whether "the interests of justice" require the witness to give the evidence within the meaning of s 128(4)(b). Other factors to be taken into account include the probative value of the evidence, the nature of the proceedings, and the consequences for the witness: *R v Ronen (No 2)* [2004] NSWSC 1284; *R v Lodhi* [2006] NSWSC 638; *R v Collisson* (2003) 139 A Crim R 389.

6. Section 128(7) prevents the evidence in respect of which a certificate has been given from being used against the person in a proceeding. A "proceeding" under subs (7) does not include a retrial for the same offence or an offence arising out of the same circumstances: s 128(9).

7. The certificate does not give immunity from prosecution: *R v Macarthur* [2005] NSWCCA 65 at [41]. It does no more than prevent the evidence given by the witness being used against him or her in any subsequent prosecution. Further, the grant of a s 128 certificate does not of itself provide sufficient grounds for a warning under s 165 *Evidence Act* that the evidence of the witness may be unreliable: *R v Macarthur* at [43]–[46].

8. In *Spence v The Queen* [2016] VSCA 113 at [82]–[88] the court held, *inter alia*,:

   (a) Reliance on the privilege against self-incrimination is not relevant to credit.

   (b) The granting of a s 128 certificate may affect a witness's credibility, depending on the circumstances.

   (c) If it is plain the witness's credit will be attacked and the protection afforded by the certificate is relevant, it will be proper to reveal to the jury the existence of the certificate.

   (d) Where the existence of the certificate has been revealed to a jury, it is desirable the judge provide directions explaining its effect and the extent of the protection; that it does not provide immunity from prosecution (consistent with the direction in *R v Macarthur*); and that it does not protect against perjury.

9. Part 2 cl 3 Dictionary (s 3 *Evidence Act*) defines "civil penalty". It provides that "[f]or the purposes of the Act, a person is taken to be liable to a civil penalty if,

in an Australian or overseas proceeding (other than a criminal proceeding), the person would be liable to a penalty arising under an Australian law or a law of a foreign country". Civil penalties have been held to include:

- disciplinary proceedings against a police officer, reduction in rank, dismissal from employment: *Police Service Board v Morris* (1985) 156 CLR 397 at 403, 408, 411
- penalties for failure to produce documents in non-judicial proceedings: *Pyneboard v Trade Practices Commission* (1983) 152 CLR 328 at 341
- forfeiture and punishment: s 21 *Interpretation Act* 1987.

However, they do not include the payment of compensation: *R v Associated Northern Collieries* (1910) 11 CLR 738 at 742. As to the scope of what constitutes a civil penalty see The Honourable AM Gleeson AC, "Civil or criminal — What is the difference" (2006) 8(1) *TJR* 1.

10. Section 133 provides that if a question arises under Pt 3.10 (Privileges) "relating to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question".

[The next page is 141]

Self-represented accused

[1-800] Conduct of trials

An accused person may appear personally, and may conduct his or her own case: ss 36(1), 37(2) *Criminal Procedure Act* 1986. These provisions apply "to all offences, however arising (whether under an Act or at common law), whenever committed and in whatever court dealt with": s 28(1) *Criminal Procedure Act*. While the election by an accused to appear self-represented is a fundamental right which should not be interfered with (*R v Zorad* (1990) 19 NSWLR 91 at 95) the operation of the adversarial system "may be severely impaired" by the absence of legal representation: *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at [49]. The High Court in *Dietrich v The Queen* (1992) 177 CLR 292 at 302 describes the disadvantages facing a self-represented accused. See also Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, "Self-represented parties" at [10.1]ff.

[1-810] Duty of the trial judge

The duty of the trial judge is to give information and advice as is necessary to ensure that the self-represented accused receives a fair trial so that "the accused is put in a position where he [or she] is able to make an effective choice as to the exercise of his [or her] rights during the course of the trial, but it is not [the judge's] duty to tell the accused how to exercise those rights": *R v Zorad* (1990) 19 NSWLR 91 at 99; *R v Anastasiou (aka Peters)* (1991) 21 NSWLR 394 at 399. The trial judge must maintain the appearance of impartiality and should ascertain the level of assistance required by a self-represented accused: *Kenny v Ritter* [2009] SASC 139 at [23]. A judge is entitled to peruse committal papers to inform himself or herself about the likely scope of the trial and potential evidentiary or other issues that might arise: *R v SY* [2004] NSWCCA 297 at [13]. The judge may also, of course, ask the Crown to give an outline of the Crown case and the nature of the evidence to be led.

[1-820] Suggested advice and information to accused in the absence of the jury

The suggested advice and information below assumes that the Crown has taken all reasonable steps to ensure that the self-represented accused is "equipped to respond" to the Crown case in accordance with the Office of Director of Public Prosecutions (NSW), Prosecution Guidelines, Guideline 4.6, *Unrepresented accused*. The suggested advice and information also assumes that the issues of whether proceedings should be stayed, or whether the trial will proceed as a judge-alone trial, have already been resolved. Where the trial is by judge-alone trial, the suggested information and advice will require appropriate amendment.

It is a matter of discretion for the trial judge as to whether aspects of the following suggested advice and information are provided to the accused, prior to, or after, the Crown Prosecutor opens its case. Given the length of the suggested guidance, the judge may prefer to deal with the issues in more than one stage. Consideration might also be given to the provision of the suggested advice and information to the accused in written form. If the issue of an alibi is raised by a self-represented accused at the

beginning of the trial and notice has not been given to the Crown, then, depending on the circumstances, it might be necessary to consider a short adjournment: see **Alibi** at **[6-010]**.

An unrepresented accused should plead personally to each charge in the indictment, although a failure to do so will not necessarily vitiate the trial, provided it is clear the accused knew the contents of the indictment and intended to plead not guilty: *Amagwula v R* [2019] NSWCCA 156 at [26]–[41], [238]–[309].

Before empanelling the jury

You have been charged with … [*state offence(s)*]. There are a number of elements to that charge(s) which the Crown must prove beyond reasonable doubt … [*detail elements of offence(s)*]. As this is a criminal trial, the burden or obligation to prove you are guilty is placed squarely on the Crown. That burden rests upon the Crown in respect of every element or essential fact that makes up the offence. There is no obligation whatsoever on you to prove any fact or issue that is in dispute. You do not have any obligation to call any evidence or prove anything.

Role of judge and jury

I should explain my role and the role of the jury in the trial. The jury is the sole judge of the facts. All disputes about matters of fact in this case will be decided by the jury and not me. Generally that means that it is entirely up to the jury to decide what evidence they accept and what evidence they do not accept. I am not involved in making decisions about the facts. I am the judge of the law. During the trial this means that I am required to ensure that all the rules of procedure and evidence are followed. At the end of the trial, I will give the jury directions about the legal principles that apply to the case. I will explain to them how the legal principles should be applied to the issues which they have to decide.

Legal argument

Sometimes during the trial a question of law will arise for me to decide. This might include arguments about whether particular evidence should be admitted. I may need to hear arguments from the Crown Prosecutor and from you before I make a decision. If that occurs, it is usually necessary for the matter to be debated in the absence of the jury.

Opening addresses

After the jury has been empanelled, I will ask the Crown Prosecutor to give an outline of the case the Crown anticipates establishing by the evidence. The purpose of the opening is to assist the jury in understanding the evidence as it is given during the trial. What the Crown tells the jury in the outline is not evidence. It is nothing more than an outline of what the Crown expects the evidence will establish. After the Crown Prosecutor has completed [*his/her*] address you have the right to address the jury yourself. Your address can refer to any issues which you dispute or which you do not dispute. However, at this stage, your address must be limited to the matters dealt with in the prosecutor's opening address and, if you wish, to the matters you propose to raise in your defence … [*see* s 159(1), (2) *Criminal Procedure Act* 1986]. Like the Crown Prosecutor's opening address, what you say to the jury at this stage is not evidence. You do not have to address the jury. That is up to you.

[*Note:* *It may be appropriate to empanel the jury after these opening remarks: see [1-015] below; and once that has been completed, continue with the following comments in the jury's absence.*]

Explanation of the Crown case and objections

You have heard the Crown Prosecutor explain to the jury the nature of the charge(s) and the Crown's case against you. When the jury is brought back into court, the Crown Prosecutor will call witnesses and produce documents or other material, to seek to prove the charge(s).

[*If it is considered more appropriate to give this information and advice before the jury has been empanelled, this part of the advice could read:*

Once the Crown Prosecutor explains to the jury the nature of the charge(s) and the Crown's case against you, [*he/she*] will call witnesses and produce documents or other material, to seek to prove the charge(s).**]**

Documents and other material tendered in evidence during the trial are marked as exhibits. The exhibits are used by the jury in its deliberations.

You can object to any question asked by the Crown Prosecutor if you have a legal basis for doing so. An example of a legal basis for an objection is that a question is not relevant or it is unfair. If you want to object to any question, after it is asked but before it has been answered, you must stand up and say "I object". I will then hear whatever you want to say about the question, and depending on why you are objecting, I may do so in the absence of the jury. You cannot object simply because you disagree with the evidence. If you are unsure about your right to object to a question on legal grounds, you should ask me for assistance.

If the Crown seeks to tender material such as a document, photograph, video or other item, you have the right to object to its tender if there is a legal basis for the objection. If you want me to rule on the tender of any such material you should stand up and say, "I object", and I will then hear whatever you want to say. Again, I may do so in the absence of the jury.

Cross-examination of Crown witnesses

[*Note:* *The following does* ***not* *apply to cross-examination of complainants in prescribed sexual offence proceedings and vulnerable witnesses in personal violence proceedings: see [1-020] below which addresses that scenario.*]**

You have the right to cross-examine a Crown witness: that is, to ask him or her any questions which you think may help you, or weaken the Crown case. However, they must be questions, not statements or comments by you. If a Crown witness is able to say something or has material which you think will assist your case [*give example, possibly an earlier inconsistent statement of an alleged victim who is a witness*], then you can ask the witness questions and tender in evidence that material through the witness. If there is evidence you want the jury to consider which affects the reliability of the witness or the witness's evidence [*give examples — related to witness's memory, or potentially unreliable evidence or witnesses referred to in s 165 Evidence Act such as identification evidence, prison informers, etc*], then you may test that by asking the witness questions.

If you are going to contradict the evidence of a Crown witness or suggest that the witness is telling lies, you should make your allegations to that witness in the form of questions, so that he or she has the opportunity to respond to your suggestions. It is also important for you to remember that any suggestion in a question you have asked during cross-examination is not evidence, unless the witness agreed with that suggestion. So, for example, if you ask a witness [*give example, "you saw me wearing a grey jumper on [date], didn't you?"*], and the witness says "no" or "I don't know" or "I don't remember", there is no evidence to support the particular question you have asked.

[*Note:* *The rule in Browne v Dunn does not generally apply in criminal trials: MWJ v The Queen (2005) 80 ALJR 329 at [41].*]

Defence case

No case to answer

After the Crown Prosecutor has called all the Crown evidence, you will be given the opportunity to submit to me that the Crown case should be taken away from the jury because there is not enough evidence to prove the charge(s) against you. This application is made in the absence of the jury. You do not have to do this.

Opportunity to present any evidence

If you do not make such an application, or you make an application and it is rejected, you will then be given an opportunity to present any evidence you wish to answer the Crown case. You do not have to give evidence yourself and you do not have to call any witnesses to give evidence on your behalf. The Crown has to prove the case against you. You do not have to prove anything.

However, if you are calling any evidence, either by giving evidence yourself or by calling other witnesses, you may, if you wish, first address the jury … [*see* s 159(3) *Criminal Procedure Act*]. The purpose of addressing the jury before you call your evidence is to give them a general outline of the case you are going to present. During that address you cannot attack the Crown case. You have the opportunity to do that later, in your final address, after all the evidence has been given.

You may give evidence yourself, or choose not to give evidence. If you choose not to give evidence, I will direct the jury that you are entitled to say nothing and make the Crown prove your guilt and that your silence in court cannot be used against you … [*see* **Suggested Direction** at [2-1010]].

Even if you do not give evidence, you can still call other witnesses to give evidence which is relevant to the charge(s). You may also tender any relevant documents or other things as exhibits in your case. If you intend to give evidence yourself and to call other witnesses, it is normal to give your own evidence before calling those witnesses because, if you give evidence after any of your witnesses, the comment may be made that you have tailored your own evidence to fit in with the evidence given by them … [*see R v RPS (unrep, 13/8/97, NSWCCA) at 23*]. But if you decide not to call evidence, I will direct the jury that decision cannot be used against you either.

I remind you again that you do not have to give evidence or call witnesses to give evidence on your behalf. It is entirely a matter for the Crown to prove its case against you. You do not have to prove anything.

Questioning witnesses

When you do call your own witnesses, you may ask them questions. However, you cannot ask your own witnesses a leading question. A leading question is one which suggests the answer to the witness. [*Give example, "You're a good bloke aren't you?"*] If you do ask a leading question, then the Crown is likely to object.

In some circumstances you may, with the leave of the court, question a witness you have called as though you were cross-examining the witness.

[*Optional explanation to accused of s 38 Evidence Act 1995*

You may wish to do this because the witness has given evidence that is unfavourable to you, or the witness has not made a genuine attempt to give evidence about a matter which he or she may reasonably be expected to have knowledge of, or the witness has given a prior statement which is inconsistent with the evidence he or she has given in court.]

If that occurs, I will make a legal ruling about whether you can cross-examine your own witness. If leave is granted, you may ask him or her any questions which you think may help you, or weaken the Crown case.

The Crown has the right to cross-examine the witnesses you call. At the conclusion of the Crown's cross-examination, you may ask each witness further questions to explain or contradict matters put to them in cross-examination which they might have been unable to explain or contradict during the cross-examination itself.

It is also very important that all the evidence you want the jury to hear is given during your case.

Closing addresses

When all of the evidence has been presented, both you and the Crown Prosecutor have the opportunity to address the jury again. The Crown Prosecutor will address the jury first. After that, you will have the opportunity, if you wish, to address the jury. At that time, you may present arguments as to why the jury should not accept the Crown case against you, or as to why you should be found "not guilty". At that stage, you can discuss the evidence already given, but you cannot introduce new evidence. You will be entitled to refer in your address to all of the evidence that the jury has heard or seen. This includes any exhibit which has been put into evidence, and includes your own evidence if you have given evidence. As I have already said, any suggestion in a question you have asked one of the Crown's witnesses during cross-examination or one of your own witnesses is not evidence unless the witness agreed with the suggestion put to them.

You must understand that if, during your address, you assert facts about the charge(s) which are not supported by the evidence, I may give the Crown permission to make a supplementary address or another address to the jury replying to any such assertion [*see* s 160(2) *Criminal Procedure Act*].

If you would like me to further explain anything I have told you, please let me know now, or when the particular matter arises.

[Other general comments

Other general comments may be necessary depending on the nature of the case. These comments should be made before the jury has been empanelled.**]**

[***Where appropriate*** *— admission to an investigating official*

In this case, the Crown alleges that you have made an admission to an investigating official. It is for the judge in the trial to decide whether an admission you may have made should be admitted in evidence. I decide those issues by hearing evidence from the witnesses to whom you are said to have made the alleged admission. If you wish to contest the evidence of the admission, then you should tell me now, and I will deal with the issue before the jury is empanelled.**]**

[***Where appropriate*** *— good character*

If you want to suggest to the jury that you are a person of good character either generally or in a particular respect, then you are entitled to raise that good character for their consideration. You may do this by either asking appropriate questions of Crown witnesses, or by stating this during your evidence, and/or by calling witnesses to give evidence to that effect. [*For example, if you do not have a criminal history, then you may wish to ask one of the Crown witnesses a question about that*.]

However, it is important for you to understand that if you, either directly or by implication, suggest to a witness that you are a person of good character either generally or in a particular respect then, depending on his or her answer, the Crown may lead evidence to rebut your suggestion that you are a person of good character. This may include evidence of any criminal record you might have.**]**

[***Where appropriate*** *— alibi*

If you wish to rely upon an alibi: that is, to suggest either by cross-examination of Crown witnesses, during your own evidence, or by calling witnesses in your case, that you were not at a relevant place at the relevant time, but were somewhere else, then, unless you have already given notice of that alibi to the Crown, you may not do so unless you first obtain the leave of the court.**]**

[1-830] Empanelling the jury — right of accused to challenge

[*Name of the accused*], the law requires that you be tried by a jury of 12 people chosen from those members of the public forming the jury panel who are presently in court. Each potential juror has been given a number. They are referred to by that number and not by their names. Twelve cards will now be drawn, at random, from a box, one by one. Each of the 12 people selected will then take a seat in the jury box over there. Each person will then be called again, one by one.

[If Bibles are being used to swear the jurors:
The sheriff's officer might hand them a Bible. This depends on whether they have told the sheriff's officer that they will take an oath or make an affirmation.**]**

You have a legal right to challenge a maximum of three people without giving any reason. If you do wish to challenge a particular person, then you should say, "challenge" as that person's number is read a second time.

In addition, if you want to challenge a particular person for a specific reason, then you should, without stating your reason, say, "challenge for cause". I will deal with that situation, if it arises [*see* s 46 *Jury Act* 1977]. Do you understand?

The Crown has the same right of challenge, and that right will be exercised by the Crown Prosecutor.

[1-835] Notes

1. *Stay of proceeding*: even if a self-represented accused is aware of their right to make an application for an adjournment or stay of the proceedings to enable legal representation to be obtained, the trial judge should consider whether the trial is likely to be unfair if the accused is forced to proceed unrepresented: *Dietrich v The Queen* (1992) 177 CLR 292.

   Where a self-represented accused, "who through no fault on his or her part, is unable to obtain legal representation" and is facing trial for serious offences, a trial judge has power to make an order staying the proceedings if, in the circumstances of the case, it appears that the accused would otherwise not receive a fair trial: *Dietrich v The Queen* at 315. See also *R v Gilfillan* [2003] NSWCCA 102 where the Court of Criminal Appeal noted at [75] that circumstances may exist where it is reasonable for an accused to withdraw his or her instructions even at an advanced stage of a trial, and that although there is a strong public interest in ensuring that a criminal trial which is well advanced proceeds to a verdict, the court is required to consider why instructions were withdrawn.

   In *Craig v South Australia* (1995) 184 CLR 163 at 184, the High Court considered the phrase, "through no fault of his own", and concluded that the test focused on the reasonableness of the accused's conduct in all of the circumstances, and excluded the situation where it was fair to say the accused "by his gratuitous and unreasonable conduct, had been the author of his own misfortune".

2. *Address by the Crown Prosecutor:* the Crown is not prohibited from making a closing address where the accused is self-represented, although there is a practice that the Crown not do so in such circumstances: *R v Zorad* (1990) 19 NSWLR 91; *R v EJ Smith* [1982] 2 NSWLR 608 at 615–616. The decision as to whether the Crown Prosecutor should exercise the right to make a closing address is a discretionary question for the trial judge: *R v Zorad* at 95.

3. The following documents may also be of assistance when considering the professional obligations of the Crown Prosecutor:

   - Office of the Director of Public Prosecutions (NSW), Guideline 4.6: *Unrepresented Accused*, Prosecution Guidelines, March 2021: see https://www.odpp.nsw.gov.au/sites/default/files/2021-08/Prosecution-Guidelines.pdf
   - The New South Wales Bar Association, *Guidelines for barristers on dealing with self-represented litigants*, October 2001: see https://nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Self%20Represented%20Litigants.pdf
   - The New South Wales Law Society, *Guidelines for solicitors dealing with self-represented parties*, April 2006: see https://www.lawsociety.com.au/sites/default/files/2018-03/Self%20represented%20parties.pdf .

[1-840] Cross-examination of complainants in prescribed sexual offence proceedings and vulnerable witnesses in criminal proceedings

Special procedures apply with respect to the cross-examination of certain witnesses by a self-represented accused. The relevant categories of witness are complainants in sexual offence proceedings: s 294A *Criminal Procedure Act*; and vulnerable persons (whether or not the complainant) in criminal proceedings: s 306ZL. If the accused is self-represented, any cross-examination must be conducted through a court-appointed intermediary.

With respect to vulnerable persons, the court may choose not to appoint such a person if the court considers that it is not in the interests of justice to do so: s 306ZL(5). There is no discretion with respect to sexual offence complainants: s 294A(5).

The person appointed must ask the complainant or vulnerable person only those questions which the accused requests that person to put to the complainant or vulnerable person: ss 294A(3), 306ZL(3); and must not give legal or other advice to the accused: ss 294A(4), 306ZL(4).

The procedure applies whether or not closed-circuit television facilities are used to give evidence, or alternative arrangements have been made: ss 294A(6), 306ZL(6).

The purpose of the provisions is to spare the witness "the need to answer questions directly asked of him or her by the person said to have committed the offence": *Clark v R* [2008] NSWCCA 122. The legitimacy of such provisions with respect to sexual assault complainants was confirmed in *R v MSK & MAK* (2004) 61 NSWLR 204, where it was recognised at [69]:

> The use by [the self-represented accused] of the opportunity to confront and to challenge his alleged victim personally and directly risks diverting the integrity of the judicial process, insofar as it is likely to intimidate the complainant to the point where he or she is unable to give a coherent and rational account of what truthfully occurred. The threat of its occurrence may also discourage a victim of sexual assault from giving evidence or even from making an initial complaint.

Special leave to appeal to the High Court was refused on 17 February 2005: *R v MSK and MAK* [2005] HCA Trans 22.

Section 294A does not prescribe a procedure for the application of its provisions. In *Clark v R* it was held that it was appropriate for the judge to have appointed the registrar as the intermediary, and that there was nothing in the legislation to require the appointment of a legal practitioner: at [40], [43]–[44]. The appointed person should be present in court to hear the complainant's examination in chief to ensure the appointed person can carry out the cross-examination effectively and intelligently: at [45], [55].

The judge erred in requiring the appellant to provide the judge with a list of questions proposed for cross-examination before the complainant's examination in chief: *Clark v R* at [46]. Such a requirement is "likely to give rise to the risk of a miscarriage of justice": at [47], [55]. Furthermore, it may be impossible to meet as the questions asked in cross-examination may depend to a significant degree upon the witness's responses to previous questions: at [48]. Such an approach may be justified where proposed questions deal with the matters proscribed by s 293 (now s 294CB) *Criminal Procedure Act*: at [49]; but even in those circumstances disclosure before the complainant's evidence in chief is finished is not justified: at [50]–[53].

[1-845] Suggested procedure: ss 294CB, 294A

The following procedure is suggested (steps (a) to (e) should take place in the absence of the jury):

(a) At the earliest possible opportunity in proceedings, the court should inform the self-represented accused that if they remain self-represented, they are prevented by law from personally questioning the complainant, and that the court must appoint a person to ask the questions on their behalf.

(b) Once it is apparent the trial will proceed with a self-represented accused, at the earliest opportunity the court should appoint the person who will ask the accused's questions of the complainant: s 294A(2). In any event, the person should be appointed in sufficient time to ensure they can be present in court to hear the complainant's examination in chief: *Clark v R* [2008] NSWCCA 122 at [45], [55].

(c) The judge will explain to the intermediary their role, that is, that the intermediary is only to ask the questions sought to be put by the accused: s 294A(3).

(d) The court should advise the accused to begin to prepare a list of questions sought to be asked of the complainant in cross-examination. Consistent with the judge's obligations with respect to a self-represented accused, the judge should explain the proposed procedure for cross-examination of the complainant to the accused and advise them of the nature and form of questions that are not permissible. For example, the trial judge should explain to the accused the type of questions that may be proscribed by s 294CB (formerly s 293): *Clark v R* at [49].

There is no requirement that the draft questions be made available to the Crown, although the Crown may be entitled to notice of particular questions, for example, for the purposes of ascertaining admissibility under s 294CB: *Clark v R* at [54].

Similarly, there is no requirement for all of the draft questions to be submitted to the court for approval in advance as:

> "… any question to be asked of a witness in cross-examination may ride upon the answer just given. The requirement to frame all questions in advance may impart a rigidity which robs a cross-examination of its effectiveness": *Clark v R* at [48].

However, the trial judge may require the accused to formulate proposed questions which might infringe the requirements of s 294CB, and inform the court in advance of any such questions: *Clark v R* at [49].

(e) If the accused is not literate, the court-appointed intermediary — or, if necessary, an interpreter — could write out the questions sought to be put by the accused.

(f) The jury will be brought back into court and an explanation should be given to the jury by the judge about the procedure to be adopted for the accused to cross-examine the complainant and the required warning given: s 294A(7).

(g) Once the complainant has given evidence in chief, the accused will be given the opportunity to add to and/or re-formulate the list of questions they have prepared.

(h) The intermediary will then ask the complainant only the questions the accused has requested be asked: s 294A(3). The intermediary may rephrase a question if necessary to aid the complainant's understanding: *Clark v R* at [45].

(i) If necessary during the cross-examination, the judge will give the accused the opportunity to re-formulate the questions in accordance with the court's rulings on objections and admissibility.

(j) After the complainant has answered the questions, the judge will ask the accused if there are any further questions arising from the complainant's answers, or any questions previously overlooked.

(k) If the accused has further questions, the procedures set out in paragraphs (d)–(e) and (h)–(j) would be repeated.

Section 294CB(4) sets out the limited circumstances in which a complainant can be cross-examined about their sexual experience. Section 294CB(8) provides the court must, *before* the evidence is given, provide reasons as to why the evidence falls within one of the exceptions in s 294CB(4) and the nature and scope of the evidence. Where an accused is self-represented "the trial judge needs to take special care to see that the requirements of the section are respected": *Clark v R* at [49]. The judge should explain to an accused person the nature of the questions proscribed by s 294CB and require the accused to formulate any proposed questions in advance: *Clark v R* at [49]. See further discussion of s 294CB at [5-100].

[1-850] Suggested information and advice to accused in respect of a "prescribed sexual offence"

As you are representing yourself in these proceedings, you cannot ask the complainant questions once the Crown Prosecutor has finished asking [*his/her*] questions. I will appoint a person, who I will refer to as an intermediary, to ask the complainant questions in cross-examination for you. The intermediary will be present when the complainant gives [*his/her*] evidence in chief.

You need to prepare a list of the questions you want the intermediary to ask the complainant and I suggest you start preparing those questions now, if you have not already done so. The intermediary is only here to help you by asking the complainant the questions you have prepared. [*He/she*] cannot give you legal advice. However, the intermediary can put into other words the questions you have prepared. Before the intermediary cross-examines the complainant I will give you the opportunity to review the questions you propose to have asked.

The Crown Prosecutor will not see the questions before they are asked, but if [*he/she*] objects to any of the questions when the intermediary asks the complainant, then I will deal with that objection in the usual way.

During the complainant's cross-examination, if you need more time to prepare additional questions, or reconsider the wording of some of your questions because of rulings I have made as a result of objections or the admissibility of a particular question, then I will give you some time to do so.

[*Note:* *to address the possibility or difficulty of the accused communicating with the intermediary during the course of cross-examination see Clark v R at [47].***]**

When the cross-examination is finished, and before I give the Crown Prosecutor the opportunity to re-examine the complainant, I will ask you if you have any other questions arising from the cross-examination of the complainant and, if you need more time to prepare additional questions, I will give you some time to do so.

[1-860] Suggested information and advice where s 294CB(4) does not apply

There are some questions that by law you cannot ask the complainant. You cannot ask [*him/her*] questions about what the law refers to as [*his/her*] "sexual reputation". This means you cannot ask any question which suggests the complainant:

- has or may have had sexual experience, or
- lacks sexual experience, or
- has taken part in sexual activity, or
- has not taken part in sexual activity.

[1-870] Suggested information and advice to accused's intermediary

You have been appointed by me to assist the accused in this case. That assistance is limited to asking the complainant the questions appearing on the list the accused has prepared. You cannot give the accused legal advice. However, if some of the questions the accused proposes that you ask do not make sense then you can put those particular questions into other words. The only time you may ask additional questions is when it is necessary to assist the complainant's understanding of a particular question which has been asked.

[1-875] Direction re use of intermediary

Where an intermediary is appointed to ask questions of a complainant in prescribed sexual offence proceedings: s 294A(7); or a vulnerable witness in criminal proceedings: s 306ZI(4); and the proceedings are before a jury, the judge must:

(a) inform the jury that this is standard procedure in such cases, and

(b) warn the jury not to draw any inference adverse to the accused, or to give the evidence any greater or lesser weight because of the use of that arrangement.

[1-880] Suggested direction to jury re use of intermediary

An intermediary has been appointed by me to cross-examine the complainant for the accused. [*He/she*] is not a lawyer representing the accused; perhaps this person is not a lawyer at all. During cross-examination, [*he/she*] will ask the complainant questions — which have been formulated by the accused — on the accused's behalf.

Where, as here, the accused is self-represented, it is standard procedure in cases of sexual assault for the court to appoint a person to ask the complainant questions on the accused's behalf. You should not draw any inference against the accused or give the evidence any greater or lesser weight simply because it is given in this manner. You should assess the evidence in the same way as you assess the evidence of any other witness in the case.

[1-890] Cross-examination in proceedings for Commonwealth offences

Part 1AD *Crimes Act 1914* (Cth) also places constraints on the cross-examination of certain witnesses by a self-represented accused. That Part applies to various offences, including child sex tourism, slavery, sexual servitude and human trafficking: s 15Y(1). Under s 15YF, a self-represented accused is prohibited from cross-examining a vulnerable person, and a person appointed by the court is to ask him or her any questions sought to be put by the accused. A self-represented accused must not cross-examine a vulnerable person unless the court grants leave: s 15YG(1). Section 15YG(1A) defines a vulnerable person to include a child witness (other than a child complainant) for a child proceeding (as defined in s 15YA). The court must not grant leave "unless satisfied that the vulnerable person's ability to testify under cross-examination will not be adversely affected": s 15YG(2). In applying this test, the court is to consider "any trauma that could be caused if the defendant conducts the cross-examination": s 15YG(3). The Commonwealth legislation does not specifically require a warning in the terms of ss 294A(7) or 306ZI(4) *Criminal Procedure Act*, although it may be prudent to give a warning in such terms for these matters.

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Witnesses — cultural and linguistic factors

[1-900] Introduction

In some cases it may be necessary to give specific directions concerning a witness' cultural and linguistic background. The issue should be first ventilated with the parties in the case. The Judicial Commission of NSW, *Equality Before the Law Bench Book*, 2006-, provides guidance on issues relating to cultural and linguistic background of witnesses. Section 2 "Aboriginal people" discusses various issues that may arise for Aboriginal witnesses or defendants. Section 3 "People from culturally and linguistically diverse backgrounds" discusses a broad range of issues including cultural differences, translators/interpreters, modes of dress, oaths and affirmations, appearance behaviour and body language, verbal communication, the impact of different customs and values, cultural and linguistic differences and jury directions. Sections 2 and 3 are useful starting points for issues that may be raised in a given case.

[1-910] Directions — cultural and linguistic factors

It is axiomatic that any given case must be decided by the jury on the evidence of the witnesses and not on stereotypical or false assumptions about people from culturally and linguistically diverse backgrounds: Judicial Commission of NSW, *Equality Before the Law Bench Book*, 2006-, at [2.3.5]. In the Northern Territory, Justice Mildren developed suggested directions for that jurisdiction in relation to Aboriginal witnesses: see D Mildren, "Redressing the imbalance against Aboriginals in the criminal justice system" (1997) 21 *Crim LJ* 7, pp 21–22. It is accepted that the issues in that jurisdiction "differ in many respects from those in NSW": NSW Law Reform Commission, *Jury directions*, Report No 136, 2012, at [5.129].

The issue of appropriate jury directions in relation to Indigenous witnesses has been raised in a number of interstate intermediate appellate court decisions (see below) and reports, including *Jury directions* at [5.120]–[5-133] and the NSW Parliament Standing Committee on Law and Justice, *The family response to the murders in Bowraville*, Report No 55, 2014.

Generally, it is inadvisable to give directions to the jury about cultural and linguistic factors in the form of preliminary observations before any witnesses are called: *Stack v Western Australia* (2004) 151 A Crim R 112 at [19], [144]; *Jury directions* at [5.128], [5.130]. General directions are not helpful because they encourage a stereotypical approach to the evidence of Indigenous witnesses: *R v Knight* [2010] QCA 372 at [283]. If a direction is given, it should specifically address the issues raised in the case and be framed in terms of the competing submissions of the parties concerning individual witnesses: *Bowles v Western Australia* [2011] WASCA 191 at [69]; *Jury directions* at [5.132]; *Equality Before the Law Bench Book* at [2.3.5]. In "Language and communication" at [2.3.3] of the *Equality Before the Law Bench Book*, contextual information about potential socio-linguistic and extra linguistic features of some Aboriginal people is provided. The topics discussed include the use of Aboriginal English, gratuitous concurrence, silence (of a witness) before giving a response and the avoidance of eye contact. (See further *Jury directions* at [5.125].) In some cases, these issues may be the subject of submissions in closing addresses.

Although a judge may comment on the facts and witnesses (see *R v Zorad* (1990) 19 NSWLR 91; *B v The Queen* (1992) 175 CLR 599 at 605–6; *R v Heron* [2000] NSWCCA 312 at [74]–[81]), the safer and wiser course is to make no comment and to explain the competing arguments of counsel: *RPS v The Queen* (2000) 199 CLR 620 at [42]; *Castle v The Queen* (2016) 259 CLR 449 at [61]. If any comment is made it is essential that: (a) the judge make clear that it is entirely within the jury's province to determine the facts; and (b) that the jury is not deprived of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence: *Castle v The Queen* at [61] citing Brennan J in *B v The Queen* (1992) 175 CLR 599 at 605.

A judge should refrain from suggesting to the jury how to approach the assessment of a witness' evidence in a manner that has the appearance of a direction of law: *RGM v R* [2012] NSWCCA 89 at [97]. It is for the jury alone to decide the facts and to assess the credibility of the witness in light of the evidence and the submissions of the parties. It is important that the judge does not exceed his or her judicial function and enter "into the arena": *CMG v R* [2011] VSCA 416 at [18]; *Doggett v The Queen* (2001) 208 CLR 343 at [1]–[2].

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para

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Accusatory statements in the presence of the accused

[2-000] Introduction

This section contains a suggested direction to be given where the Crown relies upon the adoption, by words or conduct, of an accused, of the truth of an accusatory statement made in his or her presence by a person who is not an "investigatory official": cf s 89 *Evidence Act* 1995. As to the admissibility of such evidence at common law: see *R v Christie* [1914] AC 545 at 554; applied in *Woon v The Queen* (1964) 109 CLR 529 and *R v Freeman* (unrep, 18/12/86, NSWCCA) at 4–5 where it was noted:

> It is of course well established that, where an accusatory statement is made in the presence of an accused person, it is not evidence against him of the facts stated except insofar as he accepts it. Acceptance may be by way of word, conduct, action or demeanour. Whether there is acceptance is a matter for the jury. A mere denial by an accused does not render the statement inadmissible but its evidential value when he denies it is limited and the judge may well think it proper to exclude such evidence. *Where failure to deny is relied on, it is necessary to ensure that, before any such evidence is admitted, the circumstances are such as to leave it fairly open to conclude that silence is such as to convey a tacit admission of the truth of what is being asserted. This will, of course require consideration of whether the circumstances were such that some denial or explanation might reasonably be expected* . [Emphasis added.]

As to silence amounting to an admission: see generally *R v Rose* (2002) 55 NSWLR 701; [2002] NSWCCA 455 at [260]ff.

Evidence of the accused's response to an accusatory statement is receivable as an admission subject to Pt 3.4 *Evidence Act* including whether the reception of the admission would be unfair within the meaning of s 90, as to which: see *Em v The Queen* (2007) 232 CLR 67 at [109], [112], [179], [196]. Section 90 permits the exclusion of evidence of admissions to prove a fact if the prosecution seeks to adduce it and it would be unfair to a defendant to use the evidence. In *DPP (NSW) v Sullivan* [2022] NSWCCA 183, the accused's admissions in a police interview were found to be unreliable as the accused did not have an actual recollection of events and was instead speculating or hypothesising about them. It was unfair to permit the prosecution to use these admissions for their truth: [53]–[54].

As an admission or as hearsay evidence, in such a case, a warning may be required under s 165 of the Act.

It is desirable to give the jury a direction or explanation, along the lines suggested at **[2-010]**, at the time when the evidence is given, as well as in the summing-up.

As to admissions generally: see **Admissions to police** at **[2-100]**.

[2-010] Suggested direction — accusatory statements in the presence of the accused

You have heard evidence from [*name of witness*] that [*he/she*] said to [*the accused*], [*accusatory statement*]. The accused is said to have made no reply to that statement [*the accused is alleged to have replied to that statement with the words*, [*quote evidence*]].

What one person says to another is not normally relevant evidence. Here the evidence is being led before you because the Crown asserts that the lack of response [*response*] by the accused to the statement made to [*him/her*] or in [*his/her*] presence is an admission

by the accused that what was contained in the statement was true. It would be different had the accused denied the allegation made or had given some innocent explanation to rebut the allegation. The evidence is only relevant if you find that the accused's lack of response [*response*] when confronted with the allegation amounted to an admission that it was true.

Let us take an example away from the facts of the present case. Assume that a man has been the driver of a motor vehicle which has struck a child, causing serious injuries. Assume that the mother of the injured child immediately after the accident approaches the driver and says to his face, "This is your fault you are always driving too fast around this street ignoring the children playing on the road". If the driver says nothing to that allegation, a jury could find that the failure to respond amounted to a silent acceptance of the truth of what was said because the driver had nothing to say in defence to the allegation made to him.

In that case, the statement made by the mother would not, of itself, be relied upon by the Crown as evidence that what she asserted was true. Before any part of that statement made in the presence of the driver could be used as evidence against him, a jury would have to be satisfied that the statement was made; that the driver heard it; and that he had the opportunity to respond to it but did not respond because he accepted the truth of what was said. There may be an alternative explanation for the driver not responding. It may be that he did not hear what the mother said, or that he heard it but was too upset to respond. Or it could be the case that he treated the allegation of the mother as unworthy of a response.

In the present case, you need to first decide whether you accept that [*name of witness*] made the statement to the accused; whether the accused heard it; and whether [*he/she*] had an opportunity to respond. You also need to decide whether you accept that the accused did not respond [*or, did respond by saying* [*quote evidence*]]. If you do accept the evidence about each of those things, you then need to consider whether you accept that by [*his/her*] lack of response [*or response*] the accused had acknowledged that what [*name of witness*] had said was, either in whole or in part, true.

It is really a matter for you to apply your common sense and your experience of life and what you might expect a person in the position of the accused to do or say when faced with such an allegation, although you should also consider that people do not always act predictably in certain situations. Here you are considering the conduct of the accused, and not the conduct of some hypothetical person in [*his/her*] position. You must also consider whether there is an alternative explanation for the accused's lack of response [*or response*], other than that [*he/she*] accepted the truth of what [*name of witness*] said. In this case it has been put that [*refer to defence response*].

If you accept this alternative explanation then this part of the evidence would not advance the Crown case at all and may be put completely to one side. However, if after considering all of the circumstances I have mentioned, you are satisfied that the accused did acknowledge, either in whole or in part, the truth of what [*name of witness*] said, then this is something you can take into account along with all of the other evidence in the case in your assessment of whether the Crown has proved the guilt of the accused beyond reasonable doubt.

[The next page is 175]

Acquittal — directed

[2-050] Introduction

Last reviewed: June 2023

The trial judge has a duty to direct an acquittal if at the conclusion of the prosecution evidence the charge or any available charge has not been proved by the evidence. The trial judge has no power to direct a verdict merely because he or she has formed the view that a guilty verdict would be unsafe or unsatisfactory: *R v R* (1989) 18 NSWLR 74. A verdict of not guilty may be directed only if "there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty": *Doney v R* (1990) 171 CLR 207 at 214–215; *LK v The Queen* (2010) 241 CLR 177 at [29].

If a directed acquittal is being ordered in relation to only some accused persons or counts and the jury consists of more than 12 jurors immediately before the delivery of the directed acquittal(s), a ballot must be conducted in accordance with s 55G *Jury Act* 1977 to select a verdict jury to deliver the directed acquittal(s) (with the excluded jurors remaining in court but sitting out of the jury box). An order must then be made that the excluded jurors re-join the jury (and return to the jury box) for the continuation of the trial in respect of the accused person(s) or counts (as the case may be) that have not yet been the subject of a verdict in accordance with s 55G(5)(a) *Jury Act*.

As to the power of the judge to direct a verdict: see generally *Criminal Practice and Procedure NSW* at [7-525].

It had been customary for the trial judge to give the jury some explanation for requiring the foreperson to give a verdict at the trial judge's direction. But as there is now an appeal available to the Crown against a directed verdict of acquittal on a ground that "involves a question of law" pursuant to s 107 *Crimes (Appeal and Review) Act* 2001, full reasons should be given by the judge for the decision to direct an acquittal so that the decision can be subject to consideration by the Court of Criminal Appeal. For an example of an appeal against a directed verdict: see *R v PL* [2009] NSWCCA 256.

[2-060] Suggested direction — directed acquittal

Last reviewed: June 2023

Note The suggested direction does not require that full reasons be given to the jury at the time of requiring the directed verdict be given. But as explained above, such reasons must be given at the time of directing the verdict or shortly thereafter as the Crown has 28 days following the verdict in which to lodge an appeal against the decision.

Members of the jury, in your absence I have heard submissions concerning whether sufficient evidence had been led by the Crown that would entitle you to return a verdict of "guilty". As a matter of law, I have concluded that the evidence given could not establish the essential ingredients of the offence.

The verdict must come from you, but you have no choice in the matter because of my ruling in law. You will not need to retire. I will simply say to the [*foreman/forewoman*]: "Do you, in accordance with my direction, find the accused 'not guilty' of [*offence*]?" and the [*foreman/forewoman*] will necessarily say "Yes".

[The next page is 185]

Admissions to police

***Evidence Act* (NSW) 1995, Pt 3.4, s 165(1)(f)**

[2-100] Introduction

The following will only be relevant where disputed admissions have been admitted into evidence notwithstanding s 281 *Criminal Procedure Act* 1986. See *Bryant v R* [2011] NSWCCA 26 at [147]ff for examples of where that has occurred.

[2-110] Pre-Evidence Act position

Prior to the *Evidence Act* 1995, the decision of the High Court in *McKinney v The Queen* (1991) 171 CLR 468 required a trial judge to warn the jury that, because of the apparent vulnerability of an accused person in police custody, they should give careful consideration to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is an oral admission allegedly made while in police custody, the making of which is not reliably confirmed: *McKinney v The Queen* at 476.

In the course of that warning, the jury had to be told:

(a) that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of confirmation to have evidence available to support a challenge to police evidence alleging that an oral admission had been made, than it is for such police evidence to be fabricated,

(b) that police officers are trained to give evidence in court, and

(c) that it is not an easy task to decide whether a practised witness is telling the truth.

Those requirements were directed to ensuring that the accused person obtained the fair trial to which he or she is entitled: *McKinney v The Queen* at 476; *Dietrich v The Queen* (1992) 177 CLR 292 at 327–328, 333. This decision has to be read in light of the provisions of the *Evidence Act* set out at [2-120].

[2-120] Position under the Evidence Act

Section 165 *Evidence Act* requires a warning to be given to the jury that the evidence of witnesses within the various categories of suspect witnesses may be unreliable, with information as to the matters which may cause it to be unreliable, and a warning of the need for caution in determining whether to accept the evidence and the weight to be given to it: s 165(2). This must be done whenever any party so requests, unless the judge is satisfied that there are good reasons for not doing so (s 165(2) and (3)), and it is not restricted to the cases to which *McKinney v The Queen* was directed — where, generally, the oral admissions form the only (or substantially the only) evidence of guilt and where they were made in police custody: *McKinney v The Queen* at 476; *R v Small* (1994) 33 NSWLR 575 at 602–604. The warning, if sought by counsel, should be given where the Crown is relying upon evidence coming within the category described in the section.

The category of evidence identified by s 165(1)(f) *Evidence Act* is:

> [O]ral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant.

"Investigating official" is defined in the Dictionary to the Act.

Those directions must be given with the weight of the judge's own authority: *R v Richards* (unrep, 03/04/98, NSWCCA) at 3 and 15. But it should be made clear that it is an issue for the jury to determine whether and to what degree weight should be given to evidence falling within s 165: *R v Wilson* (2005) 62 NSWLR 346; [2005] NSWCCA 20 at [38].

A judge is entitled to direct the jury that evidence of pre-trial exculpatory statements of an accused could be given less weight than inculpatory admissions in the absence of testimony from the accused at trial but it is for the jury to determine the weight to be given to parts of the evidence: *Mule v The Queen* (2005) 79 ALJR 1573 at [21]ff. However, caution should be exercised in this area generally and before instructing the jury in such a way, particularly when the out-of-court statements may be mixed and complex: *Xiao v R* [2022] NSWCCA 95 at [142]–[148]; see also *Nguyen v The Queen* (2020) 269 CLR 299 at [24], [59]. If mixed statements are admitted into evidence "they are invariably subject to a direction to the jury that they may give less weight to exculpatory assertions than to admissions and that it is for them to decide what weight is to be given to a particular statement": *Nguyen v The Queen* at [24]. In a separate judgment, Edelman J stated it was not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state: at [59].

[2-130] Suggested direction — where disputed admissions

Where the evidence of an admission can be used by the jury as the only evidence upon which to convict an accused, the reliability of the admission must be proved beyond reasonable doubt. If it is not relied upon as the only evidence of guilt, then the warning must be given, if asked for, but the admission does not have to be proved to the criminal standard.

Evidence has been given, that the accused made certain admissions to the police. The accused has denied that [*he/she*] made those admissions and has suggested that this evidence is deliberately false.

[*Outline the evidence and the nature of the dispute in sufficient detail to suit the circumstances of the case*.]

It is not unknown for a guilty person to make full admissions to the police and then to have second thoughts and dishonestly deny having made them. However, and unfortunately, it is also not unknown for police officers to manufacture evidence against a person whom they believe has committed an offence.

There are two issues for you to decide. Were the admissions made and, if you decide that they were made, were they true?

You may think that a person would not usually admit to committing a crime unless the admissions were true, but there may be situations where a person may make a false admission. The main issue in this case, as I understand it, is whether the admissions

were made at all. But the Crown must also prove that they are truthful admissions and, if there is any evidence to suggest that they are not, the Crown must refute that suggestion. [*Indicate what evidence, if any might call the truth of the admissions into question, such as, for example, mental illness, personality defect or intoxication.*]

In relation to the first issue, that is, whether the admissions were made, you must approach the evidence of the police with caution. This is because the circumstances in which it is alleged that the admissions were made may make the evidence unreliable. I am not telling you that you should regard this evidence as unreliable. The reliability of the evidence is a matter for you to decide. I cannot make that decision for you and nor am I trying to suggest what decision you should make. It is, however, my duty to warn you of the possibility that evidence of this kind may be unreliable and to explain why that is so. It is up to you to decide whether you accept this evidence and what weight, or significance, it should have.

There are a number of reasons why the evidence may be unreliable. Generally, they indicate that it is easier for police officers to fabricate their evidence than it is for the accused to have evidence available to challenge what they have said.

First, although police do have available to them equipment and facilities to record interviews with suspects, in this case there was no electronic recording made. Even if you accept the explanation that was given for no electronic recording being made, the fact remains that there is no confirmation that those admissions were made independent of the police who say that they were made by the accused.

Second, there was no-one present at that interview except the accused and the police. That state of affairs is not improper. The police officers were perfectly entitled to interview the accused alone. What this means, however, is that there was no independent person present who might have been able to support the accused's challenge to the police evidence.

Another matter you should take into account is that the accused had no opportunity to make any note of [*his/her*] conversation with the police officers at the time of that conversation. A note made by the accused at the time might have enabled [*him/her*] to challenge the evidence of the police officers more persuasively.

[*Where applicable*

You should also take into account that police officers are generally experienced in giving evidence in court. It is not an easy task to decide whether a practiced witness is telling the truth or not. If a witness appears to be confident and self-assured, it does not necessarily follow that the witness is giving honest evidence.]

[*Refer to any other matters that may not be apparent to the jury and which may bear upon the reliability of the evidence*.]

All of these matters mean that the evidence of the police as to the disputed admissions may be unreliable. For this reason, it is necessary that you approach their evidence with caution in deciding whether to accept it and what weight, or significance, you should give to it.

I repeat that I am not giving you this warning because of any opinion I have about the evidence. As I have already said, the reliability of the evidence is a matter for you to decide. This warning is one which is given in every case where this type of evidence is relied upon by the Crown.

[*Indicate the arguments relied upon on this issue by both parties*.]

Those are the arguments put before you. As I have said, there are two matters for you to decide. Were the admissions made? If so, were they truthful?

If you decide that the admissions were made, and that they were truthful, then you may take them into account in deciding whether the Crown has proved the guilt of the accused beyond reasonable doubt. If the admissions are the sole evidence of the accused's guilt [**if appropriate add** *and in this case they are*], then because of the requirement that the accused's guilt be proved beyond reasonable doubt, it follows that you must be satisfied beyond reasonable doubt that the admissions were made and that they were true.

[The next page is 201]

Alternative verdicts and alternative counts

[2-200] Introduction

An alternative verdict can be returned by the jury where it is charged by the Crown on the indictment (see s 23(3) *Criminal Procedure Act* 1986) or where it is available as an included offence at common law (see *James v The Queen* (2014) 253 CLR 475 at [14]) or under a particular statutory provision. Notable examples of the latter include ss 33(3), 80AB, 86(4), 97(3) and 193E *Crimes Act* 1900. Section 162 *Criminal Procedure Act* permits a jury to return an alternative verdict of attempt for any indictable offence. Section 153 *Criminal Procedure Act* provides for the taking of a guilty plea to an alternative charge "of some other offence not charged in the indictment".

The Crown should indicate in its opening whether it relies upon any statutory or common law alternatives to the offence charged in the indictment. Generally, it is prudent practice for the judge to raise with the parties the issue of whether an alternative verdict is available at least prior to closing addresses in order to avoid possible unfairness to the defence: *Sheen v R* (2011) 215 A Crim R 208 at [82], [90]; *James v The Queen* at [34] approving *R v Cameron* [1983] 2 NSWLR 66 at 71 and *R v Pureau* (1990) 19 NSWLR 372 at 375–377.

[2-205] The duty to leave an alternative verdict

Last reviewed: January 2018

The judge's duty to instruct the jury on an alternative verdict is an aspect of the duty to ensure a fair trial: *James v The Queen* (2014) 253 CLR 475 at [38]. The judicial obligation to leave manslaughter to the jury as an alternative to murder (regardless of the stance of trial counsel) is a product of the development of the law of homicide. It does not extend to the trial of offences generally: *James v The Queen* at [19], [23] disapproving *R v King* (2004) 59 NSWLR 515. As to the obligation to leave manslaughter, see **Murder** at **[5-1140]**.

The duty to leave an alternative verdict for offences other than murder does not require that a lesser charge is left in every case; the test is "what justice to the accused requires" in the circumstances of the case: *James v The Queen* at [34]; *The Queen v Keenan* (2009) 236 CLR 397 at [138]. If neither party relies on an included offence then the judge may conclude that it is not a real issue in the trial: *James v The Queen* at [37]. The duty to leave an alternative verdict will depend on the real issues in the case and the forensic choices of counsel: *James v The Queen* at [38]. However, the forensic choices of counsel are not determinative and on occasion the judge's duty to secure a fair trial will require that an alternative verdict be left despite defence counsel's objection: *James v The Queen* at [34], [38]. The judge may refrain from leaving an alternative verdict if to do so would jeopardise the appellant's chances of acquittal: *James v The Queen* at [48].

Where an alternative verdict is left, the jury must be specifically warned not to return an alternative verdict as a compromise: *R v Heaton* (unrep, 1/6/90, NSWCCA) at 8–9; *R v Currie* [2002] NSWCCA 126 at [11]–[13].

As to alternative verdicts generally see *Criminal Practice and Procedure NSW* at [2-s 153.1], [2-s 162.1], [8-s 61I.20]; *Criminal Law (NSW)* at [CPA.162.40]–[CPA.162.100].

[2-210] Suggested direction — alternative verdict

After dealing with the ingredients of the alternative offence add

It is a matter for you how you approach your task in determining the verdict or verdicts to give on the principal charge in the indictment and any alternative charge available for your consideration. Of course, if you are not satisfied that the Crown has proved beyond reasonable doubt all the necessary elements of the principal offence being [*state offence*], then you must find the accused not guilty of that charge. You may then consider whether the Crown has proved beyond reasonable doubt all the necessary ingredients of the alternative charge [*or charges*] which are open to you. As I have indicated to you, the ingredients of the principal offence and the alternative charge [*or charges*] are not identical. If you find that the Crown has proved beyond reasonable doubt each of the elements of the alternative offence [*or any of them*] then you may find the accused guilty of the alternative count [*or any of them*].

However, I direct you that you should not regard the availability of an alternative count as an invitation to compromise your verdict. For example, it would be quite wrong for you to find the accused guilty of the alternative count [*or any of them*] simply because some of you found that the accused was guilty of the principal count but others were not so satisfied and would enter a verdict of not guilty of that charge. It would be unfair and contrary to your oaths [*or affirmations*] to decide to break the deadlock by convicting the accused on the alternative count [*or any of them*].

[The next page is 211]

Attempt

[2-250] Introduction

State offences

As to the availability of a charge of attempt to commit an offence or an assault with intent to commit an offence as an alternative verdict for any indictable offence: see s 162 *Criminal Procedure Act* 1986.

As to the general power of a jury to find a verdict of attempt for an offence within the *Crimes Act* 1900: see Pt 8A, s 344A *Crimes Act*.

As to attempt generally: see *Criminal Practice and Procedure NSW* at [6-300]; *Criminal Law (NSW)* at [CLO.320]ff; *Laws of Australia* at [9.2.900]ff (as at 20/3/08); *Halsbury Laws of Australia* at [130-7000]ff (as at 1/11/10).

Commonwealth Code

As to attempt under the *Criminal Code (Cth)* 1995: see s 11.1 of the Code and generally *Onuorah v R* (2009) 76 NSWLR 1.

As to attempts under the Code generally: see *Federal Criminal Law* at [5A-11.1] and Commentary.

Although the common law is that the accused must intend to commit the offence attempted, there is dicta that suggests that under the *Criminal Code (Cth)* recklessness is a sufficient mental state in respect of the offence attempted notwithstanding the terms of s 11.1(3): see *O'Meara v R* [2009] NSWCCA 90 at [61].

[2-260] Procedure

The availability of an alternative verdict of attempt should be raised by the Crown in opening or at the very least before closing addresses of counsel: *R v Pureau* (1990) 19 NSWLR 372. The question as to the appropriateness of raising the alternative verdict of attempt is whether it results in any unfairness to the accused: *R v Quinn* (1991) 55 A Crim R 435. See further at [2-200].

[2-270] Suggested direction

Note: The charge of attempt may be the only charge on the indictment or it may be left as an alternative to the offence charged in the indictment. In the latter case, the judge must explain how the Crown puts the case of attempt as an alternative verdict to the substantive offence charged in the indictment: *R v Crisologo* (1997) 99 A Crim R 178 at 187 applying *R v Pureau*, above. The jury must also be instructed to acquit the accused of the substantive charge if they find the accused guilty of attempt: *R v Crisologo* at 187.

[Where the offence of attempt is the *only* offence on the indictment

In order to prove that the accused is guilty of an attempt to commit the offence of [*state the offence attempted*], first, the Crown must prove beyond reasonable doubt that the accused intended to commit the crime which the Crown alleges he attempted to commit. In other words, the accused must have intended to commit all the physical acts which would constitute the crime attempted in circumstances which make those acts criminal. [*State the physical elements of the attempted crime and the relevant circumstances. For example, in an offence of attempted sexual intercourse, the accused must have intended to have intercourse knowing that the complainant was not consenting or to have been reckless to that fact*.]

Next, the Crown must prove beyond reasonable doubt that the accused, with that intention, did some act toward committing the intended crime which was immediately connected with the commission of that crime and which cannot have any other reasonable purpose other than the commission of the crime. This may sound complicated but you must understand that the law does not generally punish a criminal intention without any accompanying physical act: it is not an offence to form the idea that you would like to rob a bank. Nor does the law punish acts by a person that are done merely in preparation to committing a crime. For example, it is not an attempt to commit a robbery merely if a person purchases a balaclava thinking that it might be used to rob a bank sometime in the future.

So, if you are satisfied beyond reasonable doubt that the accused intended to commit the crime alleged, [*he/she*] is not guilty of the crime of attempt unless the accused has with that intention committed an act that is more than mere preparation to commit the crime. [*He/she*] must have actually embarked upon the commission of the crime that [*he/she*] intends to commit. If you find beyond reasonable doubt that the accused had the required intention and committed acts with that intention in mind, you must then determine whether the acts that you find the accused committed were merely preparatory acts toward committing the crime. If you form the view that they are preparatory acts, the accused is not guilty of the crime of attempt. If, however, the acts have gone further and are immediately connected to the crime and cannot have any other reasonable purpose than the commission of the intended crime, the accused may be found guilty of the charge of attempt.

[*If necessary, incorporate as much of the Suggested direction above to suit the circumstances of the case*.]

[*The following example may be considered appropriate*

Assume that a young man gets into his motor vehicle with a bag containing a balaclava and replica pistol and has a map showing how to get to a particular hotel. If on the way he is stopped by a police officer for some traffic infringement and these items are found, a jury might well find that, although he intended to rob the hotel, his acts are merely in preparation for that offence. He might have committed some offence but not the offence of attempting to rob the hotel. On the other hand, if he arrives near the hotel, leaves his vehicle wearing the balaclava and carrying the pistol but is confronted by a police officer as he opens the hotel door, a jury might find that he has gone further than merely acting in preparation to commit the offence but has embarked upon it only to be frustrated by the presence of the police officer. In that situation, the jury might

find that he has committed the offence of attempted robbery. It is a matter for you to assess the facts and determine whether beyond a reasonable a doubt the accused has proceeded so far in carrying out [*his/her*] intentions as to amount to an attempt to commit the crime intended.]**]**

[Where the offence of attempt is an alternative to a charged offence

The Crown has alleged that the accused committed the offence of [*state offence charged*]. However, the Crown argues that, even if you are not satisfied beyond reasonable doubt that the accused completed all the acts necessary to have committed that offence, you would find beyond reasonable doubt that the accused attempted to commit that crime.

[*Indicate to the jury, the Crown's alternative argument for the jury finding beyond reasonable doubt an attempt rather than the offence charged in the indictment.*]

I direct you that the alternative charge of attempt cannot be used as a compromise verdict, so that it is a verdict given simply because some of you thought he was not guilty of the charge in the indictment but some thought that the charge had been proved beyond reasonable doubt. The alternative arises because you may collectively have a doubt that the offence charged was committed yet all agree that the Crown has proved beyond reasonable doubt that the charge of attempt has been proved. If you have not been satisfied that the accused is guilty of the crime charged, you must find [*him/her*] "not guilty" of that crime before you can bring in the alternative verdict that [*he/she*] is "guilty" of "attempting to commit" that crime.**]**

[The next page is 221]

Causation

[2-300] Introduction

Causation can arise in two distinct but related issues:

(a) Did the act of the accused cause the harm the subject of the charge?

(b) Was there an act of the accused that caused the harm?

See the discussion in *R v Katarzynski* [2005] NSWCCA 72 at [17].

In (a) there is no dispute as to the act of the accused but the issue is whether it caused the harm occasioned to the victim. In (b) the issue is whether there was any act of the accused that caused the harm occasioned to the victim. In relation to this aspect of causation see **Voluntary act of the accused** at **[4-350]**ff.

[2-305] Causation generally

Causation is a question of fact. There can be more than one cause of the injury suffered by the victim. It is wrong to direct the jury that they should search for the principal cause of death: *R v Andrew* [2000] NSWCCA 310 at [60].

As to causation generally see: *Royall v The Queen* as summarised in *Cittadini v R* [2009] NSWCCA 302 at [81]–[83]; *Burns v The Queen* (2012) 246 CLR 334 at [86]–[87]; *Reynolds v R* [2015] NSWCCA 29 at [41]–[43]; *Criminal Practice and Procedure NSW* at [6-900]; *Criminal Law (NSW)* at [CLP.380]ff.

In a murder trial, proof of the element that the act of the accused caused death requires the jury to be satisfied beyond reasonable doubt that the act of the accused was a "substantial or significant cause of death" or a "sufficiently substantial" cause: *Swan v The Queen* (2020) 269 CLR 663 at [24].

In many cases of murder, however, particularly where a single act such as a shooting or stabbing is alleged, it may be unnecessary to elaborate the requirement that the victim's death should have been caused by the accused: *Royall v The Queen* at 412 per Deane and Dawson JJ.

Where appropriate the jury should be directed to consider whether there is any act of the victim that broke the chain of causation between the act of the accused and the injury inflicted upon the victim: *McAuliffe v The Queen* (1995) 183 CLR 108. In *Burns v The Queen* it was said at [86]: "Absent intimidation, mistake or other vitiating factor, what an adult of sound mind does is not in law treated as having been caused by another."

In a murder trial, proof of the element that the act of the accused caused death requires the jury to be satisfied beyond reasonable doubt that the act of the accused was a "substantial or significant cause of death" or a "sufficiently substantial" cause: *Swan v The Queen* at [24].

As to cases where the act of the deceased in fleeing the accused resulted in death, see *Royall*, above, *McAuliffe*, above, *Adid v R* (2010) VR 593, *R v RIK* [2004] NSWCCA

282. In such cases the question is whether the act of the deceased broke the chain of causation by responding to the threat posed by the accused in an unreasonable or irrational manner. Where there are a number of causes of death as a result of more than one life-threatening injury including that allegedly inflicted by the accused or where there have been a number of persons who have inflicted injuries upon the victim the terminology more appropriately used is whether an act of the accused was an "operating and substantial" cause of death: see *R v Lam* (2008) 185 A Crim R 453. The suggested direction has been framed accordingly.

[2-310] Suggested direction — causation generally

There is an issue as to whether the accused's [*acts/omissions*] caused the [*nature of harm*] suffered by [*the victim*]. This is a question of fact for you to decide. The Crown must prove beyond reasonable doubt that the accused caused this harm to [*the victim*].

The Crown says the accused caused this injury because [*indicate Crown allegations*]. The accused says you would not be satisfied beyond reasonable doubt of this because [*summarise defence arguments*].

In deciding whether the Crown has proved this fact, you will apply your common sense to all the facts surrounding the infliction of [*the harm*] to [*the victim*]. But you should appreciate that you are deciding whether to attribute legal responsibility to an accused person for the harm suffered by another person in what is a criminal prosecution. This is not an issue of philosophical or scientific proof. You are deciding a more practical issue, that is, whether an accused person has committed a crime involving the causing of the harm alleged to another person.

The Crown will have proved this fact if you are satisfied beyond reasonable doubt that an [*act/omission*] of the accused substantially or significantly contributed to [*the harm*] allegedly suffered by [*the victim*]. It is not sufficient if the [*act/omission*] was merely coincidental with the suffering of [*the harm*] by [*the victim*] or was insignificantly connected with it. Whether the [*act/omission*] of the accused relied upon by the Crown substantially or significantly contributed to [*the harm*] suffered by [*the victim*] is a matter of fact for you to decide on a common sense basis.

[***If appropriate — where evidence of more than one cause of harm***

There can be more than one cause for [*the harm*] suffered by [*the victim*] arising from the facts before you. You may find [*the harm*] to [*the victim*] was a result of [*list possible causes*]. You do not have to determine what, if any, was the major or direct cause of that harm. It is sufficient that you find beyond reasonable doubt that an [*act/omission*] of the accused remained an operating and substantial cause of [*the harm*] allegedly suffered by [*the victim*] despite the other injuries [*s/he*] suffered. You make this decision applying your common sense but appreciating that you are concerned with the determination of the criminal responsibility of an accused person for that harm.]

[***If appropriate — where it is alleged the victim had a prior existing physical injury***

The accused relies on evidence that at the time of the accused's alleged [*act/omission*] [*the victim*] suffered from a physical condition of which the accused was then unaware … [*identify the evidence relied upon by the accused and any evidence on this issue relied upon by the Crown*].

Even if you find [*the victim*] suffered from such a physical condition and that the accused was not aware of it at the time of the [*act/omission*] alleged against [*him/her*], it would still be open to you to find that the Crown has established beyond reasonable doubt that the [*act/omission*] of the accused caused [*the harm*] allegedly inflicted upon [*the victim*] provided the accused's [*act/omission*] substantially or significantly contributed to that [*harm*]. The law is that, if a person [*does an act/omits to do an act*] such as is alleged here, then [*he/she*] must take or accept the victim as that person was at the time of the [*act/omission*]. That is to say an accused person cannot seek to excuse himself or herself from responsibility for the harm inflicted upon another person only because the harm was due to some physical condition or weaknesses from which the victim suffered at the time and of which the accused person was unaware.

[The next page is 233]

Character

[2-350] Introduction

As to evidence of the character of the accused in criminal proceedings: see Pt 3.8, ss 110, 111, 112 *Evidence Act* 1995.

As to the nature of evidence of character and the duty of a judge to address the jury on the issue: see generally *Melbourne v The Queen* (1999) 198 CLR 1; *Braysich v The Queen* (2011) 243 CLR 434 at [40]–[43]. There is discretion whether or not to give a good character direction having evaluated the probative value of such evidence in relation to both the accused's propensity to commit the crime charged and the accused's credibility.

As to the raising of good character and the Crown seeking leave to rebut good character: see generally: *Criminal Practice and Procedure NSW* annotations at [3-s110.1], [3-s112.1]; *Uniform Evidence Law* annotations at [1.3.9000], [1.3.9020]; *The New Law of Evidence* annotations at [110.2]–[110.13], [112.1]–[112.5].

[2-370] Suggested direction — where evidence of general good character is not contested

[*The accused*] has called evidence to establish that [*he/she*] is a person of good character [*refer to the evidence of good character called*]. That evidence has not been challenged by the Crown. Therefore you should accept the fact that [*the accused*] is a person of good character.

The law provides that a jury is entitled to take evidence of an accused's good character into account in favour of [*him/her*] on the question of whether the Crown has proved [*the accused's*] guilt beyond reasonable doubt. The fact that [*the accused*] is a person of good character is relevant to the likelihood of [*his/her*] having committed the offence alleged. You can take into account [*the accused's*] good character by reasoning that such a person is unlikely to have committed the offence charged by the Crown. Whether you do reason in that way is a matter for you.

[*If the issue of [the accused's] credibility has arisen because, for example, the accused has given evidence and/or has made exculpatory statements in a police record of interview, add*

Further, a jury can use the fact that [*the accused*] is a person of good character to support [*his/her*] credibility. You may reason that a person of good character is less likely to lie or give a false account either in giving evidence before you or in giving an account of the events in answer to questions asked by the police. Whether you reason in that way is a matter for you to determine.]

None of this means, of course, that good character provides [*the accused*] with some kind of defence. It is only one of the many factors which you are to take into account in determining whether you are satisfied beyond reasonable doubt of the guilt of [*the accused*]. What weight you give to the fact that [*the accused*] is a person of good character is completely a matter for you, but you should take that fact into account in the [*way(s)*] I have indicated to you.

[2-390] Suggested direction — where good character is contested by evidence in rebuttal from the Crown

[*The accused*] has called evidence to establish that [*he/she*] is a person of good character [*refer to the evidence of good character called*]. The Crown has, however, led evidence to contest that fact.

[*Refer to the evidence called in rebuttal by the Crown*.]

Counsel for [*the accused*] and counsel for the Crown have placed arguments before you as to whether you should find that [*the accused*] is a person of good character or not based upon this evidence. It is necessary for you, therefore, to have regard to the totality of the evidence relating to the character of [*the accused*] and determine whether you consider that [*the accused*] is a person generally of good character.

If you find that [*the accused*] is a person of good character, you may take that evidence into account in favour of [*the accused*] in the following [*way(s*)] … [*the good character direction in the previous direction should be adapted to the instant case*].

If, on the other hand, you do not accept that [*the accused*] is a person of good character, you cannot use the evidence called by the Crown on this issue to strengthen the Crown case against [*the accused*]. Thus, you are not entitled to reason that because of the evidence called by the Crown on the issue of character that [*the accused*] is more likely to have committed the offence charged against [*him/her*]. The Crown did not call that evidence and does not rely upon that evidence to establish [*the accused's*] guilt of the [*charge/charges*] before you. It was simply led on the issue of [*the accused's*] character and it would be improper of you to use that evidence for any other purpose than on the issue of whether [*the accused*] is a person of good character. If you find after considering the evidence on this issue that [*the accused*] is not a person of good character, you cannot then decide that [*he/she*] is a person of bad character and use that finding against [*the accused*].

Indeed, if you are not satisfied that [*the accused*] is a person of good character, the law requires you to put all considerations of character out of your minds in determining whether you are satisfied beyond reasonable doubt that [*the accused*] is guilty of the crime charged. That is a direction of law that you are bound by your oaths [*or affirmations*] to follow during your deliberations.

[2-410] Suggested direction — character raised by one co-accused

[*Accused A*] has raised the question of [*his/her*] good character, whereas [*Accused B*] has not. I warn you that you should not be prejudiced in any way, or seek to draw any adverse inferences against [*Accused B*] because of that situation.

[*Accused B*] is entitled to conduct [*his/her*] case as [*he/she*] chooses, or might be advised, and the position so far as [*he/she*] is concerned is that [*his/her*] character is simply not in issue.

[2-430] Suggested direction — bad character (where not introduced as evidence of tendency)

You have heard evidence that [*the accused*] has a prior conviction for … [*give details of record*]. This has been given in evidence because … [*state the legal reason for which this evidence was allowed*].

Now there is a danger about which I must warn you, and that is the possibility that such evidence will set off in your minds the following prohibited line of reasoning

> The evidence shows the accused to be a person of bad character; crimes are more often committed by the bad than the good. Therefore the accused is likely to be guilty of the crime with which [*he/she*] is charged.

A jury is never permitted to use such evidence for the purpose of concluding that [*the accused*] person is guilty of the crime with which [*he/she*] is charged simply because [*he/she*] is the sort of person who would be likely to commit that crime.

As I say, that is a prohibited line of reasoning and my firm direction to you is that you must not allow it to enter into your deliberations. The evidence was not led before you for that purpose and the Crown does not rely upon it in that way.

[***Where appropriate, add***

You are, however, free to take that evidence into account, giving it such weight as you think it deserves as evidence showing that [*he/she*] is not a truthful person, when you are assessing the credibility of the evidence [*he/she*] has given in this trial.]

[***When the "bad character evidence" is probative of a fact in issue under the coincidence rule, add***

You may, however, bearing in mind my direction about the prohibited line of reasoning, take that evidence into account in the following way in relation to the issue of … [*state the issue*].]

[The next page is 249]

Circumstantial evidence

[2-500] Introduction

Where the Crown case rests substantially on circumstantial evidence a jury cannot return a guilty verdict unless the Crown has excluded all reasonable hypotheses consistent with innocence: *The Queen v Baden-Clay* (2016) 258 CLR 308 at [46], [50]; *Barca v The Queen* (1975) 133 CLR 82 at 104. For an inference to be reasonable it must rest upon something more than mere conjecture: *The Queen v Baden-Clay* at [47] quoting *Peacock v The King* (1911) 13 CLR 619 at 661; *Gwilliam v R* [2019] NSWCCA 5 at [101], [104]. It is not incumbent on the defence either to establish that some inference other than guilt should be drawn from the evidence or to prove particular facts tending to support such an inference: *The Queen v Baden-Clay* at [62] citing *Barca v The Queen* at 105. It is sufficient that an accused's hypothesis consistent with innocence can be derived reasonably from the evidence in the Crown case. No standard of proof applies: *Wiggins v R* [2020] NSWCCA 256 at [65].

It is the duty of the trial judge to put to the jury with adequate assistance any matters which the jury, upon the evidence, could find for the accused: *The Queen v Baden-Clay* at [62]. This includes directing attention to alternative hypotheses not the subject of evidence but available and consistent with the accepted evidence: *Wiggins* at [87]. The trial judge can invite defence counsel to state any reasonable hypothesis consistent with innocence that may be put to the jury in the summing up: *The Queen v Baden-Clay* at [60].

Where an accused with peculiar knowledge of the facts is silent, "hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused": *The Queen v Baden-Clay* at [50] quoting *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227–228, which was cited with approval in *RPS v The Queen* (2000) 199 CLR 620 at 633.

A direction in relation to a circumstantial Crown case is an amplification of the proposition that the Crown must prove its case beyond reasonable doubt where the evidence relied upon by the Crown may give rise to another reasonable explanation for the facts other than that the accused is guilty of the offence charged: see generally *Shepherd v The Queen* (1990) 170 CLR 573; *R v Keenan* (2009) 236 CLR 397 at [126]. The usual circumstantial case is often referred to as a "strands in a cable case".

In considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence: *The Queen v Baden-Clay* at [47] citing *The Queen v Hillier* (2007) 228 CLR 618 at [46]. The evidence must be considered as a whole and not by a piecemeal approach to each particular circumstance: *The Queen v Hillier* at [46]. Individual items of evidence, on their own inadequate to found a conviction, may take strength from other items: *Davidson v R* (2009) 75 NSWLR 150 at [61].

See also *Criminal Practice and Procedure NSW* at [2-s 161.15]; *Criminal Law (NSW)* at [CLP.580].

[2-510] "Shepherd direction" — "link in the chain case"

Generally, no particular fact or circumstance relied upon in a circumstantial case needs to be proved beyond reasonable doubt. There may, however, be a circumstantial case where one or more of the facts relied upon by the Crown is, or are, so fundamental to the process of reasoning to the guilt of the accused that the fact or facts must be proved beyond reasonable doubt. Such a fact is referred to as an "intermediate fact" being an indispensable link in a chain of reasoning toward an inference of guilt: *Shepherd v The Queen* (1990) 170 CLR 573. There is no settled way of determining what constitutes an indispensable intermediate fact, however Simpson J in *Davidson v R* (2009) 75 NSWLR 150 at [74] said it may be tested by asking whether, in the absence of evidence of that fact, there would nonetheless be a case to go to the jury: *D'Agostino v R* [2019] NSWCCA 259 at [64]. This is often referred to as a "link in a chain case". As to the appropriateness of such a direction, see *Davidson v R* at [8], [14], [18] and *Burrell v R* [2009] NSWCCA 163 at [95]ff. Such a direction should not be given where it would be likely to confuse the jury. It is ultimately for the jury to determine whether the particular fact has such significance.

[2-520] Suggested direction — "strands in a cable case"

It is assumed for the purposes of this direction that the jury have already been directed in terms of the **Onus and standard of proof** at **[3-600]** and as to **Inferences** at **[3-150]**. It is also assumed that the legal ingredients of each charge in the indictment will have been the subject of directions: see **Summing-up format** at **[7-000]**.

Of course, where the Crown is relying upon direct evidence as well as a circumstantial case, the directions will have to acknowledge the existence of the two different types of case and the different approach to direct evidence which can prove the offence if it is accepted beyond reasonable doubt. The following directions are to be adapted if the Crown is intending to prove a particular element or elements of the offence charged by a circumstantial case rather than the guilt of the accused generally.

> As I have already told you, the onus of proving [*the accused's*] guilt in respect of the [*charge(s)*] which it brings against [*the accused*] is on the Crown. It must establish [*his/her*] guilt beyond reasonable doubt. This means that, in respect of each of the essential legal ingredients or elements of the [*charge(s)*], you must be satisfied beyond reasonable doubt that the Crown has established its case before you would be entitled to bring in a verdict of "guilty" of [*that charge/those charges*].
>
> I have also told you that your function as the judges of the facts in this case extends beyond coming to a conclusion as to whether you find that any particular fact has been established by the evidence. Your function also extends to drawing reasonable inferences or conclusions from the facts you find established. "Inference" and "conclusion" mean the same thing. I will use the word "conclusion" to refer to the line of reasoning that the Crown intends to prove by its circumstantial case.
>
> In this case, the Crown relies [*wholly/partly*] … [*if partly, identify which part*] on what is called "circumstantial evidence". In relying upon circumstantial evidence, the Crown asks you to find certain basic facts and then from those facts to draw a conclusion as to the existence of a further fact(s).

Circumstantial evidence can be contrasted with direct evidence. Direct evidence is what a witness says that he or she saw or heard or did. It may be a witness saying that he or she saw an accused person do the act which the Crown says constitutes the alleged crime charged. It may be a video recording showing an accused person committing an act that the Crown relies upon as part of its case or it can be evidence from a witness that he or she heard an accused person admit to committing the crime. In a direct evidence case, if the evidence is accepted beyond reasonable doubt, it is capable of proving the guilt of the accused.

In a circumstantial case, the Crown lacks direct evidence of that kind. This does not mean that a circumstantial case is for that reason weaker than a case based upon direct evidence. Some direct evidence can be of very dubious quality. For example, direct evidence from a witness identifying an accused person as being the offender can be very unreliable because identification evidence can be honest but mistaken.

But in a circumstantial case no individual fact can prove the guilt of the accused. Where the Crown's case depends either wholly or in part on circumstantial evidence, then the jury is asked to reason in a staged approach. The Crown first asks the jury to find certain basic facts established by the evidence. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves they cannot prove the guilt of the accused. The jury is then asked to infer or conclude from a combination of those established facts that a further fact or facts existed. The ultimate fact the Crown asks the jury to find based upon the basic facts is that an accused person is guilty of the offence charged.

A case based on circumstantial evidence may be just as convincing and reliable as a case based upon direct evidence. This will depend upon the number and nature of the basic facts relied upon by the Crown when considered as a whole (not individually or in isolation). And it will depend upon whether all of the evidence leads to an unavoidable conclusion that the Crown has established the guilt of the accused. It is important that you approach a circumstantial case by considering and weighing, as a whole, all the facts you find established by the evidence. It is wrong to consider any particular fact in isolation and ask whether that fact proves the guilt of [*the accused*], or whether there is any explanation for that particular fact or circumstance which is inconsistent with [*the accused's*] guilt.

The correct approach is first to determine what facts you find established by the evidence. As I have already told you, any particular fact to be taken into account by you does not need to be proved beyond reasonable doubt. You then consider all of those facts together as a whole and ask yourself whether you can conclude from those facts that [*the accused*] is guilty of the offence charged. If such a conclusion does not reasonably arise, then the Crown's circumstantial case fails because you are not satisfied of guilt beyond reasonable doubt. Of course, it follows that you must find [*the accused*] not guilty.

But if you find that such a conclusion is a reasonable one to draw based upon a combination of those established facts then, before you can convict [*the accused*], you must determine whether there is any other reasonable conclusion arising from those facts that is inconsistent with the conclusion the Crown says is established. If there is any other reasonable conclusion arising from those facts that is inconsistent with the guilt of [*the accused*], the circumstantial case fails because you are not satisfied beyond reasonable doubt of [*the accused's*] guilt.

You should understand that drawing a conclusion from one set of established facts to find that another fact is proved involves a logical and rational process of reasoning. You must not base your conclusion upon mere speculation, conjecture or supposition.

[*Specify the nature of the Crown's circumstantial case and what fact(s) the Crown asks the jury to conclude or infer from a consideration of the evidence.*]

In order to satisfy you beyond reasonable doubt of [*the accused's*] guilt of the offence, the Crown must first persuade you that the inference or conclusion it relies upon is a reasonable one to draw from the facts that you find established by the evidence. It then must prove to you that the only reasonable inference or conclusion that can be drawn from a consideration of all the established facts viewed as a whole is that [*the accused*] is guilty of the offence. If there is any other reasonable conclusion open on those facts that is inconsistent with the conclusion the Crown asks you to find, then the Crown's circumstantial case has failed.

[*Summarise the Crown's circumstantial case and the defence arguments in reply.*]

[2-530] Suggested direction — "link in a chain case"

If it is a case in which there is a fact or facts essential to a finding of guilt or a finding in favour of the Crown (in respect of an essential matter which it must prove) and it is thought helpful to identify that fact or those facts, then after it/they have been identified, continue as follows:

The Crown asks you to draw an inference or conclusion of guilt [*as to an essential ingredient of the charge*] … [*specify ingredients*] beyond reasonable doubt from the [*fact(s)*] which I have summarised.

It will not be open to you to come to a conclusion favourable to the Crown unless you were, first to find as a fact that … [*refer to the essential intermediate fact*]. As that fact is essential to your coming to a conclusion in favour of the Crown — because the Crown must prove its case beyond reasonable doubt — then you would first have to be satisfied as to the existence of that particular fact beyond reasonable doubt. This particular fact must be proved beyond reasonable doubt not because it alone proves the guilt of [*the accused*] but because it is an essential step in the reasoning that the Crown asks you to follow in order to establish its case. Unless that fact is proved beyond reasonable doubt, the reasoning relied upon by the Crown must fail.

As I have already said, in relation to facts which are not essential to your process of reasoning, you would not consider those facts you find established by the evidence in isolation, but you would have regard to them as a whole.

If you were satisfied beyond reasonable doubt as to the existence of the essential fact, then you can take that fact together with all the other facts you find established and ask whether you can draw an inference or conclusion in favour of the Crown from those facts considered as a whole. If such a conclusion that the Crown asks you to find is not available then the Crown's circumstantial case fails. But it is for you to determine what conclusion, if any, can reasonably be drawn from the established facts, and then consider whether there is any other reasonable explanation for those facts

other than that of [*the accused's*] guilt. If there is no other explanation consistent with all the established facts considered together, then it would be open to you to convict [*the accused*].

If, however, you are not satisfied beyond reasonable doubt as to the essential fact to which I have referred, you must return a verdict of not guilty. You should also find [*the accused*] not guilty if, looking at the established facts as a whole you cannot conclude beyond reasonable doubt that [*he/she*] is guilty. As I have said, this would also be the position if, at the end of your deliberations, you are of the view that some other reasonable explanation exists for those facts other than that [*the accused*] is guilty.

[The next page is 287]

Complicity

[2-700] Introduction

Last reviewed: September 2023

A person may be criminally liable in various ways for a crime physically committed by another person. For the sake of simplicity, that other person is referred to in the suggested directions as "the principal offender", and the person charged with complicity in that crime is referred to as "the accused". See suggested directions on **Conspiracy** at **[5-5300]**; **Manslaughter** at **[5-6200]**ff and **Murder** at **[5-6300]**ff.

For the general law on complicity and the various ways that an accused may be held criminally responsible for the crime committed by the principal offender under State law: see Pt 9 *Crimes Act* 1900 (NSW); *Criminal Practice and Procedure (NSW)*, Pt 6 "Criminal responsibility"; *Criminal Law (NSW)*, annotations to Pt 9 *Crimes Act* at [CA.345.20]ff; New South Wales Law Reform Commission, *Complicity*, Report 129, 2010.

For the law on complicity in Commonwealth offences: see Pt 2.4 *Criminal Code Act* 1995 (Cth), especially ss 11.2 and 11.2A. (Note: s 11.2A commenced on 20 February 2010.) As to the position before: see *Handlen v The Queen* (2011) 245 CLR 282; LexisNexis, *Federal Criminal Law*, annotations to Pt 2.4 *Criminal Code*; Thomson Reuters, *Federal Offences*, annotations to Pt 2.4 *Criminal Code*.

As to proof of the commission of an offence by the principal offender if that person is tried separately: see s 91(1) *Evidence Act* 1995.

Accessorial liability

[2-710] Suggested direction — accessory before the fact

Last reviewed: September 2023

This form of liability applies only where the principal offence is a "serious indictable offence": see ss 346 and 4 *Crimes Act*; see s 351 in relation to "minor indictable offences". The applicable directions will depend upon the nature of the issues before the court, for example, whether the accused accepts that the relevant acts relied upon by the Crown were committed but argues that there was no requisite mental state. There is no need to refer to terms such as "counsel" or "procure" unless those terms have been used in the charge, or raised by the parties; "to counsel" means "to order, advise encourage or persuade"; "to procure" means that the accused intentionally took steps to ensure that the offence was committed by the principal.

The identity of the principal offender is not an element of the offence; nor does it need to be proved the accessory knew the personal identity of the principal offender: *Jaghbir v R* [2023] NSWCCA 175 at [195]–[196]; *King v The Queen* (1986) 161 CLR 423 at 434.

The Crown accepts that the accused was not present when the crime of [*specify offence*] was committed by [*the principal offender*]. But it alleges that the accused is still guilty of that crime because of what they did before the crime was committed by [*the principal*

offender]. This allegation is known in law as being an accessory before the fact to the offence that was later committed by a person I will describe as a principal offender. The Crown must prove beyond reasonable doubt both that [*the principal offender*] committed an offence of a particular type and that the accused was an accessory to that crime before it was committed.

A person is guilty of being an accessory before the fact where at some time before the crime is actually carried out, the person intentionally encourages or assists [*the principal offender*] to commit that crime. Therefore, there must be some act committed by the accessory that was intended to bring about the crime later committed by [*the principal offender*]. The act of an accessory can consist of conduct of encouraging, including advising, urging or persuading the principal offender to commit the crime, or it can be assisting in the preparations for the commission of the crime. It can be both encouraging and assisting [*the principal offender*].

In this case, the Crown alleges, and must prove beyond reasonable doubt, that the accused [*specify the act or acts of encouraging and/or assisting in the preparations relied upon by the Crown*] intending that [*the principal offender*] would commit the crime of [*specified offence*] later. The Crown must prove that by these acts the accused intentionally [*encouraged and/or assisted*] [*the principal offender*] to commit the crime of [*specified offence*].

The fact that a person knew that another person intended to commit a particular crime does not by itself mean that they are guilty of being an accessory before the fact. Nor is it enough that a person merely approves of the commission of the crime but did not make the approval known to [*the principal offender*]. To make out the offence, the Crown must prove beyond reasonable doubt that the accused intentionally encouraged [*the principal offender*] to commit the crime, and/or the accused assisted [*the principal offender*] in the preparations for the commission of the crime. There must be some conduct on the accused's part carried out with the intention to [*encourage and/or assist*] [*the principal offender*] to commit the crime that was later committed. Here, the Crown relies on [*specify the encouragement and/or assistance relied upon by the Crown*].

Before a person can be convicted of being an accessory before the fact, the Crown must prove beyond reasonable doubt that, at the time of the encouragement and/or assistance, the accused knew all the essential facts or circumstances which would make what was later done a crime. This includes the state of mind of the principal offender when those acts are carried out. The accused need not actually know that what they encourage and/or assist [*the principal offender*] to do is in law a crime. The accused does not need to have the legal knowledge that the conduct to be committed by [*the principal offender*] actually amounts to a criminal offence. But the accused must believe that what they are encouraging and/or assisting [*the principal offender*] to do are acts that make up the crime committed.

Here, according to the Crown's allegation, the crime foreseen by the accused was the offence of [*specify offence*]. The Crown must, therefore, prove that, at the time of the alleged [*encouragement and/or assistance*] given to [*the principal offender*], the accused foresaw that [*the principal offender*] would [*set out the elements of the serious indictable offence charged*]. Further, the Crown must prove beyond reasonable doubt that the [*encouragement and/or assistance*] given by the accused was aimed at the commission by [*the principal offender*] of that criminal act.

In summary, before you can convict the accused of being an accessory, the Crown must prove beyond reasonable doubt each of the following:

1. that [*the principal offender*] committed the offence of [*specify offence*], and
2. [*set out the alternative(s) which apply*] that:
   (a) the accused intentionally encouraged [*the principal offender*] to commit that offence, and/or
   (b) the accused intentionally set out to assist [*the principal offender*] in the preparations to commit that offence, and
3. that the crime which [*the principal offender*] committed was one that the accused intended would be committed.

   [*If applicable* or was within the scope (see below) of what they foresaw that [*the principal offender*] would do], and
4. that the accused knew at the time of [*the encouragement and/or assistance*] all the essential facts, both of a physical and mental nature, which made what was to be done by [*the principal offender*] a crime,

   [*and* ***if applicable*** *(see below)*:
5. that the accused, before the crime was committed by [*the principal offender*] neither had a genuine change of mind nor expressly instructed [*the principal offender*] not to commit the offence.**]**

For you to be satisfied that [*the principal offender*] committed the crime, the Crown must prove each of the following facts beyond reasonable doubt.

[*Set out the elements of the specified offence committed by the principal offender.*]

[Where applicable, add involvement of third party

The act intended to encourage the commission of the crime or assist in its preparation may be carried out personally by the accused or through the intervention of a third person acting on the accused's behalf, or a combination of both.**]**

[Where the offence committed differs from that contemplated

On the facts you find proved by the evidence, you might conclude that the crime foreseen by the accused at the time of the alleged [*encouragement and/or assistance*] differed from the crime actually committed by [*the principal offender*]. If that is your finding, then the Crown must prove beyond reasonable doubt that the crime committed by [*the principal offender*] was nevertheless within the scope of the type of conduct that the accused intended to [*encourage and/or assist*] and that it was not something materially different from what the accused foresaw would be done by [*the principal offender*].**]**

[Where there is evidence of a belief that there is no real possibility of the commission of the crime

If the accused at the time of the alleged [*encouragement and/or assistance*] does not honestly believe that the commission of the offence by [*the principal offender*] is a real possibility, the accused is not guilty of being an accessory. The accused claims [*set out the details of the claim that it was believed that there was no real possibility that the crime would be committed*]. It is necessary for the Crown to prove beyond reasonable doubt that the accused did not honestly have this belief.**]**

[Where there is evidence of withdrawal by the accused of encouragement and/or assistance

The [*encouragement and/or assistance*] given to [*the principal offender*] by an accessory must be continuing. The accused has claimed [*set out basis upon which the accused claims to have withdrawn*]. The law provides that an accused may avoid criminal responsibility if:

(a) the accused did in fact withdraw his or her encouragement and/or assistance, and

(b) communicated that fact to the principal offender, and

(c) did everything reasonably possible to prevent the commission of the crime.

In these circumstances, the onus is on the Crown to prove beyond reasonable doubt a negative, that is, it must prove that any one of these facts did not occur. That means that the Crown must prove either that the accused did not in fact withdraw their [*encouragement and/or assistance*] or that the accused did not communicate that fact to [*the principal offender*], or that the accused did not do everything reasonable possible to prevent the commission of the crime.**]**

[2-720] Suggested direction — accessory at the fact – aider and abettor

Last reviewed: September 2023

As to the distinction between an aider and abettor, and a principal: see *R v Stokes* (1990) 51 A Crim R 25. The Crown can prove an offence by proving that the accused was either a principal or an aider and abetter without proving which the accused was: *R v Stokes* at 35; *R v Clough* (1992) 28 NSWLR 396 at 398–400. See *Mann v R* [2016] NSWCCA 10 for the elements of affray for a principal in the second degree or a participant in a joint criminal enterprise.

The Crown does not allege that the accused committed the crime of [*specified offence*]. The Crown's allegation is that the accused was what the law calls an aider and abettor in the commission by the principal offender of that crime.

An aider and abettor is a person who is present at the place where, and at the time when, a crime is committed by another person and who intentionally assists or gives encouragement to that other person to commit that crime.

The fact that a person was simply present at the scene of the crime is not enough to make that person an aider and abettor even if the person knew the crime was to be committed. A bystander at the commission of a crime is not guilty of any offence. The Crown must prove beyond reasonable doubt that the person was present at the scene of the crime intending to assist or encourage the person who commits the crime. A person is guilty as an aider and abettor only if the Crown proves beyond reasonable doubt that the person was present when the crime was committed for the purpose of aiding and assisting the principal offender if required to do so. If the person is present for that purpose, that makes the person an aider and abettor in that crime even if such encouragement or assistance is not actually required.

Before you can convict the accused as being an aider and abettor to the commission of an offence, you must first be satisfied beyond reasonable doubt that [*the principal offender*] committed the crime of [*specify offence*]. [*This fact may, or may not, be an issue at the trial and what is said to the jury will vary accordingly.*]

If the Crown has satisfied you of that fact, you must then consider whether, at the time when that crime was being committed, the accused was present, intending to assist or to encourage [*the principal offender*] in its commission.

Before you could find that the accused intentionally assisted or encouraged [*the principal offender*] in the commission of the crime, you must be satisfied beyond reasonable doubt that the accused knew all the essential facts or circumstances that gave rise to the commission of the crime by [*the principal offender*]. The accused does not have to know that what is being done by [*the principal offender*] is in law a crime. The accused does not need to have legal knowledge that the conduct being carried out by [*the principal offender*] actually amounts to a criminal offence. But they must know that [*the principal offender*] intends to commit all the acts that amount to a crime with the state of mind that makes those acts criminal.

The Crown relies on the following matters in support of its allegation that the accused gave assistance or encouragement to [*the principal offender*] [*set out the matters on which the Crown relies*].

In short then, to establish that the accused is guilty of the offence charged on the basis that the accused was an aider and abettor, the Crown must prove beyond reasonable doubt each of the following:

1. the commission of the crime by [*the principal offender*]
2. the presence of the accused at the scene of the crime when the crime was committed
3. the accused's knowledge of all the essential facts or circumstances that must be proved for the commission of the offence by [*the principal offender*]
4. that with that knowledge the accused intentionally assisted or encouraged [*the principal offender*] to commit that crime.

For you to be satisfied that [*the principal offender*] committed the crime, the Crown must prove each of the following facts beyond reasonable doubt [*set out the elements of the crime committed by the principal offender*].

[2-730] Suggested direction — accessory after the fact

Last reviewed: September 2023

As to accessory after the fact, see s 347 *Crimes Act* 1900 which makes provision for how the accessory may be tried. Sections 348–350 contain provisions relating to punishment, depending upon the nature of the principal offence. The offence of being an accessory after the fact can be committed by rendering assistance either to the principal offender or to a person who aids and abets the principal. The prosecution must establish the accused had knowledge of the precise crime committed by a principal offender: *Gall v R* [2015] NSWCCA 69 at [164] (confirming a submission at [155]), [249]–[251], [257]).

The Crown does not allege that the accused was involved in the commission of the crime carried out by [*the principal offender*].

The charge brought against the accused is that they assisted [*the principal offender*] after they committed the crime of [*nature of crime*] and gave that assistance with knowledge that [*the principal offender*] had committed that crime.

Where a person knowingly assists an offender after a crime has been committed, the person is an accessory after the fact to the crime committed by the other person. This allegation is known in law as being an accessory after the fact to the offence that was earlier committed by a person who I will describe as a principal offender. A charge that a person is an accessory after the fact to a crime committed by another is an allegation that the person giving that assistance has themself committed a crime. It is a separate and distinct offence from that committed by the principal offender but it is dependent upon the fact that the principal offender committed a specific crime.

Here, the Crown must prove beyond reasonable doubt both the commission of the crime of [*insert crime*] by [*the principal offender*] and that the accused assisted [*the principal offender*] knowing that the crime had been committed. A person is an accessory after the fact to the commission of a crime if, knowing that the crime has been committed, the person assists the principal offender. It could be, for example, by disposing of the proceeds of the crime, or by doing an act intending to hinder the arrest, trial or punishment of the principal offender.

In this case, the Crown alleges that the accused assisted [*the principal offender*] by [*state allegation by prosecution*]. The Crown says this was done with the purpose of [*specify the alleged reason for the assistance rendered by the accused*]. To be guilty of being an accessory after the fact, the Crown must also prove beyond reasonable doubt that the accused knew [*the principal offender*] acted in a way and with a particular state of mind that gives rise to a criminal offence. The accused does not need to have the legal knowledge that those facts amount to a crime, but they must know or truly believe that the facts and circumstances giving rise to the specific offence alleged have occurred. [*It may be necessary to set out the evidence upon which the Crown relies to establish the knowledge or belief of the accused that an offence has been committed depending upon the issues raised at the trial.*]

In summary, before you can convict the accused of the offence of being an accessory after the fact to the commission of a crime, the Crown must satisfy you beyond reasonable doubt of each of the following essential facts:

1. that the crime of [*specify offence*] was committed by [*the principal offender*]
2. that the accused intentionally assisted [*the principal offender*]
3. that at the time of that assistance, the accused was aware of all the essential facts and circumstances that give rise to the precise offence committed by the [*the principal offender*]
4. that the accused with that knowledge, intentionally assisted [*the principal offender*] by [*specify the allegation and particularise concisely*]
5. that the accused gave that assistance so that [*the principal offender*] could escape arrest, trial or punishment for the offence committed by them.

[Where applicable — explanation of belief and knowledge

For the purposes of the offence with which the accused is charged, a well-founded belief is the same as knowledge. A person may know that an event has occurred even

though they have not witnessed the occurrence of that event personally. A person can accept what they are told by some person about the occurrence of an event and, therefore, believe that the event has taken place. It will often be the case in a charge of accessory after the fact that the accused is said to have known of the commission of a crime simply on the basis of what they are told by the principal offender or some other person who witnessed the commission of the crime. The accused may come to know that a crime has been committed by the principal offender from inferences that the accused has drawn from facts which they believe have occurred.**]**

In the present case, the Crown must prove that the accused did [*set out the allegation of assistance*] knowing or believing that the crime of [*set out the alleged crime committed by the principal offender*] had been committed by [*the principal offender*] and gave assistance in the way the Crown alleges with the intention of assisting [*the principal offender*] to escape [*arrest, trial or punishment*] for the crime committed by them.

Joint criminal enterprise and common purpose

[2-740] Joint criminal liability

Last reviewed: September 2023

In the usual case it will be necessary for the judge to instruct the jury in relation to the elements of the offence and, where appropriate, the principles governing accessorial or joint enterprise liability: *Huynh v The Queen* [2013] HCA 6 at [31]. Joint criminal liability between two or more persons for a single crime may be established by the Crown in different ways:

(a) where the crime charged is the very crime that each of the participants agreed to commit: *Gillard v The Queen* (2003) 219 CLR 1 at [109]–[110]

(b) where the crime committed fell within the scope of the joint criminal enterprise agreed upon as a possible incident in carrying out the offence the subject of the joint criminal enterprise: see *McAuliffe v The Queen* (1995) 183 CLR 108 at 114–115 affirmed in *Miller v The Queen* (2016) 259 CLR 380 at [29]; *Clayton v The Queen* [2006] HCA 58 at [17]

(c) where the crime committed was one that the accused foresaw might have been committed during the commission of the joint criminal enterprise although that crime was outside the scope of the joint criminal enterprise: see *McAuliffe v The Queen* at 115–118 affirmed in *Miller v The Queen* at [10], [51], [135], [148].

Joint criminal liability arises from the making of the agreement (tacit or express) and the offender's participation in its execution: *Huynh v The Queen* at [37]. A person participates in a joint enterprise by being present when the agreed crime is committed: *Huynh v The Queen* at [38]; *Youkhana v R* [2015] NSWCCA 41 at [13]. Although presence at the actual commission of the crime is sufficient, it is not necessary if the offender participated in some other way in furtherance of the enterprise: *Dickson v R* (2017) 94 NSWLR 476 at [47]–[48]; *Sever v R* [2010] NSWCCA 135 at [146]; *Osland v The Queen* (1998) 197 CLR 316 at [27]. If participation by the accused is not in issue a specific direction explaining the concept may not be required: *Huynh v The Queen* at [32]–[33].

In *IL v The Queen* (2017) 262 CLR 268 there was disagreement as to what the High Court had held in *Osland v The Queen* (1998) 197 CLR 316 (see Special Bulletin 33 which explains *IL's* case). Bell and Nettle JJ at [65] opined that in a joint criminal enterprise the only acts committed by one participant that are attributed to another participant are those acts that comprise the actus reus of the commission of a crime. Kiefel CJ, Keane and Edelman JJ did not agree: "… joint criminal liability involves the attribution of acts. The attribution of acts means that one person will be personally responsible for the acts of another". Gaegler J at [106] agreed with Kiefel CJ, Keane and Edelman JJ. See also Gordon J at [152]. The direction below follows the prevailing view in *IL's* case.

In *Miller v The Queen*, the plurality at [6]–[45] reviewed the history of the doctrine of extended joint criminal enterprise, including the UK decision of *R v Jogee* [2016] 2 WLR 681, and the current law as stated in *McAuliffe v The Queen* at 114–115. The High Court declined to alter the law following *R v Jogee*. If any change to the law is to be made, it should be made by the Parliament: *Miller v The Queen* at [41].

The concept of extended common purpose only arises where the offence committed is different from the offence which is the subject of the joint criminal enterprise (referred to as the foundational offence): see *May v R* [2012] NSWCCA 111 at [249]–[252].

For the purposes of the following suggested directions on extended criminal liability, (b) and (c) above are merged because the distinction may be confusing to a jury. Whether the crime committed is foreseen as a possible incident in carrying out the joint criminal enterprise, (b) above, or foreseen as a possible consequence of the commission of the joint criminal enterprise, (c) above, is not so significant a distinction as to require separate directions to meet those particular factual situations. The accused is criminally liable for the commission of the further offence, if they foresee the possibility of it being committed during the course of carrying out the joint criminal exercise no matter what the reason is for that foresight. The suggested directions use the term "additional crime" rather than "incidental crime" or "consequential crime" to avoid the distinction which seems to be of theoretical more than of practical significance. It may be that, where the additional offence is viewed as incidental to the commission of the joint criminal enterprise, it will be more easily proved that the commission of that offence was foreseen as a possibility by a particular participant. The suggested directions are based on a scenario where the crime, the subject of the joint enterprise is committed *and* an additional crime is also committed.

[2-750] Suggested direction — (a) joint criminal enterprise

Last reviewed: September 2023

The law is that where two or more persons carry out a joint criminal enterprise, that is an agreement to carry out a particular criminal activity, each is held to be criminally responsible for the acts of another participant in carrying out that enterprise or activity. This is so regardless of the particular role played in that enterprise by any particular participant. The Crown must establish both the existence of a joint criminal enterprise and the participation in it by the accused.

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime.

The agreement need not be expressed in words, and its existence may be inferred from all the facts and circumstances surrounding the commission of the offence that are found proved on the evidence.

The agreement need not have been reached at any particular point in time before the crime is committed, provided that at the time of the commission of the crime the participants have agreed that the crime should be committed by any one or all of them.

The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish that at some point in time an agreement has been reached between them that the crime should be committed. For example, if two people are at the very same time punching a third person, a jury could infer or conclude that they had agreed to assault that person.

It does not matter whether the agreed crime is committed by only one or some of the participants in the joint criminal enterprise, or whether they all played an active part in committing that crime. All of the participants in the enterprise are equally guilty of committing the crime regardless of the actual part played by each in its commission.

The Crown must prove beyond reasonable doubt that the crime which was the subject of the joint agreement was in fact committed. It therefore must prove beyond reasonable doubt that each of the essential facts or ingredients, which make up that crime, was committed, regardless of who actually committed them [*specify the ingredients of the crime charged*]. Further in respect of a particular accused, the Crown must prove beyond reasonable doubt that he/she or they was a participant in the commission of that crime as part of a joint criminal enterprise with one or more persons.

Note: *It is essential to identify the elements of the offence the subject of the joint criminal enterprise and to direct the jury that the participants agreed to do all the acts with the relevant intention necessary to establish the offence: TWL v R [2012] NSWCCA 57 at [36].*

[The following example may be given if thought appropriate in assisting the jury to understand the concept of a joint criminal enterprise. Care should be taken in not making the example more serious than the actual offence before the court. The following is an example of a possible scenario that might appropriately be given to the jury.]

You may take the following as an example of the operation of the law relating to joint criminal enterprise. Suppose that three people are driving in the same vehicle and they see a house with a lot of newspapers at the gate. One says to the others, "Let's check out this place". The car pulls up, two of them get out and one of them stays in the car behind the steering wheel with the engine running, while the other two go to the front door. One of the two persons breaks the glass panel on the outside of the door, places a hand through the panel, unlatching the door and opening it. The other goes inside and collects some valuables and comes out. Meanwhile, the one who opened the door has returned to the vehicle without entering the house. The question arises whether the three of them have by their acts and intentions committed the offence of breaking into the house and stealing objects from it.

Only one of them broke into the house (being the person who broke the glass panel and put a hand inside to open the door). Only one of them entered the house and stole something (that is the one who removed the valuables from the house) and the

third person did neither of those things. But the law provides that, if a jury were satisfied that by their actions (rather than merely by their words) all three had reached an understanding or arrangement which amounted to an agreement between them to commit the crime of break, enter and steal from a house, each of the three is criminally responsible for the acts of the others. On this example all three could be found guilty of breaking, entering and stealing from the house regardless of what each actually did.

[2-760] Suggested direction — (b) and (c) extended common purpose

Last reviewed: September 2023

Note: The suggested direction is based on a scenario where the crime the subject of the joint enterprise is committed and an additional crime is also committed.

The law is that where two or more persons carry out a joint criminal enterprise, that is an agreement to carry out a particular criminal activity, each is responsible for the acts of another participant in carrying out that enterprise or activity. This is so regardless of the role taken by a particular participant. The Crown must establish both the existence of a joint criminal enterprise and the participation in it by the accused.

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The agreement need not be expressed in words, and its existence may be inferred from all the facts and circumstances surrounding the commission of the offence that are found proved on the evidence.

The agreement need not have been reached at any particular time before the crime is committed, provided that at the time of the commission of the crime, the participants have agreed that the crime should be committed by any one or all of them.

The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish that at some point in time an agreement has been reached between them that the crime should be committed. For example, if two people are at the very same time punching a third person, a jury could infer or conclude that they had agreed to assault that person.

It does not matter whether the agreed crime is committed by only one or some of the participants in the joint criminal enterprise, or whether they all played an active part in committing that crime. All of the participants in the enterprise are equally guilty of committing the crime regardless of the actual part played by each in its commission.

The Crown must prove beyond reasonable doubt that the crime which was the subject of the joint agreement was in fact committed. It therefore must prove beyond reasonable doubt that each of the essential facts or ingredients, which make up that crime, was committed, regardless of who actually committed them. Further, in respect of a particular accused, the Crown must prove beyond reasonable doubt that he/she or they was a participant in the commission of that crime as part of a joint criminal enterprise with one or more persons.

But it may be that in carrying out the joint criminal enterprise, one of the participants commits an additional offence that was not the crime that they had agreed to commit but

was one that at least one or some of the other participants foresaw might be committed. In such a case, not only would each of those participants be guilty of the offence that they agreed to commit, but those participants who foresaw the possibility of the commission of the additional offence would also be guilty of the additional offence.

Here, the Crown alleges the accused was a participant in a joint criminal enterprise to commit the offence of [*insert offence alleged by the Crown*] and they foresaw that the additional crime of [*insert additional offence alleged by the Crown*] might be committed. So for the accused to be guilty of the additional crime, the Crown must prove beyond reasonable doubt that they foresaw the possibility that this crime might be committed in carrying out the joint criminal enterprise. The Crown alleges that the additional crime committed is [*insert alleged offence*].

Note: *It is essential to identify the elements of the additional offence and to direct the jury that the accused must foresee the other participant or participants might do all the acts with the relevant intention necessary to establish the commission of the additional offence: McAuliffe v The Queen (1995) 183 CLR 108 at 114–115. This part of the direction will vary according to the facts.*

[An example of the commission of an additional crime outside the scope of the joint enterprise might be as given to the jury if appropriate as follows.]

As an example of the principle that I have just explained to you, let us suppose that three people plan to rob a bank. The plan is that one person will drive the getaway car, another is to stand guard at the doorway to warn of any approach by the police and assist in their getaway from the bank, and the third is to enter the bank itself with a sawn-off shotgun. It is the third person's job to use the shotgun to threaten the teller into handing over the money. That is, the crime to which they have jointly agreed is to be committed by them carrying out their assigned roles, and all three could be found guilty of the crime of armed robbery on the bank staff. The person who drives the car is just as guilty as the one to whom the money is handed over by the teller. You may think that that is only common sense.

The three members of this joint criminal enterprise accordingly reach the bank: one is sitting in the get-away vehicle, another is keeping guard at the door and the third is armed with the gun and inside the bank. However, suppose that things do not go as planned and the teller reaches over to press an alarm button despite a warning not to do so. As a result, the robber in the bank deliberately fires the gun at the teller to stop the alarm being sounded and wounds the teller.

At the time this is happening, of course, the robber in the bank is alone and has no opportunity to consult with the other two persons as to what should be done as a result of the actions of the teller. The other two have no control over what the third person does. The question may arise as to whether the other two persons are criminally responsible for the more serious crime that has been committed by the third man being an armed robbery with wounding.

First of all, as I have explained, each of the three is guilty of the crime which was the immediate subject of their original agreement: that is the armed robbery of the bank. That is because everyone who embarks upon a joint criminal enterprise is criminally responsible for all of the acts done by each of them in the execution or carrying out of the agreed crime.

Because things do not always turn out precisely as planned, the law makes each participant in the joint enterprise criminally responsible, not only for the acts done as part of that enterprise, but also for any additional acts that the participant foresees as possibly being committed in carrying out the joint criminal enterprise. If any one of the participants does an act which they all foresaw may possibly be done in the course of committing the agreed crime, then all of them are criminally responsible for that act. Thus, to take the example which I have already given you, if the person guarding the door pushed a bystander out of the way to prevent that person from interfering with their escape after the armed robbery was complete, all three would be guilty of that assault as well as of the armed robbery, if the possibility that the person on guard may have to do something like that was, obviously enough, originally foreseen by them in carrying out the robbery.

On the other hand, and to take perhaps an extreme example, if the person guarding the door (unknown to the others) had a hand grenade, removed the pin and lobbed it inside the bank to prevent those inside from interfering with their escape, you might think that this is hardly an act that the others would foresee as possibly happening during the robbery, and, therefore, they would not be guilty of any offence resulting from the injuries caused by the explosion. This person's act of throwing a grenade would not have been foreseen as incidental to or as a consequence of the execution of the joint criminal enterprise to carry out an armed robbery

In relation to the wounding of the teller by the person with the sawn-off shotgun however, the question is whether the discharge of the weapon was foreseen by the others as a possible occurrence in carrying out the armed robbery. That question is answered by a consideration of what a particular participant knew about the circumstances in which the robbery was to take place. If, for example, the other members of the joint criminal enterprise were aware that the robber in the bank would be armed with a loaded weapon, a jury might conclude that in those circumstances the agreement to threaten the teller with the weapon might possibly include the commission of an additional crime being that in carrying out that threat the weapon would be fired, if the teller resisted, and some person may be injured as a result. The jury in such a case would be entitled to convict all three participants in the armed robbery of the more serious crime of armed robbery with wounding, even though the wounding was not part of the agreement and even though only one of them was actually involved in the wounding. Such a conviction would follow if the Crown proves beyond reasonable doubt that each of the participants foresaw the possibility of the shotgun being fired and injuring someone as a result.

[***If appropriate*** *— where the Crown alleges different liability between participants, that is, there is different evidence as to each participant's knowledge of the events surrounding the enterprise which the Crown alleges leads to different conclusions as to the foreseeability of the additional offence, add*]:

Let us now consider a further situation, one where not everyone engaged in the joint criminal enterprise foresaw the possibility that the shotgun would be fired injuring someone in the bank. Let us assume, for example, that there had been a discussion amongst the three participants to the joint enterprise beforehand as to whether the gun should be loaded, and there had been a clear agreement reached between them that it would be unloaded. If, notwithstanding this agreement and unbeknown to the others, the man with the shotgun had loaded it, then the others would not be criminally

responsible for any injury caused by the discharge of the weapon during the robbery. This is because the discharge of the weapon was not part of the agreement and could not have been foreseen by the others as a possible incident or consequence occurring in the course of carrying out the robbery.

But let us now assume another scenario. Suppose that one of the other two participants, let us say the driver of the getaway car, knew that the person who was to carry the shotgun was unhappy with the agreement that the gun should not be loaded, that this person had access to ammunition and that he/she or they was someone who could not always be trusted to keep his or her word. In such a case, a jury might find it proved beyond reasonable doubt that despite the agreement reached that the gun should not be loaded, the driver foresaw that the person armed with the gun might load it and so foresaw that there was a possibility that the gun would be discharged during the robbery injuring some person in the bank. If the jury found beyond reasonable doubt that the driver had this possibility in mind and yet nevertheless continued to take part in the armed robbery, they could convict the driver of the more serious crime of armed robbery with wounding, even though there was a clear agreement between the parties that the gun was not to be loaded, and even though the third member of the group had no idea that the gun might be loaded. In such a case, the jury might convict the robber and the driver of the more serious offence involving the wounding but not the third member.

[2-770] Suggested direction — application of joint criminal enterprise to constructive murder

Last reviewed: September 2023

As to the liability of a participant in a joint enterprise for murder based upon the commission of an offence punishable by imprisonment for life or 25 years (constructive murder), see *R v Sharah* (1992) 30 NSWLR 292 at 297–298. The directions for constructive murder must address both the liability of the accused for the offence punishable by imprisonment for life or 25 years (the foundational offence) and the liability of the accused for murder based upon his or her liability for the foundational offence: see *R v Thurston* [2004] NSWCCA 98 at [3]–[9] and *Batcheldor v R* [2014] NSWCCA 252 at [80]–[82] where the judge failed to direct the jury as to the appellant's liability for the foundational offence of specially aggravated kidnapping. The judge must direct the jury that it is for them to:

(a) identify the act causing death; and

(b) decide whether the act causing death was voluntary or accidental: *Penza v R* [2013] NSWCCA 21 at [167].

See further discussion in **Voluntary act of the accused** at **[4-350]**. It has been noted that the decision in *R v Sharah*, introduced an element of knowledge on the part of the accomplice of the possibility of the discharge of the weapon, even though that knowledge was not a requirement under the common law: see the NSW Law Reform Commission, *Complicity*, Report 129, 2010 at p 148 and RA Hulme J's discussion in *Batcheldor v R* at [128]–[132].

In *IL v The Queen* (2017) 262 CLR 268, some of the Justices passed comment about *R v Sharah*. Gordon J opined at [166] that constructive murder under s 18(1)(a)

Crimes Act 1900 did not require any additional foresight on the part of the accomplice; Bell and Nettle JJ noted at [89] that although *R v Sharah* has been "questioned" by the NSWCCA resolution of the issue can await another day; Gageler J at [102] said *R v Sharah* was not challenged (in *IL v The Queen*) but it is not inconsistent with Jordan CJ's explanation of felony murder in *R v Surridge* (1942) 42 SR (NSW) 278 at 282. Kiefel CJ, Keane and Edelman JJ in *IL v The Queen* did not comment on *R v Sharah*.

In *R v Sharah*, the foundational offence relied upon by the Crown was armed robbery with wounding. A suggested direction based upon *R v Sharah* for such a case follows.

Of course, the particular direction given will have to be adapted to the particular foundational crime upon which the charge of murder is based and the peculiar facts of the particular case before the jury. The person actually causing the death of the victim of the murder charge is described as "the principal offender". In *R v Sharah*, the victim of the foundational offence was different to the victim of the murder.

The Crown must first prove, beyond reasonable doubt, that the accused is criminally liable for the foundational offence of armed robbery with wounding by proving each of the following:

1. that there was a joint enterprise between the accused and [*the principal offender*] to rob [*the victim*] while [*the principal offender*] was, to the knowledge of the accused, armed with an offensive weapon, namely [*describe weapon*] (proof of these facts gives rise to criminal liability of the accused for the offence of armed robbery), and
2. that during the course of the armed robbery [*the principal offender*] wounded [*the victim*], and
3. that the accused foresaw that, in carrying out the joint criminal enterprise of armed robbery, such a wounding might occur (proof of this fact gives rise to criminal liability of the accused for armed robbery with wounding).

In order to prove that the accused is liable for murder, the Crown must further prove beyond reasonable doubt:

1. that during the course of commission of the offence of armed robbery with wounding, or immediately after the commission of that offence, [*the principal offender*] discharged the gun, causing the death of [*the deceased*], and
2. the discharge of the gun by [*the principal offender*] during, or immediately after, the armed robbery with wounding of [*the victim*] was a possibility which the accused had in mind when agreeing to participate in the armed robbery. It does not matter whether the gun was fired intentionally or whether it was necessary for the gun to be fired for the purpose of carrying out the armed robbery.

[2-780] Notes

Last reviewed: September 2023

1. The application of the doctrine of extended joint criminal enterprise (or extended common purpose) to constructive murder was considered in the South Australian context in *Mitchell v The King* [2023] HCA 5. It was held that combining the doctrine with the statutory provision of constructive murder (s 12A of the *Criminal*

Law Consolidation Act 1935 (SA)) was impermissible as it amounted to creating a new doctrine of "constructive, constructive murder", where no such doctrine has ever existed. Section 12A is drafted in somewhat similar terms to s 18 of the *Crimes Act* 1900 (NSW).

[2-790] Suggested direction — withdrawal from the joint criminal enterprise

Last reviewed: September 2023

As to withdrawal from a joint criminal enterprise, see *R v Tietie* (1988) 34 A Crim R 438 at 445–447 applying *White v Ridley* (1978) 140 CLR 342 at 348–351. It is a question of fact to be decided by the jury whether a co-accused has withdrawn from a criminal enterprise: *Tierney v R* [2016] NSWCCA 144 at [19]. The jury must be satisfied beyond reasonable doubt that the accused did not intend to withdraw or did not take reasonable steps to prevent the co-accused from committing the crime: *Tierney v R* at [19]. There is no obligation to direct jury specifically in the terms of *R v Sully* (2012) 112 SASR 157: *Tierney v R* at [19].

A person who is part of a joint criminal enterprise to commit a particular crime may withdraw from that enterprise. If they do withdraw, they cease to be criminally responsible for that crime if the other members of the enterprise go on to commit the offence after the withdrawal.

To withdraw from a joint criminal enterprise to commit a crime, a person must take such action as they can reasonably perform to undo the effect of their previous encouragement or participation in the joint enterprise and thereby to prevent the commission of the crime. What is reasonable depends upon all the circumstances.

[Where applicable, add

Usually, this will involve, if it is reasonable and practicable to do so, the person communicating the fact of their withdrawal, verbally or otherwise, to the other members of the joint enterprise, in sufficient time before the crime is committed, trying to persuade the other members not to proceed, and notifying the police or the victim of the intended crime.]

[Where applicable, add

Where an accused decides to withdraw at the last minute, that is, immediately before the offence is committed, they must take all reasonable and practicable steps to prevent the commission of the crime and to frustrate the joint enterprise of which they had been a member. Otherwise they may have left it too late to withdraw. The example which is often given is that, if the enterprise is to dynamite a building, it is not enough for a member of the enterprise simply to declare an intent to withdraw from the enterprise. If the fuse has been lit, the person must attempt to put out the fuse.]

There is no onus placed upon the accused to establish that they withdrew from the joint criminal enterprise. As part of its overall onus of proof, the Crown must prove beyond reasonable doubt that the accused did not withdraw. It will do so by proving beyond reasonable doubt that the accused either:

1. did not intend to withdraw from the joint enterprise, or
2. if they did so intend, the accused did not take such action as they reasonably could to prevent the others from proceeding to commit the crime.

It is sufficient if the Crown has proved one of these alternatives. Unless the accused did what they reasonably could to prevent the commission of the crime, the accused remains criminally responsible for that crime even though the accused took no further part. It is sufficient if the action taken by the accused was capable of being effective, even though the action failed to frustrate the commission of the crime.

[The next page is 319]

Consciousness of guilt, lies and flight

[2-950] Introduction

Last reviewed: September 2023

The Crown can rely upon the accused's post-offence conduct as evidence of a consciousness of guilt. This will usually be in the form of a lie (either in or out of court) or flight (absconding to avoid arrest or trial). But it can include other forms of conduct: *McKey v R* [2012] NSWCCA 1; see *Pollard v R* (2011) 31 VR 416, where the evidence of the accused hiding his mobile phone was admitted on this basis. Such evidence will generally be part of a Crown's circumstantial case or evidence supporting direct evidence such as an admission.

[2-953] Alternative charges and included offences

Last reviewed: September 2023

Difficulties can arise in the case of alternative charges. Generally it will be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them rather than to some other culpable act: *The Queen v Baden-Clay* (2016) 258 CLR 308 at [73] approving *R v White* [1998] 2 SCR 72. Where there is an alternative charge, whether on the indictment or not, an assessment needs to be made as to whether consciousness of guilt reasoning can serve to prove one or the other: *R v Ciantar* (2006) 16 VR 26 at [40]–[42], [64]–[68], [77]–[78], [81]–[87]. The judge should ask the Crown Prosecutor how the Crown seeks to use the accused's post-offence conduct to show a consciousness of guilt of the alternative charge.

The issue is determined in light of the specific facts of the case — there are no "… rigid prescriptive rules as to when and in what precise terms an *Edwards*-type direction should be given …": *Zoneff v The Queen* (2000) 200 CLR 234 at [15]. In *The Queen v Baden-Clay*, the issue arose as to whether post-offence conduct could be used to specifically prove the accused's murderous intent. The court held that there is no hard and fast rule that evidence of post-offence concealment and lies is always intractably neutral as between murder and manslaughter and that the issue will turn on the nature of the evidence in question and its relevance to the real issue in dispute: at [74]. In some cases, an accused's post-offence conduct may go to such lengths in concealing or distancing themselves from the death as to provide the jury with a basis to conclude the accused had committed an extremely serious crime and warrant a conclusion beyond reasonable doubt as to the accused's responsibility for the death and the concurrent existence of the intent necessary for murder: at [74]. In *Lane v R* [2013] NSWCCA 317 at [111] (cited with approval in *The Queen v Baden-Clay* at [75]), the court held that the jury were entitled to take the post-offence conduct of the accused into account as evidencing consciousness of guilt of murder.

In some cases, post offence conduct may be relevant to negative a defence such as self-defence or provocation: *Gall v R* [2015] NSWCCA 69 at [92]–[93]. In other cases, it may only prove the accused committed the act in question but say nothing about the accused's state of mind: *R v Ciantar* at [40]–[42], [64]–[68], [77]–[78], [81]–[87]. Where the act is admitted and the only issue in dispute is the accused's state of mind,

the jury may need to be warned about misusing post-offence conduct as evidence of a consciousness of guilt: *SW v R* [2013] NSWCCA 103 at [62]–[65]. In *SW v R*, some post-offence conduct was used to prove the mental state for murder while other conduct was not: at [62]–[63].

[2-955] Lies

Last reviewed: September 2023

Care is necessary when the issue of lies arises: *R v Ray* (2003) 57 NSWLR 616 at [98]; *Healey v R* [2008] NSWCCA 229 at [43]. It is important to distinguish between lies being used to attack the credit of the accused and lies being used as evidence of guilt, and the Crown should make it clear what use it is seeking to make of an allegation that the accused lied: *R v GJH* [2001] NSWCCA 128. Where the issue is one of credit, the jury should not usually be directed as to consciousness of guilt: see *Zoneff v The Queen* (2000) 200 CLR 234 at [14]–[17]. It is not always necessary for a judge to give a direction on lies: *Dhanhoa v The Queen* (2003) 217 CLR 1 at [34]; *Ahmed v R* [2012] NSWCCA 260 at [44]–[45]; *KJS v R* [2013] NSWCCA 132 at [56]–[57]. It may be necessary for the judge to warn the jury against using lies as evidence of guilt because of the conduct of the Crown in cross-examination or addresses: *McKey v R* [2012] NSWCCA 1 at [26]–[35]. In *AB v R* [2023] NSWCCA 165 the jury were not directed regarding consciousness of guilt reasoning as the Crown denied reliance upon it in its case. However, the Crown employed such reasoning to rebut *doli incapax* in its closing address and the absence of directions caused the trial to miscarry. Generally, the Crown will not have to prove the evidence beyond reasonable doubt unless the lie is being relied upon as an implied admission: *Edwards v The Queen* (1993) 178 CLR 193 at 201, 210–211; *R v Adam* [1999] NSWCCA 189 at [55].

As to the use of lies to prove a consciousness of guilt: see generally: *Edwards v The Queen* at 210 and *R v Lane* [2011] NSWCCA 157 where the lies could be used for that purpose and *R v ST* (1997) 92 A Crim R 390 where they could not.

See generally *Criminal Practice and Procedure NSW* at [2-s 161.62].

[2-960] Flight

Last reviewed: September 2023

Evidence that the accused fled from a place to avoid arrest or trial can be admitted as evidence of consciousness of guilt in a similar way to the use of a lie. The suggested directions at **[2-965]** concerning the use of lies can be adapted. The most significant direction is that the jury must be satisfied that the accused fled because of a consciousness of guilt of the offence for which they stand charged and not for some other unrelated reason.

As to the admission of evidence of flight: see generally *R v Adam* [2004] NSWCCA 52 (where the evidence was wrongly admitted) but compare *Quinlan v R* [2006] NSWCCA 284 and *Steer v R* [2008] NSWCCA 295 (where the evidence was correctly admitted).

As to the need for a direction to meet a specific case: see for example, *Steer v R*.

See generally *Criminal Practice and Procedure NSW* at [2-s 161.62].

[2-965] Suggested direction — lies used as evidence of a consciousness of guilt

Last reviewed: September 2023

The direction should be tailored to the circumstances of each case. It is essential that the alleged lie (or lies) is precisely identified in the summing-up. The suggested direction may need to be adapted where there are alternative charges: *SW v R* [2013] NSWCCA 103 and *The Queen v Baden-Clay* (2016) 258 CLR 308 at [73]–[74].

The next direction I must give you concerns the evidence of [*the accused*] saying [*set out evidence of accused's statement that the Crown alleges amounts to a lie*]. The Crown says that this was a lie because [*set out evidence that is capable of establishing that the statement was a lie*].

First, you must be clear about what a lie is. A lie is to say something untrue, knowing at the time of making the statement that it is untrue. If a person says something which is untrue, but does not realise at the time that it is untrue, then that is not a lie. The person is simply mistaken or perhaps confused. Even if the person later comes to realise that what they said was incorrect, that does not transform the statement into a lie. To be a lie, the person must say something that the person knows, at the time of making the statement, is untrue.

If you find that [*the accused*] made the statement I have just referred to, and you find it was a lie, then I must give you a direction about the care with which you must approach the task of deciding what significance, if any, it has. You may take this lie into account as evidence of [*the accused's*] guilt but you can only do that if you find two further things which I will refer to shortly. When I say you can take it into account as evidence of [*the accused's*] guilt, I am not suggesting that it could prove their guilt on its own. What I mean is that it can be considered along with all of the other facts that the Crown relies upon and which you find established on the evidence in considering whether the Crown has proved its case beyond reasonable doubt. The Crown does not suggest that if you found [*the accused*] told a lie that this finding can prove the guilt of [*the accused*] by itself.

Apart from the fact that [*the accused*] made the statement and that it amounted to a deliberate lie, before you can use the lie as some evidence of [*the accused's*] guilt you must find two further matters proved.

First, you must find that what [*the accused*] said that amounts to a lie relates to an issue that is relevant to the offence the Crown alleges that [*the accused*] committed. It must relate to some significant circumstance or event connected with that alleged offence. The Crown says it is relevant because [*set out Crown case on this issue*].

Second, you must find that the reason [*the accused*] told this lie is because they feared that telling the truth might reveal their guilt in respect of the charge they now face. In other words, they feared that telling the truth would implicate them in the commission of the offence for which they are now on trial.

[*Where manslaughter is an alternative charge in appropriate cases, the above paragraph can be substituted with:*

Second, you must find that the reason [*the accused*] told this lie is because they feared that the truth would implicate them in relation to the commission of the offence for which they are now on trial because it would indicate they [*modify next part of direction*

as required (see ***[2-953]****): had an intention to kill or inflict grievous bodily harm/was not acting under provocation/did not reasonably believe the actions were necessary in self-defence, etc*].]

The Crown says you would be satisfied of that because [*set out Crown case on this issue*].

You must remember, however, that people do not always act rationally, and that conduct of this sort, that is, telling a lie, may sometimes be explained in other ways. A person may have a reason for lying quite apart from trying to conceal their guilt. For example, a lie may be told out of panic; to escape an unjust accusation; to protect some other person; or to avoid a consequence unrelated to the offence. [*It is dangerous to give too many examples for the reasons stated in R v Jeffrey (1991) 60 A Crim R 384.*]

If you think that the lie may have been told for some reason other than to avoid being implicated in the commission of the offence for which [*the accused*] is now on trial, then it cannot be used as evidence of [*the accused's*] guilt. If that is the case, you should put it to one side and focus your deliberations upon the other evidence in the case.

Let me summarise what I have just said. Before you can use what [*the accused*] said as something which points towards their guilt, you must be satisfied that they lied deliberately. You must find that the lie related to some significant circumstance or event connected with the alleged offence. You must find that the reason [*the accused*] told this lie was because they feared that the truth would implicate them in relation to the commission of the offence for which they are now on trial.

The defence case in relation to this issue is [*set out the defence response in detail appropriate to the circumstances of the case*].

[2-970] Suggested direction from Zoneff v The Queen — limiting the use of lies to credit

Last reviewed: September 2023

If the prosecution has not suggested that the accused told lies because they knew the truth would implicate them in the commission of the offence, there may nevertheless be risk of misunderstanding on the part of the jury about the significance of possible lies. The suggested direction below takes account of *Zoneff v The Queen* (2000) 200 CLR 234 at [23].

You have heard it suggested that [*the accused*] lied.

[*Refer to the evidence said to constitute lie(s).*]

Whether [*the accused*] did in fact lie is a matter for you to decide. To decide that a lie was (or lies were) told, you must be satisfied that [*the accused*] said something that was untrue and that at the time of making the statement, they knew that it was untrue. Saying something that is untrue by mistake, or out of confusion or forgetfulness, is not a lie.

If you decide that a lie was (or lies were) told, you cannot use that fact in support of a conclusion that [*the accused*] is guilty. A lie cannot prove [*the accused's*] guilt and nor can a lie be used in conjunction with the other evidence that the Crown relies upon to prove [*the accused's*] guilt.

The only use you can make of the fact that [*the accused*] told a lie (or lies) is in your assessment of their credibility. If you are satisfied that they did lie, then that may be considered by you as having a bearing upon whether you believe the other things that they have said.

[The next page is 331]

Election of accused not to give evidence or offer explanation

[2-1000] Introduction

The power of a judge to comment upon the failure of the accused to give or call evidence is contained in s 20 *Evidence Act* 1995. As to the effect of s 20 see generally:

- *Azzopardi v The Queen* (2001) 205 CLR 50 especially at [50]–[56]
- *Dyers v The Queen* (2002) 210 CLR 285
- *R v Wilson* (2005) 62 NSWLR 346
- *Criminal Practice and Procedure NSW* at [3-s 20.1]
- Anderson, Williams & Clegg, *The New Law of Evidence*, 2nd edn, 2009 at 20.2ff
- Odgers, *Uniform Evidence Law*, 16th edn, 2021 at [EA.20.90]ff.

The majority in *Azzopardi v The Queen* summarised, at [51], the four aspects of a direction it is almost always desirable to give concerning the accused's silence in court. The High Court, in *GBF v The Queen* (2020) 271 CLR 537, reiterated that an *Azzopardi* direction is required in almost all cases where the accused does not give evidence: at [23]. The direction is particularly important in those cases where the accused bears the onus of establishing a defence: *Ahmed v R* [2021] NSWCCA 280 at [44]. It cannot necessarily be implied from the right to silence direction: *Ahmed v R* at [48]–[53]. Cases where a judge may comment on the failure of an accused to offer an explanation will be rare and exceptional, and comment will never be warranted merely because the accused has failed to contradict some aspect of the prosecution case: *Azzopardi v The Queen* at [68]; *GBF v The Queen* at [23]. A failure to give a full direction on the decision of the accused not to give evidence may, in some cases, result in a miscarriage of justice: *R v Wilson* at [25], [35]; *Martinez v R* [2019] NSWCCA 153 at [113]. Examples of cases where the failure to give a full direction was said to be an error are *Martinez v R*, particularly at [114]–[117], and *Ahmed v R* at [44]–[53].

[2-1010] Suggested direction — failure of accused to give or call evidence

The accused has not given [*or called*] any evidence in response to the Crown's case.

The Crown bears the onus of satisfying you beyond reasonable doubt that the accused is guilty of the offence charged.

The accused bears no onus of proof in respect of any fact that is in dispute. Although an accused person is entitled to give or call evidence in a criminal trial, there is no obligation upon [*him/her*] to do so. [*He/She*] is presumed to be innocent until you have been satisfied beyond reasonable doubt by the evidence led by the Crown that [*he/she*] is guilty of the offence charged. Therefore, it follows that the accused is entitled to say nothing and make the Crown prove [*his/her*] guilt to the high standard required.

The accused's decision not to give evidence cannot be used against [*him/her*] in any way at all during the course of your deliberations. That decision cannot be used by you

as amounting to an admission of guilt. You must not draw any inference or reach any conclusion based upon the fact that the accused decided not to give (or call) evidence. You cannot use that fact to fill any gaps that you might think exist in the evidence tendered by the Crown. It cannot be used in any way as strengthening the Crown case or in assisting the Crown to prove its case beyond reasonable doubt.

You must not speculate about what might have been said in evidence if the accused had given evidence (or what might have been said by [*name of person*] if that person had been called by the accused as a witness in the trial).

[2-1020] Failure of offer explanation

Where the accused has failed to give an explanation in response to the circumstantial case led by the Crown, a comment can be made on the inference that a jury can draw from that failure. The effect of the comment is that, in the absence of any explanation for the evidence produced by the Crown by way of facts that are peculiarly within the accused's knowledge, the jury can more safely infer the guilt of the accused. This is usually referred to as a "*Weissensteiner* direction". It will be a rare and exceptional case where such a comment would be appropriate. The fact that the accused could have contradicted facts in the Crown case is not sufficient to warrant such a comment. It will usually be prudent for the trial judge to ask the parties about the appropriateness of such a comment.

As to the failure to give an explanation see:

- *Weissensteiner v The Queen* (1993) 178 CLR 217
- *RPS v The Queen* (2000) 199 CLR 620
- *Azzopardi v The Queen* (2001) 205 CLR 50 especially at [64]–[68]
- *Criminal Practice and Procedure NSW* at [3-s 20.1]
- Anderson, Williams & Clegg, *The New Law of Evidence*, 2nd edn, 2009, at 20.7
- Odgers, *Uniform Evidence Law*, 16th edn, 2021 at [EA.20.90ff].

[2-1030] Weissensteiner comments

Because a *Weissensteiner* comment is so rarely appropriate and because what is said will depend upon the peculiar facts of the case, it is not appropriate to give a general direction. However, what is said should be made by way of a comment and not a direction. The jury should be informed that is only a comment made by the trial judge and that they are free to disregard it. The comment should be in terms of a failure to explain rather than as a failure to give evidence. The jury should be given directions in accordance with **[2-1010]** above.

[The next page is 355]

Expert evidence

[2-1100] Introduction

Last reviewed: June 2023

As to the admissibility of expert evidence, see generally: Pt 3.3 *Evidence Act* 1995 and note the effect of s 60 of the Act; see also *HG v The Queen* (1999) 197 CLR 414; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [30]–[32]; *Wood v R* (2012) 84 NSWLR 581; *Honeysett v The Queen* (2014) 253 CLR 122 at [23]–[25]; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]; *Taub v R* [2017] 95 NSWLR 388 at [19]ff; *Criminal Practice and Procedure NSW* annotations to [3–s 76]ff; *Uniform Evidence Law* [1.3.4060]ff; and *New Law of Evidence* at [76.2]ff.

As to DNA evidence: see *Aytugrul v The Queen* (2012) 247 CLR 170 at [23]–[24], [30] where it was held that it was not erroneous to direct a jury on the basis of an exclusion percentage where a frequency ratio had also been given and where the relationship between the two figures had been explained. The "prosecutor's fallacy" is discussed in *R v GK* (2001) 53 NSWLR 317; *R v Keir* [2002] NSWCCA 30 and cf *Keir v R* [2007] NSWCCA 149. The method by which fingerprint evidence is admitted is discussed in *JP v DPP (NSW)* [2015] NSWSC 1669 at [39]ff.

As to the role of the jury in relation to expert evidence: see *Velevski v The Queen* [2002] HCA 4 where there is a discussion as to when it is open to a jury to make a determination between conflicting expert evidence. However, there was no majority decision in respect of whether there was a category of expert evidence that a jury could not resolve: see *Velevski v The Queen* at [38], [85], [182]. The case does indicate that careful directions need to be given to the jury about expert evidence especially where it is in conflict.

[2-1130] Suggested direction — expert witnesses

Last reviewed: June 2023

In this case, [*CD and EF*] have been called as expert witnesses. An expert witness is a person who has specialised knowledge based on their training, study or experience. Unlike other witnesses, a witness with such specialised knowledge may express an opinion on matters within his or her particular area of expertise. Other witnesses may speak only as to facts, that is, what they saw or heard, and are not permitted to express their opinions.

The value of any expert opinion very much depends on the reliability and accuracy of the material which the expert used to reach his or her opinion. It also depends on the degree to which the expert analysed the material upon which the opinion was based and the skill and experience brought to bear in formulating the opinion given. Experts can differ in the level and degree of their experience, training and study, yet each can still be an expert qualified to give an opinion where that opinion is based on that witness's specialised knowledge.

Expert evidence is admitted to provide you with … [*specify, for example, scientific/medical/accountancy/etc*] information and an opinion on a particular topic which is within the witness's expertise, but which is likely to be outside the experience and knowledge of the average lay person.

The expert evidence is before you as part of all the evidence to assist you in determining … [*set out the particular aspect(s), for example, the mental condition of the accused; whether the accused's act was voluntary; the nature and effect of a series of financial transactions; the properties of a particular drug and its effects; the mechanical condition of a truck, etc, as the case may be*]. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the [*expert(s)*], you do not have to act upon it. This is particularly so where the facts upon which the opinion is based do not accord with the facts as you find them to be. You are also, to a degree, entitled to take into account your common sense and your own experiences if they are relevant to the issue upon which the expert evidence relates.

[Where there is a conflict between the experts, add

In this case, there is a conflict between the expert evidence of [*AB*] called on behalf of the Crown and [*CD*] who was called on behalf of the accused. It goes to the issue of … [*specify the issue(s)*]. It is not a case of simply choosing between their evidence as a matter of simple preference. [*Where the accused has the onus of proof, emphasise the relevant standard of proof and how it operates in relation to the expert evidence*].

It is for you to decide whose evidence and whose opinion you accept in whole or in part, or whose evidence you reject altogether. You should remember that this evidence relates only to part of the case, and that while it may be of assistance to you in reaching a verdict, you must reach your verdict having considered all the evidence.

[*There has been no challenge to the qualifications of any of the expert witnesses, all of whom you may think are well qualified*].**]**

[*Summarise the arguments of the parties as to why a particular expert should be preferred or discuss with the jury, matters relevant to the resolution of the evidence, such as the reliability of the information relied upon and the level of expertise of a particular witness.*]

In resolving the conflict in the expert evidence, you are entitled to consider that particular evidence in the context of all of the evidence that is before you, and especially that part of the evidence which may have a bearing on the acceptance or otherwise of a particular opinion.**]**

[Where there has been no challenge to the expert evidence either in cross-examination or by calling evidence to the contrary, add

The expert evidence has not been challenged. Accordingly, if it is not inherently unbelievable, you would need to have a good reason to reject it — for example, because it does not fit with other facts which you have found proved.**]**

[Where there is conflict as to the facts or assumptions underlying the opinion, add

The expert evidence of [*AB*], called on behalf of the Crown, relating to … [*specify points*], appears to be based on facts which [*AB*] has been told, or on assumptions which [*AB*] has been asked to make [*specify the facts or assumptions*]. You should analyse the evidence of [*AB*] and determine the extent to which [*his/her*] opinion depends upon the facts or assumptions being correct.

If the opinion is based upon facts which you are satisfied have been proved, or assumptions that you are satisfied are valid, then it is a matter for you to consider

whether the opinion based upon those facts or assumptions is correct. On the other hand, if you decide the facts have not been proved, or the assumptions are not valid, then any opinion based upon them is of no assistance because it has no foundation. If that is the case, the opinion should be disregarded.

[*This direction can be modified where the opinion is relied upon by the defence, bearing in mind which party bears the onus of proof in respect of the issue, the subject of the evidence*].**]**

[Where the expert witness relies on statements by the accused and/or others, and they do not give evidence, and no direction is given under s 136 limiting the use to be made of that material, add

The expert [*CD*] recounted what [*he/she*] had been told by [*the accused and/or members of [his/her] family*] and that formed part of the history on which [*the person*] relied to form [*his/her*] opinion. That is why that material was admitted despite the fact that it was hearsay evidence, that is, evidence of statements made outside the courtroom by persons not called as witnesses before you. However, that material is evidence before you and you are entitled to rely on it, not merely as statements made to the expert and upon which to evaluate [*his/her*] opinion, but also as evidence of the truth of the facts contained in those statements. However, I warn you that as those statements are hearsay they may be unreliable. The person or persons making those statements did not give evidence before you and, therefore, could not be tested by cross-examination [*give other reasons for the possible unreliability of the statements depending upon the facts and circumstances of the particular case*].**]**

[2-1140] Notes

Last reviewed: June 2023

1. In *Al-Salmani v R* [2023] NSWCCA 83 at [64]–[67] it was held that it will be a rare case where responsive answers by an expert to a cross-examiner's questions would be objectionable, and it is incumbent on counsel to raise any objections to an expert straying from their expertise at the trial. This is because cross examining counsel can confine questioning to the field of the witness's expertise and choosing to go beyond that field is a forensic choice which necessarily implies an acceptance the expert is capable of answering the questions within the expert's field of expertise.
2. In *Dirani v R* [2021] NSWCCA 202, it was held that while a police expert witness could give evidence of surveillance techniques generally, his mere descriptions of the accused's behaviour depicted in video recordings and his speculation as to what it meant was not based on any identified expertise and hence was inadmissible: [77]–[92]. At [91]–[92], the court distinguished *Kingswell v R* (unrep, 2/9/98, NSWCCA), in which an expert police witness gave permissible evidence of an accused's behaviour by describing the features that gave rise to the opinion.

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Trial instructions H–Q

para

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Identification evidence — visual forms

Sections 116 and 165 Evidence Act 1995

[3-000] Introduction

The directions and warnings required in relation to evidence of identification are governed by ss 116 and 165 *Evidence Act* 1995 ("the Act"). The content of those directions, however, are taken mainly from common law cases such as *Domican v The Queen* (1992) 173 CLR 555 and *R v Heuston* (1995) 81 A Crim R 387.

Section 116 requires a direction to be given to the jury as to the special need for caution and the reasons for that caution in relation to identification evidence. Section 165(1)(b) requires that a warning be given where requested in relation to "identification evidence".

One of the difficulties with this type of evidence is to determine when these sections apply having regard to the definition of "identification evidence" in the Dictionary to the *Evidence Act*.

[3-005] Admissibility

Admissibility of identification evidence is governed by Pt 3.9 of the Act. Sections 114 and 115 of the Act limit the admissibility of "visual identification evidence" and "picture identification evidence" respectively.

See generally *Uniform Evidence Law* at [1.3.9400] and *Criminal Practice and Procedure NSW* at [3-s 114]ff.

[3-010] Terminology

By reason of the definition of "identification evidence" for the purposes of the Act, only direct evidence identifying the accused falls within s 116 of the Act. Therefore, circumstantial evidence that indirectly identifies the accused as the offender does not fall within the provisions of the Act: *Trudgett v R* (2008) 70 NSWLR 696 at [38], [50]. Nor does the Act apply where there is no issue about the accused's identification: *Dhanhoa v The Queen* (2003) 217 CLR 1.

Visual identification evidence — identification based wholly or partly on what a person saw but does not include picture identification evidence: s 114(1).

Picture identification evidence — identification made wholly or partly by a person examining pictures kept for the use of police officers. Picture identification evidence is not admissible if the picture suggests that the subject is in police custody: s 115(2). As to the dangers associated with identification by photographs, see *Festa v The Queen* (2001) 208 CLR 593 at [22].

Resemblance evidence — evidence to the effect that the offender "looked like" or "sounded like" the accused. It is not sufficient to sustain a conviction but is admissible as part of a circumstantial case: *Pitkin v The Queen* (1995) 69 ALJR 612; *R v Cohen* [2002] NSWCCA 339. Such evidence falls within the definition of "identification evidence" in the Dictionary of the Act and ss 116 and 165.

Recognition evidence — evidence where the offender is purportedly recognised as the accused by someone who knows or is familiar with the accused eg a family member. It falls within the scope of "identification evidence" for the purposes of the Act: see *Trudgett v R*, above.

Opinion evidence — evidence of identification, particularly of a voice, can be given as a type of expert evidence. The distinction between opinion and identification evidence is often difficult to determine. See *Smith v The Queen* (2001) 206 CLR 650 at [15-[16] and *R v Marsh* [2005] NSWCCA 331. Opinion evidence may or may not be relevant or admissible but it does not fall within "identification evidence" for the purposes of the Act.

Descriptive evidence — evidence in the form of a description of the offender. It is not within the scope of "identification evidence", but may warrant a warning in a particular case: *Collins v R* [2006] NSWCCA 162.

In-court identification — evidence of identification of the accused as the offender by a witness giving evidence. It is subject to exclusion under s 114 of the Act: *R v Tahere* [1999] NSWCCA 179 at [27], [32]; *Walford v DPP (NSW)* [2012] NSWCA 290. If such evidence is given, the judge should immediately direct the jury that it is of no evidentiary value on the issue of the guilt of the accused: *Aslett v R* [2009] NSWCCA 188 at [56].

[3-035] Identification of objects

Evidence of identification of an object, such as a motor vehicle, does not fall within "identification evidence" but may warrant a warning under s 165 because of its potential unreliability: *R v Stewart* (2001) 52 NSWLR 301 at [104].

[3-040] Exculpatory identification evidence

Where identification evidence is given assisting the defence case, whether called by the Crown or not, a warning as to the general unreliability of identification evidence under s 165 can be given if requested by the Crown. However, the warning should be tempered and of a limited nature sufficient for the jury to understand the potential for unreliability of such evidence. See *R v Rose* (2002) 55 NSWLR 701 at [314] where there was identification of the deceased at a time after, on the Crown case, she had been murdered by the accused. See also *Kanaan v R* [2006] NSWCCA 109 as to directions on the onus of proof in such a case.

[3-045] Content of identification direction

The direction required under s 116 is that there is a "special need" for caution before accepting identification evidence. There is no particular form of words which must be used in the direction required: s 116(2). It is required that the judge explain why:

(a) there is a special need for caution — why identification evidence in general may be unreliable, thus explaining why there is a special need for caution: *R v Clarke* (1997) 97 A Crim R 414 at 428, and

(b) the identification evidence in the particular case may be unreliable, by pointing out the particular matters in that case which may cause it to be unreliable: ss 116(1), 165(2).

As part of the second requirement, the judge must direct the jury that they are bound to take those particular matters into consideration in determining whether they will (or will not) rely on that evidence. That is what is meant by giving the weight of the judge's authority to the necessary directions: *R v Heuston* (1995) 81 A Crim R 387 at 394, where Hunt CJ at CL explained what had been said in *Domican v The Queen* (1992) 173 CLR 555 at 562 (see also 564, 569); *R v Clark* (1993) 71 A Crim R 58 at 72.

The directions should indicate matters that **may** affect the reliability of the identification rather than matters that **made** it unreliable: *R v Riscuta* [2003] NSWCCA 6 at [61].

The direction should make it clear that reliability and honesty are different issues so that an honest witness can be mistaken as can several witnesses. It is suggested that comments or warnings on the credibility of an identification witness be given separately from directions on the reliability of the identification.

[3-050] Suggested direction — visual identification evidence

There is an important direction I must now give you concerning the evidence of [*name of witness*] in which [*he/she*] identified [*the accused*] as the person who [*insert circumstances — for example, fired the gun at the deceased*]. In giving you these directions you should not think that I am giving you any indication of what I think about the reliability of the evidence. As I told you at the beginning of the trial that is not my task. My task is to make sure that you consider everything that is relevant to the assessment of the reliability of the evidence. That assessment is your function, not mine. Judges have an experience with the law that members of the community generally do not have. Judges know that identification evidence may be unreliable and there are a variety of reasons why that is so.

Reasons for the need for caution — generally: s 116(1) Evidence Act 1995

Evidence that [*the accused*] has been identified by a witness must be approached by you with special caution before you accept it as reliable. These directions relate only to the reliability of the identification evidence given, not to the honesty of the witness[es]. A witness may be honest but that does not necessarily mean that the witness will give reliable evidence. Because the witness who gives evidence of identification honestly and sincerely believes that [*his/her*] evidence is correct, that evidence will usually be quite impressive, even persuasive. So here, even if you thought [*name of witness*] was entirely honest in the evidence that [*he/she*] gave, you must still approach the task of assessing the reliability of [*his/her*] evidence with special caution.

So, special caution is necessary before accepting identification evidence because of the possibility that a witness may be mistaken in their identification of a person accused of a crime. The experience of the criminal courts over the years, both here in Australia and overseas, has demonstrated that identification evidence may turn out to be unreliable. There have been some notorious cases over the years in which evidence of identification has been demonstrated to be wrong after innocent people have been convicted.

You must carefully consider the circumstances in which [*name of witness*] made [*his/her*] observation of the person. The circumstances in which the witness made [*his/her*] observation of the person can affect the reliability of identification evidence.

Special need for caution before accepting identification evidence in the circumstances of the case: s 116(1)(b) Evidence Act 1995

There are a number of matters that have been specifically raised in this case that require your consideration.

[*The trial judge should identify for the jury the particular matters in the case and make brief reference to the arguments in relation to each of them. The following matters are given by way of example and would need to be adapted to the circumstances of the individual case. In most cases the jury would be assisted by the judge providing the answer to the question posed.*]

- Was the person identified a stranger to [*name of witness*]? It is obviously harder to identify strangers than it is to identify people who are well known to us. [*recite evidence*]
- What opportunity did [*name of witness*] have to make [*his/her*] observation of the person? [*Name of witness*] said the period of observation [*he/she*] had was … [*recite evidence*].
- Did the witness focus [*his/her*] attention on the person or was it just a casual sighting that did not have any significance for the witness at the time? [*recite evidence*]
- In what light was it made? You have heard evidence from [*name of witness*] about the light at the time of the alleged offence [*recite evidence — for example, poor/bright, etc*].
- Was there anything about the person observed which would have impressed itself upon the witness? In other words, was there anything distinctive about the person? [*recite evidence — for example, tattoo, albino, etc*]
- Was there any special reason for remembering the person observed?
- Was the witness under any stress or pressure at the time? For example, if a person is woken up suddenly or hit in the face. If [*name of witness*] is under any stress or pressure at the time, how do you think that might have affected [*his/her*] ability to accurately observe the person and store the image of the person's appearance in [*his/her*] memory?
- Does [*name of witness*] come from the same racial background as the person identified? That is also something you can bear in mind. It may be more difficult for a member of one race to identify an individual of another racial group. [*recite evidence*]
- When was [*name of witness*] first asked for a description of the person and how fresh would [*his/her*] memory have been at that time?
- How did the description given by [*name of witness*] compare with the appearance of [*the accused*]?
- How long was it between the sighting of the person and the giving of the description to the time that [*name of witness*] identified [*the accused*]?

You must give consideration to each of those matters. Any one of those circumstances may possibly lead to error.

[*Reference may then be made, if thought appropriate, to any other matters raised by counsel upon this issue that have not already been the subject of the direction required by the statute*.]

[Where recognition evidence is adduced, add

In this case the evidence of [*name of witness*] is that [*he/she*] recognised someone that [*he/she*] knew. [*summarise circumstances if appropriate*] It is perhaps easier to understand the possibility of error when the evidence is given by someone who has not previously known [*the accused*], but errors may also occur even when the witness has previously known [*the accused*]. Mistakes have been known to be made by friends and even by relatives of a person who thought that it was their friend or relative whom they had seen. This is something you should bear in mind. Just because a witness claims to have known the person, there remains a possibility of mistake.**]**

[Where more than one witness has given identification evidence, add

In this case more than one witness has identified [*the accused*]. This is a matter that you may take into account in determining how strong the evidence is. However, this does not mean that there is necessarily less chance that a mistake has been made. Two or more honest witnesses can be just as mistaken as one.**]**

Conclusion — the directions are not my personal view

What I have done is to tell you about the need for special caution in coming to your decision about whether you accept the identification evidence. There is this need for special caution because of the potential unreliability of the evidence and I have told you the reasons why that might be so. I want you to clearly understand this so that you can make your decision about the reliability of the evidence by taking into account all of the matters that are relevant to that task.

I repeat that I have not been expressing any personal views about the evidence. I have not been giving you any hints about how I think you should decide this case. My task, as I have told you, is limited to giving you the legal directions that you have to comply with to ensure that [*the accused*] receives a fair trial.

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Identification evidence — voice identification

[3-100] Admissibility of voice identification

The Dictionary to the *Evidence Act* 1995 ("the Act") defines "identification evidence" to include aural identification evidence of an accused. Such evidence is admissible if it is relevant subject to exclusion under ss 135 or 137 of the Act.

The evidence is not necessarily a question for expert evidence but s 79 of the Act will encompass evidence of voice identification from an "ad hoc" expert, such as a police officer or interpreter who has listened to the voice of the accused on tapes over a lengthy period of time.

Generally, see *R v Leung* (1999) 47 NSWLR 405 at [44] and *Irani v R* (2008) 188 A Crim R 125.

See, *Uniform Evidence Law* at [1.3.4280]ff.

[3-110] Warnings and directions

Sections 116 and 165 of the Act apply: the former requires the jury be informed of the special need for caution in relation to identification evidence and the reasons for that caution: see *R v Clarke* (1997) 97 A Crim R 414. Section 116 is only engaged where identification is in issue in the trial : *Dhanhoa v The Queen* (2003) 217 CLR 1 at [22] and [53].

[3-120] Suggested direction — voice identification

The particular facts before the jury will determine the nature of the warnings that are given and the defects in the evidence that should be highlighted for the jury's consideration. The direction may be adapted for evidence of identification from CCTV.

There is an important direction I must now give you concerning the evidence of [*name of witness*] in which [*he/she*] identified the voice of [*the accused*] as that of the person who [*insert circumstances — for example, discussed the importation on the telephone*]. In giving you these directions you should not think that I am giving you any indication of what I think about the reliability of the evidence. As I have told you that is not my task. I am required to make sure that you consider everything that is relevant to the assessment of the reliability of the evidence and whether you should act upon it. That assessment is your function, not mine. Judges have an experience with the law that members of the community generally do not have. Judges know that voice identification evidence may be unreliable and has been shown to be so in the past.

Evidence that [*the accused's voice*] has been identified by a witness must be approached by you with special caution before you accept it as reliable. These directions relate only to the reliability of the identification evidence given, not to the honesty of the witness[*es*]. A witness may give evidence of identification honestly and sincerely believe that [*his/her*] evidence is correct. The evidence will usually be quite impressive and even persuasive. Even if you thought [*name of witness*] was entirely

honest in the evidence that [*he/she*] gave, you must still approach the task of assessing the reliability of [*his/her*] evidence with special caution. The identification of a voice is notoriously liable to be mistaken.

So, special caution is necessary before accepting voice identification evidence because of the possibility that a witness may be mistaken in their identification of a person accused of committing a crime. The experience of the criminal courts over the years, both in Australia and overseas, has demonstrated that identification evidence, of whatever kind, may turn out to be mistaken. There have been some notorious cases in which witnesses have given evidence of identification which has later been demonstrated to be wrong after innocent people have been convicted.

You must carefully consider the circumstances in which [*name of witness*] heard the voice of the person the Crown alleges committed the crime and how [*he/she*] came to identify that voice as [*the accused*]. The circumstances in which the witness heard the voice and identified it can affect the reliability of that evidence.

There are a number of matters that have been specifically raised in this case that require your consideration in determining whether the evidence identifying the accused can be safely acted upon.

[*The trial judge should identify for the jury the particular matters in the case and make brief reference to the arguments in relation to each of them. The following matters are given by way of example and would need to be adapted to the circumstances of the individual case. In most cases the jury would be assisted by the judge providing the answer to the question posed.*]

- Was the person identified a stranger to [*name of witness*]? It is obviously harder to identify the voice of a stranger than it is to identify the voice of a person who is well known to the listener. If the person was a stranger, how did [*he/she*] come to be familiar with the voice identified? [*recite evidence*] I warn you that mistakes can easily be made even even in identifying the voice of a friend or member of the family. Identifying the voice of a stranger is even more difficult.
- What opportunity did [*name of witness*] have to hear the voice of the person? [*Name of witness*] said the [*period/number of times*] in which [*he/she*] heard the voice was … [*recite evidence*].
- How attentive was the person in hearing the voice. Was [*he/she*] able to give it full and undivided attention or was the person distracted at the time? [*recite evidence*]
- How clearly could the person hear the voice and how was the sound conveyed to the witness. Was there any chance that the voice was distorted in some way? [*recite evidence — for example, voice on a telephone, etc*]
- Was there anything about the voice which would have impressed itself upon the witness? In other words, was there anything distinctive about the voice which was similar or different to that of the accused? [*recite evidence — for example a lisp, accent, peculiar pronunciation, etc*]. It may be difficult to describe a voice unless it has some peculiar characteristic and without the witness being able to provide some description, that makes your task of assessing the reliability of the evidence more difficult.
- Was there any special reason for remembering the voice that was heard?

- Does [*name of witness*] come from the same racial background as the person identified? That is also something you can bear in mind. It may be more difficult for a member of one race to identify the voice of an individual of another racial group. [*recite evidence*]
- How long did the witness have to keep the characteristics of the voice in [*his/her*] mind before identifying that voice as that of the accused?

[*If appropriate:*

You are yourself entitled to compare the voice of the accused as you have heard it with the voice on the tape in order to see whether that affects your assessment of the evidence of [*the witness*]. But bear in mind the difference that there may be between comparing a voice heard in court with that recorded on a tape. You should consider the opportunity you have to compare the two voices with that of the witness. You should take into account the clarity of the tapes played to the witness and that you have heard and how the recording may affect the ability to compare the voices.]

You must give consideration to each of those matters. Any one of those circumstances may possibly lead to error.

[*Reference may then be made, if thought appropriate, to any other matters raised by counsel upon this issue that have not already been the subject of the direction required by the statute*.]

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Inferences

[3-150] Suggested direction

You may, in your role as judges of the facts, draw inferences from the direct evidence. There is nothing extraordinary about that. We all do it, consciously or otherwise, in our everyday lives.

Inferences are conclusions of fact rationally drawn from a combination of proved facts. If A, B and C are established as facts then one might rationally conclude that D is also a fact, even though there might be no direct evidence that D is indeed a fact. Inferences may be valid or invalid, justified or unjustified, correct or incorrect.

Let me give you an illustration. If you telephone a friend whom you then expect to be home and the phone rings and rings, unanswered, you might perhaps infer that the person has gone out. If you get the engaged signal you might infer that the person is at home but is speaking to someone else on the phone.

In a criminal trial, you must be satisfied of the guilt of [*the accused*] beyond reasonable doubt. Amongst other things, that means that you should be extremely careful about drawing any inference. You should examine any possible inference to ensure that it is a justifiable inference.

In my illustration about the telephone call, you will, when you think about it, realise that the possible inferences I suggested were really somewhat questionable. In either case, the phone might have been out of order or, indeed, you might have unwittingly dialled the wrong number or the person might have been there but in the shower.

In the context of a criminal trial you should not draw an inference from the direct evidence unless it is a rational inference in the circumstances. In the present case, the Crown asks you to draw an inference that … [*apply principles to case in hand*].

[3-160] Notes

See also **Circumstantial evidence [2-500]**.

[The next page is 443]

Intention

[3-200] Preliminary Note

The direction to the jury should not refer to the impermissible presumption that every person intends the natural consequences of their acts, requiring the accused to rebut that presumption: *R v Stokes and Difford* (1990) 51 A Crim R 25.

In *R v Stokes and Difford* it was said that while a jury may be invited to draw an inference from the accused's own acts that they were done with the requisite intention, the direction should not cause the jury to think that the test is an objective one.

[3-210] Suggested direction

Intent and intention are very familiar words; in this legal context they carry their ordinary meaning.

Intention may be inferred or deduced from the circumstances in which … [*specify, for example, the death occurred*], and from the conduct of [*the accused*] before, at the time of, or after [*he/she*] did the specific act … [*specify, for example, which caused the death of the deceased*]. Whatever a person says about [*his/her*] intention may be looked at for the purpose of finding out what that intention was in fact at the relevant time.

In some cases, a person's acts may themselves provide the most convincing evidence of [*his/her*] intention. Where a specific result is the obvious and inevitable consequence of a person's act, and where [*he/she*] deliberately does that act, you may readily conclude that [*he/she*] did that act with the intention of achieving that specific result.

Let me assist you with an illustration of that direction. If one person hits another on the head with a hammer, it is (you may think) both obvious and inevitable that that person will receive a really serious bodily injury as a result. If, therefore, the first person deliberately hits the other on the head with a hammer, it is a simple matter for a jury to conclude that [*he/she*] did so with the intention of inflicting really serious bodily injury upon that other person. You may think that there is no difficulty at all about coming to such a conclusion. But you must remember that you are considering the intention of [*the accused*] not what your intention might have been had you been in [*his/her*] position, nor the intention of any theoretical person.

[3-220] Notes

1. When directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent, unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some

further explanation or elaboration is strictly necessary to avoid misunderstanding: *R v Moloney* [1985] AC 905; *R v Hancock* [1986] 2 WLR 357; *R v Woollin* (1999) 1 Cr App Rep 8 (HL).

2. Intention is more than mere volition, it connotes an element of purpose, see: Barwick CJ in *Iannella v French* (1968) 119 CLR 84 at 95.
3. Section 66A *Evidence Act* 1995 provides, inter alia, that the hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's intention, knowledge or state of mind.

[The next page is 455]

Intoxication

[3-250] Introduction

The effect of self-induced intoxication upon the mental element of an offence is set out in Pt 11A *Crimes Act* 1900. In effect, Pt 11A divides offences committed after 16 August 1996 into two types: (a) offences of specific intent, and (b) other offences.

Offences of specific intent are set out in s 428B of the Act and are offences "of which an intention to cause a specific result is an element". Generally, intoxication (however caused) is relevant to whether the accused had the necessary specific intention at the time when the act was committed giving rise to the offence: s 428C. It does not extend to the basic or general element to commit the act: *Harkins v R* [2015] NSWCCA 263 at [34], [39]. Although offences involving recklessness are not included in s 428B (even where recklessness is proved by intent), reckless murder is an offence of specific intent: *R v Grant* (2002) 55 NSWLR 80.

For other offences, self-induced intoxication cannot be taken into account when determining whether the person had the mens rea of the offence: s 428D.

Where evidence of intoxication results in the accused being acquitted of murder, self-induced intoxication cannot be taken into account in determining whether the person has the requisite mens rea for manslaughter: s 428E. As to intoxication and **Substantial impairment because of mental health impairment and cognitive impairment** see **[6-550]**; **Self-defence** see **[6-470]**ff; **Indecent assault** see **[5-600]**; **Sexual intercourse without consent** (for offences alleged before 1 January 2008 see **[5-800]** and offences alleged thereafter see **[5-820]**).

Where a reasonable person test is applicable, the reasonable person is one who is not intoxicated: s 428F. Self-induced intoxication cannot be taken into account on the issue of voluntariness: s 428G.

The application of Pt 11A gives rise to some apparent anomalies that may complicate a summing-up. For example, the offence of robbery is not an offence of specific intention (it is a stealing accompanied by threats or violence) but an assault with intent to rob is an offence of specific intent. Yet often the assault offence will be an alternative to the completed offence.

As to intoxication see generally *Criminal Practice and Procedure NSW* at [8-s 428B.1] and *Criminal Law (NSW)* at [CLP.1180].

[3-255] Suggested intoxication direction — offence of specific intent

It is erroneous to direct the jury in terms of whether the accused had the *capacity* to form the relevant intent and a direction in those terms may give rise to a miscarriage of justice: *Bellchambers v R* [2008] NSWCCA 235. The issue is whether the accused formed the specific intent referred to in the charge notwithstanding his or her intoxication.

It may be disputed on the evidence whether a defendant was intoxicated and whether any intoxication was so extensive as to affect the formation of the relevant intent. There

must be sufficient evidence so that it is fit to be considered by a jury, but it is not a demanding standard and can still include substantial, and even reasonable, doubts on those issues: *Cliff v R* [2023] NSWCCA 15 at [21].

It is suggested that the jury would be assisted by written directions in a case where intoxication is relevant to some counts but not others.

In considering the question of whether the Crown has proved that [*the accused*] had the intention to [*specify the required intent*] one matter that you need to consider is the effect upon [*the accused*] of the [*alcohol/drugs*] which [*he/she*] says [*he/she*] consumed. Whether [*the accused*] was affected by [*alcohol/drugs*] at the relevant time and the degree of that intoxication are issues for you to consider. But as a matter of law, intoxication by alcohol or drugs is a relevant matter to be taken into account in determining whether an accused person had formed the intent to commit the offence charged. When I am speaking of intention at this time, I am not referring to the intention to commit the acts relied upon by the Crown that give rise to the offence alleged [*specify acts relied upon if necessary*]. I am referring to the specific intention that is stated in the charge, which is [*identify the specific intention alleged*]. [*In murder it will be the state of mind relied upon by the Crown including reckless indifference.*] [*The accused's*] intoxication is only relevant to that issue.

It is for the Crown to satisfy you beyond reasonable doubt that [*the accused*] had the intent to [*specify the intention*] in spite of the evidence of [*his /her*] consuming [*alcohol/drugs*] before the alleged conduct giving rise to the charge. If the Crown fails to satisfy you beyond reasonable doubt on that issue [*the accused*] must be acquitted of [*the offence of specific intent*].

In some circumstances, an intoxicated person may act without forming any particular intention at all. On the other hand, a person may be considerably affected by alcohol and/or drugs and yet still commit an act with a specific purpose in mind. The fact that the person may have no recollection of the incident afterwards does not necessarily mean that he or she was not acting with a specific intention at the time of the incident. The fact that his or her judgement was affected so that the person acts in a way different to how he or she would have acted if sober does not necessarily mean that the person was not acting with a specific intention. For example, if a person in a drunken fury picks up a hammer and hits another over the head with it, there may be little doubt that the person intended to cause the other really serious harm, even though the judgement of the person using the hammer was affected by alcohol.

[*Set out the evidence and arguments by the accused relied upon for asserting that he or she did not have the specific intention required to prove the offence and the Crown's response.*]

Having considered the evidence and arguments on this issue the question for you is whether, having regard to the evidence of [*the accused's*] intoxication, you find the Crown has proved beyond reasonable doubt that [*he/she*] acted with the intention to [*specify the specific intention*]. Keep in mind that there is no obligation on [*the accused*] to prove either that [*he/she*] could not or did not act with that intention. It is an essential fact that the Crown must prove before you can find [*the accused*] guilty of the offence charged.

[*Where there is an alternative charge add*

If the Crown fails to satisfy you that, for whatever reason, [*the accused*] did intend to [*specify the specific intention stated in the charge*], you would find [*the accused*] not guilty of the first count on the indictment. If you came to that decision then you would consider the alternative charge of [*specify the alternative charge relied upon by the Crown*].]

[The next page is 475]

Joint trials

***Criminal Procedure Act* 1986 (NSW), s 21(2)**

[3-350] Introduction

The Crown is entitled to join more than one accused in a single indictment. However, an accused can make an application for a separate trial where he or she may be prejudiced or embarrassed in his or her defence by a joint trial or the court is of the opinion that for any other reason the accused should be tried separately: s 21(2) *Criminal Procedure Act* 1986.

As to the public policy considerations favouring joint trials, see *Webb v The Queen* (1994) 181 CLR 41 per Toohey J. For the principles to be applied in deciding to grant a separate trial, see *Ross v R* [2012] NSWCCA 207 at [24].

See generally *Criminal Practice and Procedure NSW* at [2-s 21.15] and *Criminal Law (NSW)* at [CPA.21.20]ff.

Where the evidence at the trial is admissible against each accused, it is not necessary for the judge to address the case against each separately: *Huynh v The Queen* [2013] HCA 6 at [51].

It is convenient to approach the admissibility of evidence on the basis that the jury should assume that the evidence is admissible against all of the accused unless told otherwise. See relevant sections of **Suggested (oral) directions for the opening of the trial following empanelment** at **[1-490]**. The Crown should be required to indicate to the jury, when calling a particular piece of evidence or a particular witness, if it is not tendered against all the accused and the limited basis upon which it is being tendered. The trial judge should direct the jury as to the limited use to be made of evidence tendered against an individual accused, see *R v Masters* (1992) 26 NSWLR 450 at 455. This is particularly so where the evidence is of an admission implicating a co-accused.

It is suggested that directions as to the admissibility of evidence against a particular accused and the limited use that can be made of the evidence be given at the time the particular evidence is led before the jury. Later the summing up should make it clear what is the particular case against each of the accused and direct the jury against using evidence admitted against one accused as evidence against another accused.

[3-360] Suggested direction — joint trial

As you are well aware by now this is a joint trial of [*number*] accused. I told you at the outset of the trial that this was simply a matter of administrative convenience. But I also told you that you have to consider the case against each accused person separately when considering your verdicts. You will be required to return a separate verdict in respect of each individual accused. You should not, in your deliberations, try to determine whether [*both/all*] of the accused are guilty without considering them as individuals and giving each separate consideration. Simply because the Crown allegation is that they are [*each/all*] guilty of the same offence, it does not follow that you approach your deliberations in the same way.

[If appropriate add

There is nothing in law, or for that matter in common sense, which requires you to return the same verdict in respect of each individual accused.]

[Where the evidence against each accused is different add

You should understand by now that the evidence relied upon by the Crown to prove the guilt of each accused differs. You must not during the course of your deliberations take into account in deciding whether the Crown has proved its case against one accused, use evidence that was tendered only against the [*other/another*] accused. It would be a breach of your duty to decide the case according to law, as well as grossly unfair, to use evidence against an accused which the Crown did not rely upon in proof of its case against [*him/her*].

Detail how the case against the individual accused differs by indicating what evidence is, or is not, admissible against a particular accused.]

[The next page is 481]

Multiple counts — R v Markuleski

[3-400] Suggested R v Markuleski (2001) 52 NSWLR 82 direction — multiple counts

Giving separate consideration to the individual counts means that you are entitled to bring in verdicts of guilty on some counts and not guilty on some other counts if there is a logical reason for that outcome.

If you were to find the accused not guilty on any count, particularly if that was because you had doubts about the reliability of the complainant's evidence, you would have to consider how that conclusion affected your consideration of the remaining counts.

Notes

1. It is suggested that the requirement to consider multiple counts separately is raised at the outset of the trial: **[1-490] Suggested (oral) directions for the opening of the trial following empanelment**.
2. McHugh J said in *KRM v The Queen* (2001) 206 CLR 221 at [36]:

   > It has become the standard practice in cases where there are multiple counts … for the judge to direct the jury that they must consider each count separately and to consider it only by reference to the evidence that applies to it (a "separate consideration warning").

   Where tendency or coincidence evidence is not adduced, directions to the jury against the use of propensity reasoning will not normally be required, unless there is a feature of the evidence creating a risk that the jury would misuse the evidence: *R v Matthews* [2004] NSWCCA 259 at [43]–[51] applying *KRM v The Queen*.
3. In *R v Markuleski* (2001) 52 NSWLR 82 at [186], [257] and [280], the court held that:

   > … it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count.
4. The suggested direction, above, is derived from *R v Markuleski* at [188] and [191]. Spigelman CJ added at [189]–[191] that:

   > On other occasions it may be appropriate for a judge to indicate to the jury, whilst making it clear that it remains a matter for the jury, that it might think that there was nothing to distinguish the evidence of the complainant on one count from his or her evidence on another count.
   >
   > Or it may be appropriate to indicate that, if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.
   >
   > The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case.
5. A *Markuleski* direction should only be given if the complainant's credibility looms large in the trial and there is a risk that in the absence of a direction the

accused would be denied the chance of an acquittal on all counts: *RWC v R* [2013] NSWCCA 58 at [80]; *Abdel-Hady v R* [2011] NSWCCA 196 at [125]–[133]. When determining whether such a direction should be given, the whole of the relevant or surrounding circumstances needs to be considered: *R v GAR* [2003] NSWCCA 224 at [34]; *Oldfield v R* [2006] NSWCCA 219 at [24]–[25]; *Keen v R* [2020] NSWCCA 59 at [76].

6. While a *Markuleski* direction is more commonly given in a "word against word" prosecution for multiple sexual assault offences against the same complainant, its use is not confined to such cases: *Keen v R* [2020] NSWCCA 59 at [63]; *Hajje v R* [2006] NSWCCA 23 at [101]. It may also be required in cases where a complainant for some offences is also a witness to an offence/s involving another complainant: see, for example, *Sita v R* [2022] NSWCCA 90 at [36]–[42].

[The next page is 517]

Onus and standard of proof

It is essential that the jury be directed appropriately and clearly on the onus and standard of proof. The following are various passages which may be of assistance wholly or in part.

[3-600] Suggested direction — where the defence has no onus

Last reviewed: September 2023

Onus of proof

As this is a criminal trial the burden or obligation of proof of the guilt of the accused is placed squarely on the Crown. That burden rests upon the Crown in respect of every element or essential fact that makes up the offence charged. That burden never shifts to the accused. There is no obligation on the accused to prove any fact or issue that is in dispute. It is not for the accused to prove their innocence but for the Crown to prove their guilt.

A critical part of the criminal justice system is the presumption of innocence. What it means is that a person charged with a criminal offence is presumed to be innocent unless and until the Crown persuades a jury that the person is guilty beyond reasonable doubt.

[***Note****: For situations where there is an onus of proof on the accused see specific instances, such as supplying drugs at [5-6700], substantial impairment at [6-570], mental illness at [6-230].*]

[If the defence has called evidence (or relies on an account in a police interview) and a *Liberato* direction is not considered necessary:

The fact the accused has given/called evidence before you [*or relies on an account given in an interview by police*] does not alter the burden of proof. The accused does not have to prove that their version is true. The Crown has to satisfy you that the account given by the accused [*and defence witnesses*] should not be accepted as a version of events that could reasonably be true.]

[***Note****: In some instances this direction will not be appropriate because the accused may be guilty even if there is no dispute over the facts, for example where guilt is based upon an objective evaluation such as whether the accused's driving was dangerous in an offence under s 52A Crimes Act.*]

Standard of proof

Proving the accused's guilt beyond reasonable doubt is the standard of proof the Crown must achieve before you can convict them and the words mean exactly what they say — proof beyond reasonable doubt. When you finish considering the evidence in the trial and the submissions made by the parties you must ask yourself whether the Crown has established the accused's guilt beyond reasonable doubt.

[*Where the Crown must negative a defence/issue to the criminal standard, a long accepted direction which can be given (after making clear that the Crown must prove all ingredients of the charge beyond reasonable doubt) is as follows*:

"Has the Crown eliminated any reasonable possibility that the accused acted in self-defence/was extremely provoked/acted under duress, etc?"]

The burden of proof on the Crown does not mean the Crown must prove beyond reasonable doubt every single fact that is in dispute but the Crown must prove the elements of the charge and must prove those elements beyond reasonable doubt.

In a criminal trial there is only one ultimate issue that a jury has to decide. Has the Crown proved the guilt of the accused beyond reasonable doubt? If the answer is "yes", the appropriate verdict is "guilty". If the answer is "no", the verdict must be "not guilty".

[Where the accused has given or called evidence or evidence has been adduced of a conflicting defence version of events (typically in answers in a record of interview (see Note at [3-605]):

The accused relies on an account of events in [*the evidence they gave, or called, or in their interview by the police*] That account is to the following effect … [*summarise the account relied upon*].

It is important you understand that the accused must be found not guilty if their guilt has not been proved beyond reasonable doubt and that they are entitled to the benefit of any reasonable doubt you may have at the end of your deliberations.

It follows from this (***Liberato* direction**):

First, if you believe the accused's evidence [*the account relied on by the accused in their interview with the police*], obviously you must acquit.

Second, if you find difficulty in accepting the accused's evidence [*the account relied on by the accused in their interview with the police*], but think it might be true, then you must acquit.

Third, if you do not believe the accused's evidence [*if you do not believe the account relied on by the accused in their interview with the police*], then you should put it to one side. Nevertheless, the question will remain: has the Crown, upon the basis of evidence that you do accept, proved the accused's guilt beyond reasonable doubt?

[3-603] Notes

Last reviewed: September 2023

1. There is longstanding authority for the proposition that, except in certain limited circumstances, no attempt should be made to explain or embellish the meaning of the phrase "beyond reasonable doubt": *Green v The Queen* (1971) 126 CLR 28 at 32–33; *La Fontaine v R* (1976) 136 CLR 62 at 71; *R v Reeves* (1992) 29 NSWLR 109 at 117; *Raso v R* [2008] NSWCCA 120 at [20]. If, in an address, counsel suggests that fantastic or unreal possibilities should be regarded by the jury as affording a reason for doubt, the judge can properly instruct the jury that fantastic or unreal possibilities ought not to be regarded by them as a source of reasonable doubt: *Green v The Queen* at 33; or as put in *Keil v The Queen* (1979) 53 ALJR 525, "fanciful doubts are not reasonable doubts". It is generally undesirable to direct a jury in terms which contrast proof beyond reasonable doubt with proof

beyond any doubt: *The Queen v Dookheea* (2017) 262 CLR 402 at [28]. However, an effective means of conveying the meaning of the phrase "beyond reasonable doubt" to a jury may be by contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities: *The Queen v Dookheea* at [41].

2. The question of whether there is a reasonable doubt is a subjective one to be determined by each individual juror: *Green v The Queen* at 32–33; *R v Southammavong* [2003] NSWCCA 312 at [28]. There was no error in *R v Southammavong* by the trial judge saying, in response to a jury request for clarification, that "the words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them": at [23]. Newman J said in *R v GWB* [2000] NSWCCA 410 at [44] that "judges should not depart from the time honoured formula that the words 'beyond reasonable doubt' are words in the ordinary English usage and mean exactly what they say".

3. If a judge gives the jury written directions it is essential that the directions make clear where the legal onus is on the Crown to eliminate any reasonable possibility: *Hadchiti v R* (2016) 93 NSWLR 671 at [106], [112] (see Special Bulletin 32). A trial judge should take particular care before introducing the concept of reasonable possibility in the course of explaining the onus and standard of proof to the jury. The written directions in *Hadchiti v R* were held to be contrary to law because of the repeated use of the expression "reasonable possibility" throughout and the failure to make clear the onus of proof was on the Crown: *Hadchiti v R* at [44], [112] and see *Moore v R* [2016] NSWCCA 185 at [114].

4. Proof of a matter beyond reasonable doubt involves rejection of all reasonable hypotheses or any reasonable possibility inconsistent with the Crown case: *Moore v R* at [43] per Basten JA; RA Hulme J generally agreed at [94] and see RA Hulme J at [125]. It is not erroneous to direct that if there is a reasonable possibility of some exculpatory factor existing then the jury should find in favour of the accused: *Moore v R* at [99], [125]. The jury should be directed in terms that it is a matter for the Crown to "eliminate any reasonable possibility" of there being such exculpatory matter: *Moore v R* at [99], [125] and several cases cited at [99]–[124]. Framing the issue of self-defence in terms a reasonable possibility does not distort the onus and standard of proof and is consistent with the oft cited case of *R v Katarzynski* [2002] NSWSC 613 at [22]: *Moore v R* at [122]–[124] and see Basten JA in *Moore v R* at [43]. The concept of a reasonable possibility in a question trail is definitive and does not give rise to an answer other than "yes" or "no" — there is no "middle ground" answer of "not sure": *Moore v R* at [36]; [129].

[3-605] The *Liberato* direction — when a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness or the accused's account in a recorded police interview

Last reviewed: September 2023

1. In *Liberato v The Queen* (1985) 159 CLR 507 at 515, Brennan J in his dissenting judgment (Deane J agreeing) spoke of a case in which there is evidence relied upon by the defence conflicting with that relied upon by the Crown. In such a case, a jury might consider "who is to be believed". His Honour said it was essential to ensure

the jury were aware that deciding such a question in favour of the prosecution does not conclude the issue as to whether guilt has been proved beyond reasonable doubt. The jury should be directed that:

(a) a preference for the prosecution evidence is not enough — they must not convict unless satisfied beyond reasonable doubt of the truth of that evidence;

(b) even if the evidence relied upon by the accused is not positively believed, they must not convict if that evidence gives rise to a reasonable doubt about guilt.

2. In *De Silva v The Queen* (2019) 268 CLR 57, the High Court noted that there were differing views as to whether a *Liberato* direction was appropriate in a case where the conflicting defence version of events was not given on oath by the accused, but was before the jury, typically in the accused's answers in a record of interview and said such a direction should be given:

(a) if there is a perceived risk of the jury thinking they have to believe the accused's evidence or account before they can acquit, or of the jury thinking it was enough to convict if they prefer the complainant's evidence over the accused's evidence or account (*De Silva v The Queen* at [11], [13]); or

(b) in a case where the accused gives or calls evidence and/or there is an out of court representation (for example in an ERISP) that is relied upon (*De Silva v The Queen* at [11]).

3. The *Liberato* direction in the suggested direction at **[3-600]** is modelled on what was proposed by the High Court in *De Silva v The Queen* at [12]. A *Liberato* direction should be given in any case where the trial judge perceives there is a real risk the jury may be left with the impression the evidence the accused relies on will only give rise to a reasonable doubt if they believe it is truthful, or that a preference for the complainant's evidence is sufficient to establish guilt: at [9]; see also *Haile v R* (2022) 109 NSWLR 288 at [1] per Bell CJ (Ierace J agreeing) and [73] per Bellew J (Bell CJ , Ierace J agreeing).

4. The *Liberato* direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused's account (second aspect): *Park v R* [2023] NSWCCA 71 at [102]–[103]. In *Park v R*, the second aspect of the direction was defective as it was not framed in terms of a jury, though not positively believing the accused's account, thinking the account might be true. Nor did the direction make it clear there was a command to acquit in such circumstances: at [103]–[104].

5. It is never appropriate to frame the issue for the jury's determination as one which involves making a choice between conflicting Crown and defence evidence. The issue is always whether the Crown has proved its case beyond reasonable doubt: *Haile v R* at [72]. See [76]–[78] as an example of how the failure to give a *Liberato* direction can result in error.

[3-610] Suggested direction — essential Crown witness ("*Murray* direction") (in cases other than prescribed sexual offences)

Last reviewed: September 2023

The following direction applies where there is one witness essential to the Crown case.

> The Crown seeks to prove the guilt of the accused with a case based largely or exclusively on the evidence of [*essential Crown witness*].
>
> Accordingly, unless you are satisfied beyond reasonable doubt [*essential Crown witness*] is both an honest and accurate witness in the account they have given, you cannot find the accused guilty. Before you can convict the accused, you should examine the evidence of [*essential Crown witness*] very carefully to satisfy yourselves you can safely act upon that evidence to the high standard required in a criminal trial.
>
> I am not telling you to be cautious because of any personal view I have of the [*essential Crown witness*]. I told you at the outset of this summing-up that I would not express my personal opinions on the evidence. But in any criminal trial, where the Crown case relies solely or substantially upon the evidence of a single witness, a jury must always approach that evidence with particular caution because of the onus and standard of proof placed upon the Crown.
>
> I am not suggesting that you are not entitled to convict the accused upon the evidence of [*essential Crown witness*]. Clearly you are entitled to do so but only after you have carefully examined the evidence and satisfied yourself that it is reliable beyond reasonable doubt.
>
> In considering [*essential Crown witness'*] evidence and whether it does satisfy you of the accused's guilt, you should of course look to see if it is supported by other evidence.

[3-615] Notes

Last reviewed: September 2023

General direction

1. The above direction is derived from *R v Murray* (1987) 11 NSWLR 12 where Lee J said at 19(E):

   > In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable.

   R v Murray was decided when s 405C(2) (rep) *Crimes Act* 1900, which stated a judge was not required to give a warning in prescribed sexual offence trials that it would be unsafe to convict on the complainant's uncorroborated evidence, was in force. In 2007, this was replaced by s 294AA *Criminal Procedure Act* 1986 which prohibits such a warning being given at all in such cases.

2. The High Court has held that a *Murray* direction should be given in appropriate cases where there is a perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinise the evidence of a complainant with care before arriving at a conclusion of guilt: *Robinson v The Queen* (1999) 197 CLR 162

at [25]–[26]. The direction "emphasises what should be clear from the application of the onus and standard of proof: if the Crown case relies upon a single witness then the jury must be satisfied that the witness is reliable beyond reasonable doubt": *Smale v R* [2007] NSWCCA 328 at [71] per Howie J.

3. This does not mean that in cases where there is one principal witness in the Crown case a *Murray* direction is automatically required — if that witness' evidence is corroborated by other evidence in the trial, such as documentary evidence, forensic evidence or other physical evidence (for example, DNA results implicating the accused) there is no basis for a direction: *Gould v R* [2021] NSWCCA 92 at [134], [136]; cf *Ewen v R* [2015] NSWCCA 117 at [104].

4. There is no particular form of words prescribed for giving a *Murray* direction; nor is there any obligation to use the verb "scrutinize": *Kaifoto v R* [2006] NSWCCA 186 at [72]; *Williams v R* [2021] NSWCCA 25 at [144].

Direction in prescribed sexual offence matters

5. The application of *Murray* to prescribed sexual offences (defined in s 290 *Criminal Procedure Act*) has been significantly modified by s 294AA *Criminal Procedure Act*. This was considered in *Ewen v R* [2015] NSWCCA 117 (see point 7 below). Cases decided before the enactment of s 294AA, where the appellant was charged with a prescribed sexual offence, are no longer good law.

6. Section 294AA *Criminal Procedure Act*, which commenced on 1 January 2007, provides:

   (a) A judge in any proceedings to which this Division applies must not direct a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.

   (b) Without limiting subsection (1), that subsection prohibits a direction to a jury of the danger of convicting on the uncorroborated evidence of any complainant.

   (c) Sections 164 and 165 of the *Evidence Act* 1995 are subject to this section.

7. *Ewen v R* [2015] NSWCCA 117 makes clear that s 294AA takes precedence over *R v Murray*, signalling the legislature's intention to prohibit warnings that call into question (by reason *only* of absence of corroboration) the reliability not only of complainants as a class, but also of a complainant in any particular case: *Ewen v R* at [136]–[140]. A *Murray* direction, based *only* on the absence of corroboration, is tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant. If the direction suggests that merely because a complainant's evidence is uncorroborated, it would be, on that account, dangerous to convict, it transgresses s 294AA(2): *Ewen v R* at [140]–[141]. Such a conclusion cannot be avoided by switching from one linguistic formula ("dangerous to convict") to another ("scrutinise the evidence with great care").

8. This does not mean that directions appropriate to the circumstances of the individual case cannot be given as envisaged in *Longman v The Queen* (1989) 168 CLR 79: *Ewen v R* at [143]. A direction would not contravene s 294AA if it concerned specific evidence in the case, including weaknesses or deficiencies

as described in *Longman v The Queen*; *Robinson v The Queen* (1999) 197 CLR 162 and *Tully v The Queen* (2006) 230 CLR 234 — particularly weaknesses or deficiencies that are apparent to the judge but may not be so apparent to the jury. Neither would a direction concerning delay in bringing the case (although note s 165B *Evidence Act* 1995 regarding delay). Nor would a direction which addressed a scenario where the evidence indicated that others were present and were or may have been in a position to observe what took place, and were not called to give evidence: *Ewen v R* at [143]–[144]. The latter direction would, however, have to be consistent with *Mahmood v Western Australia* (2008) 232 CLR 397 at [27]. See further **Witnesses — not called** at **[4-370]**, **[4-375]**.

9. In *Williams v R* [2021] NSWCCA 25, the Court held that the trial judge (in a judge-alone trial) correctly gave a *Murray* direction without breaching s 294AA because no mention was made of the complainant's evidence being uncorroborated, only that the tribunal of fact had to be satisfied beyond reasonable doubt that the complainant was an honest and reliable witness whose evidence was "accurate in vital respects": [143]. See also *AB v R* [2022] NSWCCA 104, where the Court concluded there was no error in the trial judge's direction to consider other evidence, including evidence of complaint, that may "support" the complainant's evidence and that, in that context, her Honour's reference to *Ewen* rather than *Murray* was correct: at [62]–[63].

[3-625] Motive to lie and the onus of proof

Last reviewed: September 2023

Crown witnesses

1. A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) *Evidence Act* 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: *South v R* [2007] NSWCCA 117 at [42]; *MAJW v R* [2009] NSWCCA 255 at [31]. The jury's task does not include speculating whether there is some other reason why the Crown witness would lie: *Brown v R* [2008] NSWCCA 306 at [50]. Nor does it include acceptance of the Crown witness's evidence unless some positive answer to that question is given by the accused: *South v R* at [42].

2. If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: *Doe v R* [2008] NSWCCA 203 at [58]; *Jovanovic v R* (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: *Jovanovic v R* at 523.

3. Where the defence does not directly raise the issue, it is impermissible for the prosecutor to submit (for the purpose of promoting the acceptance of a Crown witness as a witness of truth) that the accused did not advance a motive to lie.

The jury should not be given the impression that the accused bears some onus of proving the existence of a motive for the fabrication of the allegations against them: *Doe v R* at [59]–[60].

The accused

4. It is impermissible to cross-examine an accused to show that they do not know of any reason why the complainant (or indeed a central Crown witness) has a motive to lie: *Palmer v The Queen* (1998) 193 CLR 1 at [8]; *Doe v R* at [59]. The question focuses the jury's attention on irrelevant material and invites them to accept the evidence unless some positive answer is given by the accused: *Palmer v The Queen* at [8]. An open-ended question to the accused, "why would the complainant lie?", "simply should never be asked" by a prosecutor in a trial: *Doe v R* at [54]; *South v R* [2007] NSWCCA 117 at [44]; *Causevic v R* [2008] NSWCCA 238 at [38]. If in closing addresses the prosecutor makes a comment or asks a rhetorical question to that effect when the issue has not been raised, the judge should give full, firm and clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie: *Palmer v The Queen* at [7]–[8]; *Doe v R* at [59]–[60]; *Cusack v R* [2009] NSWCCA 155 at [105].
5. The evidence of an accused person is subject to the tests which are generally applicable to witnesses in a criminal trial: *Robinson v The Queen* (1991) 180 CLR 531 at 536. However, the trial judge should refrain from directing the jury that the accused's interest in the outcome of the proceedings is a factor relevant to assessing his or her credibility as a witness: *Robinson v The Queen* at 535–536; *MAJW v R* [2009] NSWCCA 255 at [37]–[38]. *Robinson v The Queen* did not create a new rule. It applied a more general principle that directions should not deflect the jury from its fundamental task of deciding whether the prosecution had proved its case beyond reasonable doubt: *Hargraves v The Queen* (2011) 245 CLR 257 at [46]. Nevertheless trial judges must not instruct juries in terms of the accused's interest in the outcome of the proceedings whether as a direction of law or as a judicial comment on the facts: *Hargraves v The Queen* at [46]. A direction of that kind seriously impairs the fairness of the trial and undermines the presumption of innocence: *Robinson v The Queen* at 535.

See further **Cross-examination of defendant as to credibility** at **[1-343]** and **Consciousness of Guilt, Lies and Flight** at **[2-950]**ff.

[3-630] Suggested direction — where the defence has an onus

Last reviewed: September 2023

In the type of case now before you, however, there is an exception to the general propositions of law which I have just put, namely — that the Crown must prove its case, and prove it beyond reasonable doubt. The law makes provision in respect of one matter which arises for your decision in this trial, in which the accused must prove their case. I will explain shortly what that matter is.

Now however, I wish to emphasise that the law is that where the proof of any matter is on an accused person, that is to say, by way of exception to the general rule which I have explained, then the accused is not required to prove that matter beyond reasonable doubt — the standard of proof imposed upon the Crown.

The accused needs only to establish what the accused relies upon, in this regard, to a lower standard of proof than beyond reasonable doubt. The accused is required to prove the accused's case, in this regard, only on the balance of probabilities. That is to say the accused needs only to show that it is more likely than not that what the accused asserts is so.

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Possession

For possession in relation to drugs, see the definition of possession under **Supply of Prohibited Drugs** and **Deeming provision** at **[5-6700]**.

[3-700] Suggested direction

A dictionary would tell you that to possess something means to have that thing. I need to clarify that concept of possession as it is recognised by the law in the present context.

The essence of the concept of possession in law is that, at the relevant time, you intentionally have control over the object in question. You may have this control alone or jointly with some other person or persons. You and those persons (if any) must have the right to exclude other people from it. If these conditions are fulfilled, then you may be said to have possession of that object, whether it is your own sole possession or whether it is a joint possession with somebody else.

It is not necessary for you to have something in your hand, pocket, wallet or purse before the law says that you have it in your possession. Further, you do not need to own something in order to possess it. You can possess something temporarily, or for some limited purpose. You can possess something jointly with one or more other persons.

I will give you some examples. Some of you probably have a television set in your home. Even though you are now physically here in this courtroom and the television set is back in your home, the law would regard you nonetheless as being in possession of it.

You and your spouse might have bought it jointly, and you might accordingly both own it. The law would regard you, as well as your spouse, as being in possession of it.

Perhaps you have not bought the set but are renting it from a rental company. You do not own it. Nonetheless, the law would regard you, but not the rental company, as being in possession of it.

Perhaps you have not bought it and are not renting it but a friend has left it with you to mind for a few weeks whilst he or she is away on holidays. For the time being, you are in possession of it and your friend is not.

In defining possession earlier, I used the phrase "intentionally have control". This is to make clear that if something has been, for example, slipped into your suitcase unknown to you, you are not regarded as having possession of it in law, even though the case that you are carrying could be said to be under your control.

[3-710] Notes

1. This direction concerns the general concept of possession apart from any relevant statutory definition: *Crimes Act* 1900, s 7. Section 7 deals with situations which, although falling short of actual possession, may be deemed to amount to possession: *R v Dib* (1991) 52 A Crim R 64.
2. Cases on possession are: *He Kaw Teh v The Queen* (1985) 157 CLR 523 especially at 627, 629 and 648; *R v Baird* (1985) 3 NSWLR 331; *R v Cotterill* (unrep, 7/6/93, NSWCCA); and *R v Micallef* [2002] NSWCCA 480.

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Prison informers — warnings

[3-750] Introduction

Section 165(1)(e) *Evidence Act* 1995 provides that evidence given in a criminal proceeding by a witness who is a prison informer is "evidence of a kind that may be unreliable". If a party requests and if there is a jury, the judge is to:

(a) warn the jury that the evidence may be unreliable, and

(b) inform the jury of matters that may cause it to be 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: s 165(2).

The judge need not comply with s 165(2) if there are good reasons for not doing so: s 165(3). The judge should state the "good reasons for not doing so": *R v Beattie* (1996) 40 NSWLR 155 at 160. It is not necessary that a particular form of words be used in giving the warning or information: s 165(4). Section 165 "does not affect any other power of the judge to give a warning to, or to inform, the jury": s 165(5). This preserves the discretion to give additional warnings: *R v Robinson* [2006] NSWCCA 192 at [5]. A warning that evidence from a prison informer may be unreliable is only required if the evidence is unfavourable to the accused: *R v Ayoub* [2004] NSWCCA 209 at [14]–[15]; *R v Main* [2009] NSWCCA 14 at [26].

[3-760] Suggested direction

I want to now give you a direction about the way you should approach the evidence given by [*name of prison informer*]. You will recall that [*his/her*] evidence was that:

[*Briefly summarise the unfavourable evidence*]

I want to give you a warning about the way you should treat that evidence.

That evidence may be unreliable and there is therefore a need for you to exercise caution when you decide whether to accept it and the weight you should give it.

Let me explain to you why it is that the evidence may be unreliable. The first reason is that evidence of this kind is easily invented. It is simply a matter of [*name of prison informer*] saying that [*name of accused*] said something to [*him/her*], and there is not really much that a person in the [*name of accused*] position can do beyond simply denying that [*he/she*] said those things.

It's also possible that [*name of prison informer*] has made up [*his/her*] the evidence in the hope of getting some benefit, perhaps including favourable treatment within the prison environment, or a favourable decision concerning release on parole.

People like [*name of prison informer*] are also affected by the standards and culture of prison society, where respect for the law, and telling the truth, may not be valued in the same way as would be the case outside prison. In prison there is often not a lot for prisoners to do to occupy their time and they live very close to each other. It is easy in those circumstances for one prisoner to develop a grudge against another over something that would seem quite trivial to someone outside jail.

[If appropriate: You must also remember that [*name of prison informer*] is a convicted criminal who was serving a sentence of imprisonment at the time this conversation was said to have occurred. That means that you may regard [*him/her*] as a person who is less likely to tell the truth than a person who has not been convicted of a criminal offence.**]**

For these reasons the evidence of [*name of prison informer*] may be unreliable and there is therefore a need for you to exercise caution when you decide whether you accept that evidence. If you do decide to accept it, you should be similarly cautious in deciding how much significance or value that you think it has.

[*Summarise arguments of counsel as to why the evidence should, or should not, be accepted*]

I have told you that the evidence of [*name of prison informer*] may be unreliable. I have told you why that is the case. And I have told you that you should therefore exercise caution before you accept the evidence and decide what significance it has.

That is what I have done. Let me tell you what I have not done. What I have not done is to give you my personal view at any stage of these directions. I told you earlier that it is not my function to try and persuade you one way or the other about any issue in this trial. The direction that I have just given to you is one the law requires me to give to ensure that the accused receives a fair trial. It is a direction that is given to you because the experience of the courts over many years with witnesses like [*name of prison informer*] is that their evidence may be unreliable. It is a direction that you must take into account.

[3-770] Notes

1. Case law on prison informers prior to the *Evidence Act* "must be treated with considerable reserve": *R v Robinson* [2006] NSWCCA 192 at [6]. The expression "prison informer" is not defined in the *Evidence Act*. Toohey J in *Pollitt v The Queen* (1992) 174 CLR 558 at 605 took it to refer to the evidence of "a prisoner, not connected with the offence in question, who purports to give evidence of statements of a confessional nature made by an accused whilst in prison". The terms of s 165(1)(e) "evidence given in a criminal proceeding by a witness who is a prison informer" appear broader than Toohey J's formulation of "evidence of statements of a confessional nature". The court in *R v Hudd* (unrep, 9/12/94, NSWCCA) followed Toohey J's formulation. Smart AJ said with support in *R v Ton* (2002) 132 A Crim R 340 at [34], that the "term [prison informer] is most frequently used when one prisoner relays a conversation in which another prisoner has admitted his guilt of a serious offence".
2. Prior case law may be used to identify matters that may cause the evidence to be unreliable: *R v Robinson* [2006] NSWCCA 192 at [7]. In the common law decision of *R v Clough* (1992) 28 NSWLR 396 at 405, the Court of Criminal Appeal summarised several matters identified by the High Court in *Pollitt v The Queen*. Hunt CJ at CL said:

   > [It] is potentially unreliable because:
   >
   > (i) the witness is likely to be of bad character;
   >
   > (ii) the evidence is easily concocted;

(iii) the witness is likely to have been motivated to concoct such evidence either:

(a) by his perception that he will derive some benefit in terms of sentence, treatment or release from custody if such evidence is given, or

(b) by reason of pressures on him … arising from his prison environment, where conventional standards of conduct are replaced by a culture in which values such as truth and respect for the rights of others have little relevance; and

(iv) there is usually no way in which the accused can meet such evidence except by his own denial.

3. The common law necessity to warn the jury that it is dangerous to convict on the uncorroborated evidence of a prison informer was abolished by s 164(3) *Evidence Act*: *R v Robinson* [2006] NSWCCA 192 at [9]; *Conway v The Queen* (2002) 209 CLR 203; *R v Kanaan* [2006] NSWCCA 109. The judge may, if satisfied that it is necessary in the interests of justice to do so in the particular case, give a warning that it would be dangerous to convict on the uncorroborated evidence of such a witness, but the judge is *never* under a duty to do so: *R v Kanaan* at [217]; *R v Robinson* at [8]. But the use of the formulation "dangerous to convict" is best avoided, save in exceptional circumstances, as it is frequently understood by a jury as, in effect, a direction by the judge to acquit the accused: *R v Robinson* at [19].

See also the discussion in **Witness reasonably supposed to have been criminally concerned in the events** at **[4-380]**.

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Trial instructions R–Z

para

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Recent possession

Evidence that the accused was in possession of recently stolen property may be evidence that the accused was either the thief or the receiver of the property.

[4-000] Suggested direction

To prove that [*the accused*] stole the property or got it knowing that it was stolen, the Crown relied on [*the accused's*] possession of the recently stolen property and the absence of any reasonable explanation for that possession. Lawyers call this "recent possession".

Where an accused person is in possession of property which has been recently stolen and [*the accused*] either gives no explanation as to how [*he/she*] came to have it, or gives an explanation which could not reasonably be true, then you are entitled, but not obliged, to conclude either that [*he/she*] stole it or that [*he/she*] received it knowing it to be stolen. It is the possession of property recently stolen which calls, without more, for an explanation. In the absence of some explanation which you accept is reasonably possible, the conclusion may be reached that [*the accused*] stole or received the property.

[*As to Possession, see [4-020]*].

[*As to differing versions, see Conflicting Explanations [4-030]*].

[*As to Recency where there is a live issue, see [4-050]*].

In deciding —

1. whether the stealing was recent;
2. whether there has been any reasonably possible explanation; and
3. whether the inference of guilt should be drawn,

the whole of the explanation given by [*the accused*] and all the circumstances should be considered. These include: the period which has elapsed since the property was stolen; the nature and value of the property; whether the property is memorable or a common item; whether the circumstances in which it was obtained are likely to be remembered; and what is known of the circumstances in which [*the accused*] obtained it. An explanation is not reasonably to be expected if [*the accused*] exercises [*his/her*] right not to respond to questions from persons known by [*him/her*] to be police officers.

In summary, before you can draw the inference against [*the accused*] that [*he/she*] stole the property or that [*he/she*] received it knowing it to be stolen, you must be satisfied of each of the following beyond reasonable doubt —

1. the property, the subject of the charge, was in the possession of [*the accused*];
2. the property was stolen;
3. it was stolen recently;

4. no explanation which you are prepared to accept as reasonably possible has been given by [*the accused*] or appears from all the circumstances, these calling for some explanation;
5. having considered the whole of the explanation given and all the circumstances, the conclusion should be reached that [*the accused*] stole the property or received it knowing it to be stolen, no other conclusion being reasonably available.

If the Crown fails to satisfy you beyond reasonable doubt of any of these matters, then the conclusion of guilt must not be reached. If you think that the circumstances do not require an explanation or that the explanation of [*the accused*] or the explanation appearing from all the circumstances might reasonably be true, the conclusion may not be reached. You should not consider the issue of recent possession further.

Where appropriate

Even if you reject the argument based on "recent possession" you still have to consider all the other evidence on which the Crown relies.

[4-010] Notes — general

1. See: *R v Jorgic* (1962) 80 WN (NSW) 761 at 763; *R v McKenna* (1964) 81 WN (Pt 1) (NSW) 330 at 332; *R v Miller* (unrep, 16/11/77, NSWCCA); *R v Bellamy* [1981] 2 NSWLR 727; *Bruce v The Queen* (1987) 61 ALJR 603; *R v Sinanovic* [2000] NSWCCA 395.
2. *Bellamy's* case contains a very full discussion of recent possession. Where there is no other evidence available, apart from recent possession, then the jury should be instructed that if it takes the view that the accused's explanation might reasonably be true, then it must acquit the accused: *R v Bellamy* [1981] 2 NSWLR 727.

[4-020] Notes — possession

The direction as to possession will necessarily vary according to the circumstances of the case. It is well established that the Crown does not have to establish possession of the subject property in the same way as it does for crimes involving possession, for example, of drugs. In this context, see s 7 of the *Crimes Act* 1900 and the deeming provision therein.

With respect to the doctrine of recent possession, the Crown must establish some form of physical possession or dominion (or control) over the property: *R v Saleam* (1989) 41 A Crim R 108 at 114. The possession will be sufficient even if the property is in the actual physical possession of a person over whom the accused has sufficient control, or with whom the accused has such a relationship (for example, bailment), that the property will be handed over to the accused upon request: *R v Cottrell* [1983] 1 VR 143 at 148–149.

The nature of the allegedly stolen property generally dictates the circumstances which the Crown is required to prove to establish recent possession. Thus if the accused has actual manual control over a motor vehicle (by driving it) that would be sufficient to establish possession, as would the fact that the vehicle was garaged in premises over which the accused alone had the right to take such actual manual control: *R v McCarthy* (1993) 71 A Crim R 395 at 400–401.

The suggested direction on possession in **[3-700]** may be adapted to provide an appropriate direction for recent possession, depending upon the particular circumstances of the case.

[4-030] Suggested direction — conflicting explanations

The matter which you have finally to determine, if there is no other basis for convicting apart from recent possession, is whether you think that any of [*the accused's*] explanations might reasonably be true. If so, the Crown has not proved guilt beyond reasonable doubt.

[4-040] Notes — conflicting explanations

1. Often there are different, sometimes conflicting, versions given by the accused as to how the stolen property came into his or her possession, for example, one explanation given to the police on arrest, another given by evidence or statement at the trial. In *R v Bellamy* [1981] 2 NSWLR 727, Reynolds J suggested that the explanation given at the trial is the one to be examined by the jury, though its credibility may be affected by an earlier explanation. Chief Justice Street in *Bellamy's* case (at 731) put the matter somewhat differently, and suggested the above direction **[4-030]**.
2. Failure to give an explanation does not alone give rise to an inference of guilt in the absence of the other circumstances set out in the suggested direction at **[4-030]**: *Bruce v The Queen* (1987) 61 ALJR 603.

[4-050] Suggested direction — recency

You have to consider and decide whether the time that has elapsed between the theft of the property and the finding of it in the possession of [*the accused*] is such a short time that you are prepared to reach the conclusion of guilt from that fact.

When considering the question, you should take into account the value of the property in question and whether you would expect it to change hands frequently. Thus it might be easier to reach the conclusion of guilt if the property stolen was a valuable painting or a valuable piece of jewellery or a valuable motor vehicle than if it were a bank note or a piece of gardening equipment or a common tool.

[4-060] Suggested direction — where no alternative charge

See: *R v McCarthy* (1993) 71 A Crim R 395.

As I said to you, if you are satisfied that [*the accused*] had possession of the property in question when it had been recently stolen, you would be entitled to find that [*he/she*] was either the thief or the receiver of it. In this case, [*the accused*] has not been charged with being a receiver and you may therefore find [*him/her*] "guilty" only if you are satisfied beyond reasonable doubt that [*he/she*] was the actual thief. If it is reasonably possible that somebody else had already stolen it before [*the accused*] was found with it in [*his/her*] possession, then [*he/she*] must be found "not guilty".

[4-070] Notes — recency

1. As to the recency of the stealing of the property, there are cases in which goods are found in the possession of the accused very shortly after their theft (for example, when he or she is arrested at the scene of the theft or shortly after leaving it). But more often some time has elapsed between the theft and apprehension. This raises the question of recency. In *R v Smale* (unrep, 15/8/86, NSWCCA) the police found a stolen car in the accused's garage five months after the theft. The Court of Criminal Appeal held that this fell within the concept of recency. If the question of recency appears likely to trouble the jury, the above direction is suggested. In *Smale*, Lee J (as he then was) said —

   > I agree with his Honour's observation, but would say that in most of the cases that are likely to come before the courts, it would be appropriate to let the question of recency go to the jury because it is not a word of any precise significance so far as time is concerned and it can legitimately mean different things to different people. The jury should therefore rule upon it, not the judge. It is certainly not to be understood as importing the notion of "very recently" except where the nature of the property requires that view.

2. In motor vehicle cases, the degree of recent possession need not be nearly as close to the theft as in the case of more common items such as bank notes. It does not necessarily mean "very recently" except where the nature of the property requires it: *R v Mahoney* (2000) 114 A Crim R 130.

3. Where larceny and receiving of the same property are charged in alternative counts it may be appropriate to give the special verdict direction under s 121 of the *Crimes Act* 1900: see **[5-6120]**.

[The next page is 613]

Recklessness (Malice)

[4-080] Introduction

The *Crimes Amendment Act* 2007 removed the concept of malice as a fault element in various offences under the *Crimes Act* 1900 with the repeal of s 5 of that Act. The amending Act also repealed offences under s 35 and created new offences which replaced the ingredient "maliciously" with "reckless". As to the application of these amendments, see below.

Section 4A was inserted into the *Crimes Ac*t by the *Criminal Legislation Amendment Act* 2007 (Sch 3[1]), which commenced on 15 November 2007. There was no transitional provision for the amendment. Section 4A provides:

> For the purposes of this Act, if an element of an offence is recklessness, that element may also be established by proof of intention or knowledge.

The object of the amendment was to allow the Crown to rely upon an accused's intention for the purpose of proving he or she was reckless.

Following the repeal of malice in s 5, the decision in *Blackwell v R* (2011) 81 NSWLR 119 held that recklessness under s 35(2) (repealed) *Crimes Act* following the enactment of the *Crimes Amendment Act* 2007 meant a foresight of the possibility of the infliction of grievous bodily harm. Consequently, an injury is caused recklessly if the accused realised that grievous bodily harm may possibly be inflicted upon the victim by his or her actions, yet he or she went ahead and acted as he or she did. *Blackwell v R* was specifically concerned with the previous form of the offence under s 35(2) involving grievous bodily harm: *CB v Director of Public Prosecutions (NSW)* [2014] NSWCA 134 at [13]. The terms of the specific offence will define the parameters of what the Crown is required to prove: *CB v Director of Public Prosecutions (NSW)* at [40].

The *Crimes Amendment (Reckless Infliction of Harm) Act* 2012 was passed as a direct response to *Blackwell v R*. A number of offences (listed below) were amended, in effect, to apply the common law concept of recklessness that existed under the now repealed s 5. The amendment applies to the relevant offences when they are committed on or after 21 June 2012.

Therefore there are three classes of offences involving "recklessness":

1. **Offences involving s 5 (repealed) — malice**

   Section 5 (repealed) applies to offences under s 35 committed before 27 September 2007 and to other offences listed in 2(b) below committed before 15 February 2008. Recklessness is a form of malice under s 5. See further discussion at **[4-082]** and a suggested direction for these offences at **[4-085]**.

2. **Offences with recklessness as an ingredient after the repeal of s 5**

   (a) Offences under ss 35(1) and 35(2) (recklessly cause grievous bodily harm in company and recklessly cause grievous bodily harm) committed on or after 27 September 2007 but before 21 June 2012 to which *Blackwell v R* (2011) 81 NSWLR 119 applies. The latter date is the enactment of the *Crimes Amendment (Reckless Infliction of Harm) Act* 2012 (see below). However, *Blackwell v R* does *not* apply to the previous form of offences of recklessly wounding under s 35(3) and (4) (now repealed) committed before 21 June 2012, because, at common law, there was never a "lesser" mental element for

malicious wounding: *Chen v R* [2013] NSWCCA 116 at [65]. The physical element of the offence was, unlike grievous bodily harm, not founded on a gradation of seriousness. A wound was inflicted or not — albeit one not necessarily as serious as that actually inflicted: *Chen v R* at [51]. However, from 21 June 2012, the offences of reckless wounding do *not* require foresight of the possibility of wounding; it is enough if the Crown proves the accused was reckless as to the infliction of actual bodily harm: *Chen v R* at [66]. See the current form of s 35 *Crimes Act*. For a suggested direction for these offences: see **[4-092]**.

(b) Offences which have recklessness as an ingredient committed on or after:

(i) 15 February 2008 under:

- s 31 — documents containing threats
- s 32 — impeding endeavours to escape shipwreck
- s 35A — causing dog to inflict actual or grievous bodily harm
- s 39 — using poison etc to endanger life or inflict grievous bodily harm
- s 42 — injuring child at time of birth
- s 46 — causing bodily injury by gunpowder etc
- s 61J — aggravated sexual assault involving actual bodily harm
- s 61JA — aggravated sexual assault in company involving actual bodily harm
- s 61K — assault with intent to have sexual intercourse
- s 66C — aggravated sexual intercourse with child between 10 and 16 years involving actual bodily harm
- s 80A — aggravated sexual assault by forced self-manipulation involving actual bodily harm
- s 95 — aggravated robbery involving actual bodily harm
- s 138 — stealing or destroying official records
- s 154C — aggravated car-jacking involving actual bodily harms
- s 195 — destroying or damaging property. The Crown must prove foresight of harm to property to any degree from minor damage to destruction: *CB v Director of Public Prosecutions (NSW)* [2014] NSWCA 134 at [45]. If the result of the accused's acts is slight or moderate damage, recklessness will be established if the proved foresight was of destruction; and if the result is destruction, recklessness will be established if the proved foresight was of slight or moderate damage: *CB v Director of Public Prosecutions (NSW)* at [45].
- s 201 — interfering with a mine
- s 202 — causing damage to sea, river, canal, etc
- s 210 — destroying or damaging aid to navigation etc.

(ii) 15 February 2008 but before 21 June 2012 under:

- s 60(3), (3A) — grievous bodily harm or wounding of police officers

- s 60A(3) — grievous bodily harm or wounding of law enforcement officers
- s 60E(3) — assaults at schools
- s 109, 111–113 — aggravated or specially aggravated break and enter offences.

Blackwell v R (2011) 208 A Crim R 392 applies to the offences listed above which had a grievous bodily harm ingredient and were committed in the date range. *Chen v R* [2013] NSWCCA 116 at [65] applies to those offences above which had wounding as an ingredient committed before 21 June 2012.

(c) Offences which, even prior to the removal of the term "maliciously", include recklessness as an available element:

- s 43A — failure of person with parental responsibility to care for child
- s 80D — causing sexual servitude
- s 80E — conducting business involving sexual servitude
- s 93GA — firing at dwelling houses or building
- s 93T — participation in criminal groups
- s 178BA (repealed) — obtain money by deception
- s 178BB (repealed) — obtain money by false or misleading statement
- s 185A (repealed) — inducing person to enter into arrangement by false or misleading statement
- s 193B — money laundering
- s 193D — dealing with instrument of crime
- s 203E — causing a fire
- s 204 — destruction or damage to aircraft or vessel
- s 307A — false or misleading applications
- s 308D — unauthorised modification of computer data
- s 308E — unauthorised impairment of electronic communication
- s 529 — criminal defamation.

3. **Particular offences involving the infliction of grievous bodily harm or wounding following the Crimes Amendment (Reckless Infliction of Harm) Act 2012 committed on or after 21 June 2012.**

   These offences are:

   - s 35 — the basic and aggravated forms of reckless grievous bodily harm or wounding
   - s 60 — assault and other actions against police officers s 60A — assault and other actions against law enforcements officers (other than police officers)
   - s 60E — assaults etc at schools.

   The definitions in s 105A, for the purposes of specially aggravated break and enter offences in ss 109, 111-113, have also been amended to clarify that only recklessness as to causing actual bodily harm is required where the offence is committed on or after 21 June 2012.

   For a suggested direction for these offences, see **[4-095]**.

   The following offences have recklessness and grievous bodily harm as ingredients but were not included in the *Crimes Amendment (Reckless Infliction of Harm) Act* 2012:

   - s 42 — injuring child at time of birth
   - s 35A — causing dog to inflict actual or grievous bodily harm.

[4-082] Malice before repeal of s 5

Other than murder, the degree of recklessness required in order to establish that an act was done maliciously is a realisation, on the part of the accused, that the particular kind of harm in fact done (that is, some physical harm — but not necessarily the degree of harm in fact done) might be inflicted (that is, may possibly be inflicted), yet the accused went ahead and acted: see *Coleman v R* (1990) 19 NSWLR 467 at 475; *R v Stokes* (1990) 51 A Crim R 25 at 40-41; *Pengilley v R* [2006] NSWCCA 163 at [45]. *Chen v R* [2013] NSWCCA 116 at [65] (explained at **[4-080]** above) applies to offences which had wounding as an ingredient before the repeal of s 5.

[4-085] Suggested direction — recklessness before the repeal of malice

The element of recklessness is made out if you are satisfied beyond reasonable doubt that the injury [*or damage*] was caused recklessly by [*the accused*]. An injury [*or damage*] is caused recklessly if [*the accused*] realised that some physical harm [*or damage*] may possibly be inflicted upon [*the victim*] [*or caused to the property*] by [*his/her*] actions yet [*he/she*] went ahead and acted as [*he/she*] did. It is not necessary that [*the accused*] realised the degree of harm [*or damage*] that was in fact caused provided that [*he/she*] realised that some harm [*or damage*] of that type would possibly occur. [*The accused*] cannot be found to have acted recklessly unless the Crown proves that [*the accused*] actually thought about the consequences of [*his/her*] act and at least realised the possibility of some harm [*or damage*] of that type occurring.

[4-090] Offences with the ingredient recklessly cause/inflict a particular kind of harm where Blackwell v R applies

Where the charge refers to the harm inflicted as grievous bodily harm, the Crown must prove that the accused at least foresaw the possibility of the infliction of grievous bodily harm resulting from his or her intentional act: *Blackwell v R* (2011) 208 A Crim R 392. Similarly, in the case of the reckless infliction of actual bodily harm or reckless wounding, the Crown must prove beyond reasonable doubt that the accused foresaw the possibility of that particular type of harm resulting: *Chen v R* [2013] NSWCCA 116 at [65]. Section 4A (discussed at **[4-080]**) additionally provides that recklessness can be proved by intention or knowledge.

[4-092] Suggested direction — offences with the ingredient recklessly cause/inflict a particular kind of harm

The element of recklessness is made out if you are satisfied beyond reasonable doubt that the injury was [*caused/inflicted*] recklessly by [*the accused*]. An injury is [*caused/inflicted*] recklessly if [*the accused*] realised that [*insert applicable ingredient: grievous bodily harm/wounding/actual bodily harm*] may possibly be [*caused/inflicted*] upon [*the victim*] by [*his/her*] actions yet [*he/she*] went ahead and acted as [*he/she*] did. [*The accused*] cannot be found to have acted recklessly unless the Crown proves that [*the accused*] actually thought about the consequences of [*his/her*] act and at least realised the possibility of [*insert applicable ingredient: grievous bodily harm/wounding/actual bodily harm*] occurring.

For directions on **Intention**: see **[3-200]–[3-220]**.

[4-095] Particular offences involving the infliction of grievous bodily harm or wounding following the Crimes Amendment (Reckless Infliction of Harm) Act 2012

These offences under ss 35, 60, 60A and 60E and the definition of "circumstances of special aggravation" under s 105A *Crimes Act* involve the infliction of grievous bodily harm or wounding yet the mental element in each case is recklessness as to the infliction of actual bodily harm.

[4-097] Suggested direction — particular offences following the Crimes Amendment (Reckless Infliction of Harm) Act 2012

In this charge the Crown must prove beyond reasonable doubt that [*the accused*] inflicted [*grievous bodily harm/a wound*] upon [*the victim*] and was reckless when inflicting that injury. The element of recklessness is made out if you are satisfied beyond reasonable doubt that [*the accused*] at the time of the infliction of the injury realised that [*he/she*] may possibly [*cause/inflict*] actual bodily harm to [*the alleged victim*] by [*his/her*] actions yet [*he/she*] went ahead and acted as [*he/she*] did. Actual bodily harm is any hurt or injury that interferes with the health or comfort of a person. The injury does not need to be permanent but it must have more than a fleeting or trivial affect upon the victim such as fear or panic at the time of the incident. [*The accused*] cannot be found to have acted recklessly unless the Crown proves that [*he/she*] actually

thought about the consequences of [*his/her*] act and at least realised the possibility of actual bodily harm occurring to [*the victim*]. The Crown does not have to prove that [*the accused*] realised that a serious injury or any particular type of injury might result from [*his/her*] actions. Certainly [*the accused*] does not have to realise the possibility that an injury of the type and extent suffered by [*the victim*] might occur.

[The next page is 619]

Silence — evidence of

[4-100] Common law and s 89 Evidence Act 1995

Last reviewed: September 2023

The expression "right to silence" is a useful shorthand description for a number of different rules that apply in the criminal law but may obscure the particular rule or principle that is being applied: *RPS v The Queen* (2000) 199 CLR 620 at 630 at [22]; *Jones v R* [2005] NSWCCA 443. The scope and forms of the common law right are set out in *Sanchez v R* [2009] NSWCCA 171 at [47]–[52]. Section 89 *Evidence Act* 1995 is narrower in its scope than the common law concerning the right of silence: *Sanchez v R* at [71]. Section 89 *Evidence Act* 1995 provides:

> (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused—
>
> (a) to answer one or more questions, or
>
> (b) to respond to a representation,
>
> put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.
>
> (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
>
> (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

The *Evidence Amendment (Evidence of Silence) Act* 2013 inserted s 89A. Section 89A permits unfavourable inferences to be drawn against a defendant who relies at trial upon a fact that was not mentioned at the time of questioning for the offence charged and where the defendant could reasonably have been expected to mention the fact in the circumstances existing at the time. Such inferences can only be drawn where special caution is given to the defendant who has been provided with legal assistance in respect of the caution. The provision only applies to offences carrying a maximum penalty of life imprisonment or a term of imprisonment of five years or more. It does not apply to a defendant under the age of 18 years.

See Special Bulletin 31 — August 2013 for a discussion of s 89A.

[4-110] Suggested direction — right to silence where the accused has exercised the right before trial

Last reviewed: September 2023

[*The accused*], as you are aware, chose not to answer questions put to them by the police at the time of their arrest. All people in this country have a right to silence — that is, to choose not to answer questions put to them by the police. That is what the police officer told [*the accused*] when they were asked if they wanted to answer their

questions. There are some exceptions to this right, for example, when a police officer asks the registered owner of a car who was driving it at the time of some traffic incident. But those exceptions do not apply here.

In this case, it would be quite wrong if [*the accused*], having listened to what the police said, and having decided to exercise their right to silence, later found that a jury was using that fact against them. You must not do that of course. It is important, therefore, that you bear in mind that [*the accused's*] silence cannot be used against them in any way at all. The fact that they took note of the caution given by the police and chose to remain silent cannot be used against them. Under our law, an accused person has a right to silence. [*see: s 89 Evidence Act 1995 and Petty v The Queen (1991) 173 CLR 95 at 97*.]

[4-130] Notes

Last reviewed: September 2023

1. A right to silence direction should be given at the time evidence is given that an accused has exercised the right and the judge should give the direction to the jury that they are not to draw an adverse inference: *Sanchez v R* [2009] NSWCCA 171 at [58]; *Rahman v R* [2021] NSWCCA 290 at [81]–[87]. There is no rule to the effect that the warning *must* be repeated in the summing-up but it may well be a desirable and prudent course: *Sanchez v R* at [58].

2. The Crown should not lead evidence or make comments to the effect that, when charged, the defendant made no reply: *Petty v The Queen* (1991) 173 CLR 95 at 99. Justice Callinan (Gleeson CJ agreeing) said in *Graham v The Queen* (1998) 195 CLR 606 at [45] that evidence of an accused's refusal to answer one or more questions in the course of official questioning might properly be excluded in the exercise of discretion under s 137 *Evidence Act* 1995: *R v Graham* (unrep, 02/09/97, NSWCCA) at 9–10.

3. Where questions asked by the Crown prosecutor elicit the fact that the defendant did not identify matters supporting their innocence when questioned by the police, directions must be given which make it clear that no inference adverse to the defendant may be drawn from that fact: *R v Anderson* [2002] NSWCCA 141 at [30]; *R v Coe* [2002] NSWCCA 385 at [42]–[46]; *R v Merlino* [2004] NSWCCA 104 at [66]–[80].

4. It is clear from the use of the phrase "one or more questions" in s 89(1)(a) that a selective refusal to answer some questions and not others falls within the ambit of the rule in s 89: see *Rahman v R* at [81]. Accordingly, s 89 does not permit an inference of consciousness of guilt to be drawn from selective answering of questions by the defendant: *Evidence*, ALRC Report 38 (Final Report), 1987 at [165]. See also Attorney-General's Department, *Commonwealth Evidence Law*, AGPS Press, Canberra, 1995 at [89.3]: "… selective refusal to answer questions is a refusal to answer 'one or more questions', and therefore falls within the rule in s 89(1)".

   The common law authorities on selective silence in the face of police questioning (such as *Woon v The Queen* (1964) 109 CLR 529) are no longer relevant.

5. If the defendant seeks to impugn the police investigation, evidence that the police properly cautioned the defendant (and they exercised their right to silence) is only relevant if the criticisms are actually raised by the defendant: *Graham v The Queen* at [40].
6. Statements by the police and the Crown Prosecutor in court regarding the defendant's right to silence do not carry the authority or weight of the court and will not replace the need for judicial directions on the issue: *Rahman v R* at [87].

For directions regarding the election of an accused not giving evidence or offering an explanation: see **Election of accused not to offer explanation** at **[2-1000]**.

[The next page is 631]

Tendency, coincidence and background evidence

Pt 3.6 *Evidence Act* 1995 (NSW)

[4-200] Introduction

This section deals with directions to be given in relation to evidence that raises the bad character of an accused (sometimes referred to as "propensity evidence") where it is relevant to an issue in the trial.

Part 3.6 *Evidence Act* 1995 contains provisions dealing with the admissibility of tendency and coincidence evidence. This is the use of evidence of other acts of misconduct for a propensity purpose: that is, to reason that because of the accused's conduct in the past he or she is more likely to have committed the offence(s) charged.

However, there is a third category of evidence of a similar nature that is not dealt with by the *Evidence Act* explicitly but which falls within s 95 of the Act. This is evidence which is not being used to prove tendency or coincidence even though it may raise the accused's past misconduct. It is often referred to as relationship or background evidence. In sexual assault cases it is called "context evidence". This category of evidence is not used for propensity reasoning, as it is under ss 97 and 98, but to explain the conduct of the accused and/or another person (usually the alleged victim) against the background of the incident giving rise to the offence charged. This type of evidence is based upon the common law and has not been excluded by the provisions of the *Evidence Act*: *R v Quach* [2002] NSWCCA 519.

Evidence can be admitted for various reasons on a non-propensity basis within s 95: eg to rebut good character, *R v OGD (No 2)* (2000) 50 NSWLR 433; or to prove the state of mind of another person, *R v Fordham* (unrep, 2/12/97, NSWCCA) (non-consent of complainant).

It is always necessary for the trial judge to require the Crown to specify the purpose for which the evidence is to be placed before the jury as that will determine what sections of the Act apply: *DJV v R* [2008] NSWCCA 272 at [16]. Where evidence is not admitted as tendency or coincidence evidence then the issues will be whether the evidence is relevant and whether it should be rejected under ss 137 or 135 of the Act.

Generally where evidence is admitted under Pt 3.1 it will be necessary to give a warning against tendency reasoning where there is a real possibility that the jury might use it in that way: *Toalepai v R* [2009] NSWCCA 270 at [48]; *JMW v R* [2014] NSWCCA 248 at [147]–[150]; *R v Jiang* [2010] NSWCCA 277 at [44].

At the time tendency and/or coincidence evidence is adduced, consideration should be given to directing the jury as to the permissible use of the evidence and warning them against its misuse, particularly where they may wonder about the purpose of such evidence, for example, if it is not the subject of a charge in the indictment: *Qualtieri v R* [2006] NSWCCA 95 at [80].

The judge should avoid using the term "uncharged acts" in relation to evidence of this nature for whatever purpose it is being admitted: *HML v The Queen* (2008) 235 CLR 334 at [1], [129], [251], [399], [492]; *KSC v R* [2012] NSWCCA 179 at [64].

[4-210] Context evidence

Although not confined to particular offences, context evidence is most often admitted in child sexual assault cases. The complainant is permitted to give evidence of other acts of a sexual nature allegedly committed against him or her by the accused even though those acts are not charges in the indictment. The purpose of the evidence is to place the specific allegation(s) in the indictment in the context of the complainant's overall allegations against the accused in order to assist the jury in understanding the particular allegation(s) in the charge(s).

It is essential to identify the purpose of the evidence tendered by the Crown. Evidence is not admissible simply because it proves the relationship between the complainant and the accused: *R v ATM* [2000] NSWCCA 475. It must be necessary and capable of providing context to the complainant's allegations: *Norman v R* [2012] NSWCCA 230, otherwise the evidence is irrelevant or proves a tendency: *DJV v R* at [17], [29]–[30], [39]; *RWC v R* [2010] NSWCCA 332 at [130].

A discussion by the judge of "context evidence" as "relationship evidence" can cause confusion and result in a misdirection, because of the risk of the jury applying tendency reasoning: see for example *DJV v R*, *JDK v R* [2009] NSWCCA 76 at [37] and *SKA v R* [2012] NSWCCA 205 at [280]–[281].

As to the purpose of context evidence, see *RG v R* [2010] NSWCCA 173 at [38]. It answers hypothetical questions that may be raised by the jury about the allegations giving rise to the charges in the indictment. It may overcome false impressions conveyed to the jury such as that the incident "came out of the blue": *KTR v R* [2010] NSWCCA 271 at [90] or "occurred in startling isolation": *KJS v R* [2014] NSWCCA 27 at [38]. It may also be admitted to explain lack of complaint by the complainant: *DJV v R* at [28]; *KJS v R* at [34](v).

As to the distinction between context and tendency evidence see *Qualtieri v R* [2006] NSWCCA 95 particularly at [119]ff which was applied in *SKA v R*, above. In particular the evidence is not admitted to prove the guilt of the accused but may have the effect of bolstering the credit of the complainant.

As to context evidence see generally: P Johnson "Admitting evidence of uncharged sexual acts in sexual assault proceedings" (2010) 22(10) *JOB* 79; *Criminal Practice and Procedure NSW* at [3-s 97.15]; *Uniform Evidence Law* (15 ed, 2020) at [EA.101.150]; *Uniform Evidence in Australia* (3 ed, 2020) at 59-10.

[4-215] Suggested direction — context evidence

Before you can convict the accused in respect of any charge in the indictment, you must be satisfied beyond reasonable doubt that the particular allegation occurred. That is, the Crown must prove the particular act to which [*the/each*] charge relates as alleged by the complainant.

In addition to the evidence led by the Crown specifically on the count/s in the indictment, the Crown has led evidence of other acts of alleged misconduct by the accused towards the complainant. I shall, for the sake of convenience, refer to this evidence as evidence of "other acts".

The evidence of other acts is as follows:

[*Specify the evidence of other acts upon which the Crown relies*].

It is important I explain to you the relevance of this evidence. It was admitted solely for the purpose of placing the complainant's evidence towards proof of the charges into what the Crown says is a realistic and intelligible context. By context I mean the history of the conduct by the accused toward the complainant as [*he/she*] alleges it took place.

[*Outline the Crown's submission of the issue/s justifying the reception of context evidence.*]

Without the evidence of these other acts the Crown says, you may wonder, for example, about the likelihood of apparently isolated acts occurring suddenly without any reason or any circumstance to link them in anyway. If you had not heard about the evidence of other acts, you may have thought the complainant's evidence was less credible because it was less understandable. So the evidence is placed before you only to answer questions that might otherwise arise in your mind about the particular allegations in the charges in the indictment.

[*The following should be adapted to the circumstances of the case:*]

If, for example, the particular acts charged are placed in a wider context, that is, a context of what the complainant alleges was an ongoing history of the accused's conduct toward [*her/him*], then what might appear to be a curious feature of the complainant's evidence — that [*she/he*] did not complain about what was done to [*her/him*] on a particular occasion — would disappear. It is for that reason the law permits a complainant to give an account of the alleged sexual history between herself or himself and an accused person in addition to the evidence given in support of the charge/s in the indictment. It is to avoid any artificiality or unreality in the presentation of the evidence from the complainant. The complainant's account of other acts by the accused allows [*him/her*] to more naturally and intelligibly explain [*her/his*] account of what allegedly took place.

The Crown can therefore lead evidence of other acts of a sexual nature between the accused and the complainant to place the particular charge/s into the context of the complainant's account of the whole of the accused's alleged conduct.

However, I must give you some important warnings with regard to the use of this evidence of other acts.

Firstly, you must not use this evidence as establishing a tendency on the part of the accused to commit offences of the type charged. You cannot act on the basis that the accused is likely to have committed the offence/s charged because the complainant made other allegations against [*him/her*]. This is not the reason the Crown placed the evidence before you. The evidence has a very limited purpose as I have explained it to you, and it cannot be used for any other purpose or as evidence that the particular allegations contained in the charges have been proved beyond reasonable doubt.

Secondly, you must not substitute the evidence of the other acts for the evidence of the specific charges in the indictment. The Crown is not charging a course of misconduct by the accused but has charged particular allegations arising in what the complainant says, was a course of sexual misconduct. You are concerned with the particular and precise occasion alleged in [*the/each*] charge.

You must not reason that, just because the accused may have done something wrong to the complainant on some or other occasion, [*he/she*] must have done so on the

occasion/s alleged in the indictment. You cannot punish the accused for other acts attributed to [*him/her*] by finding [*him/her*] guilty of the charge/s in the indictment. Such a line of reasoning would amount to a misuse of the evidence and not be in accordance with the law.

[*Note: attention should be directed to any particular matters that might affect the weight to be given to the evidence.*]

[4-220] Background evidence

This is usually evidence of the misconduct of an accused that is being tendered for a non-propensity purpose and, therefore, is admissible under Pt 3.1.

The term "background evidence" is adopted here to refer to relationship and transactional evidence. Relationship evidence is used here in a narrow sense and is to be clearly distinguished from "context evidence" in child sexual assault offences. Not only is the use to be made of the evidence different from context evidence, but also the nature of the evidence will usually be different.

Background evidence places the accused's alleged conduct and/or state of mind within the surrounding events including the relationship between the accused and the victim, or a series of other incidents which form part of chain of events. Background evidence tends to have a close temporal connection with the incident giving rise to the charge. Background evidence is admissible to prove that the accused committed the offence charged as circumstantial evidence.

Background evidence, however, is not tendency evidence. It does not require tendency reasoning to make it relevant although as circumstantial evidence it relies upon available inferences or conclusions arising from the background evidence to prove the charge.

See generally: *Criminal Practice and Procedure NSW* at [3-s 97.1] and [3-s 97.10] and *Uniform Evidence Law* (15 ed, 2020) at [EA.101.150]; *Uniform Evidence in Australia* (3 ed, 2020) at 97-7.

(a) Relationship evidence

Simply because the evidence concerns the relationship between the accused and the alleged victim it does not follow that the evidence is admissible: *Norman v R* [2012] NSWCCA 230 at [33]. The significant questions on admissibility are:

(i) Is the evidence relevant?

(ii) What is the purpose for which it is being tendered?

The evidence can be admitted to show why certain persons acted as they did where that is a relevant consideration: *R v Toki (No 3)* [2000] NSWSC 999; *R v FDP* (2009) 74 NSWLR 645.

It can prove animosity between the accused and the deceased in order to rebut accident: see *Wilson v The Queen* (1970) 123 CLR 334; or to prove the accused's state of mind: *R v Serratore* [2001] NSWCCA 123; or to prove identification of the offender: *R v Serratore* (1999) 48 NSWLR 101.

It can be used to prove that the relationship between two persons was not an innocent one but was based upon the supply of drugs, see *Harriman v The Queen* (1989) 167 CLR 590; *R v Quach* [2002] NSWCCA 519, *R v Cornwell* (2003) 57 NSWLR 82.

Admissibility can depend upon the temporal connection between the evidence and the offence: *R v Frawley* [2000] NSWCCA 340 (6 weeks was considered not to be too long).

(b) Transactional evidence

Evidence showing a set of connected events (or a course of conduct) can be admissible even though revealing misconduct by the accused. Transactional evidence is distinguishable from tendency evidence and evidence proving an accused had a continuing state of mind: *Haines v R* [2018] NSWCCA 269 at [219], [224]–[226]. It will be admissible whether it occurred before or after the alleged offence: *R v Mostyn* [2004] NSWCCA 97 at [119]; *Haines v R* at [224]. It can be used to identify the accused as the offender or the state of mind of the accused at a particular time proximate to the time of the offence. The following are some further examples:

- Conduct during a massage before an alleged sexual assault: *Jiang v R* [2010] NSWCCA 277.
- Identification of the accused as the offender, see *O'Leary v The King* (1946) 73 CLR 566; *Haines v R* [2018] NSWCCA 269.
- Evidence which shows the state of mind of the accused at a time close to the commission of the alleged offence: see *R v Adam* [1999] NSWCCA 189 at [26]; *R v Player* [2000] NSWCCA 123 at [22]; *R v Serratore* [2001] NSWCCA 123; *R v Mostyn* at [135].
- A system of work: see *R v Cittadini* [2008] NSWCCA 256 at [26]–[27].

A direction warning the jury against tendency reasoning is necessary where there is a real possibility that the jury might use the evidence for a tendency purpose: *Jiang v R* at [44].

[4-222] Suggested direction — background evidence

The function of a direction in the case of background evidence is to inform the jury of the limited purpose for which the evidence is admitted and to direct them against using the evidence for tendency reasoning. The content of the direction will depend substantially upon the nature of evidence and the purpose it is being admitted. For example, if it is admitted to rebut a defence of accident. The direction should contain the following components:

> The evidence led by the Crown [*recite the form of the background evidence*] was placed before you as evidence of background to the incident giving rise to the charge/s before you. The Crown's argument is that without that evidence you would not have the whole history necessary to understand the full significance of the incident upon which the charge is based. The Crown argues that this evidence:
>
> [*State Crown argument eg explains why the accused and the victim acted in the way they did or reveals the state of mind of the accused at the relevant time or rebuts accident or identifies the accused as the offender*].

That is why this evidence was placed before you and how the Crown relies upon it in proof of the charge. However, that is the only reason the evidence is before you and you cannot use it for any other purpose. Whether you give it the significance the Crown asks you to place on the evidence is a matter for you. But that is the only relevance it has to your deliberations.

In particular you must not use that evidence to reason that, because the accused has behaved in a certain way on a particular occasion, [*he/she*] must have behaved in that or a similar way on the occasion giving rise to the charge. You must not use that evidence to reason that the accused is the type of person who would commit the offence with which [*he/she*] has been charged. You cannot punish the accused for other conduct attributed to [*him/her*] by finding [*him/her*] guilty of the charge/s in the indictment. That is not the Crown's argument and it would be contrary to the law and your duty as a juror to use the evidence for a purpose other than the specific basis relied upon by the Crown.

[4-225] Tendency evidence

The admission of tendency evidence is governed by Pt 3.6 *Evidence Act*. It requires two preconditions: (a) the giving of notice and (b) that the evidence has "significant probative value".

(a) The requirement to give notice was considered in *R v Gardiner* [2006] NSWCCA 190 at [128], *Bryant v R* [2011] NSWCCA 26 and *Bangaru v R* (2012) 269 FLR 367 at [256] where the tendency of the accused was not specified. See also *R v AC* [2018] NSWCCA 130 at [21]ff. As to dispensing with the requirement of notice for the tendering of tendency evidence, see s 100 and *R v Harker* [2004] NSWCCA 427.

(b) As to the admissibility of evidence under s 97 see *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56; *IMM v The Queen* (2016) 257 CLR 300 and *Hughes v The Queen* (2017) 263 CLR 338. Tendency evidence should be distinguished from coincidence evidence: *R v Nassif* [2004] NSWCCA 433.

See generally *Criminal Practice and Procedure* at [3-s.94.1]ff; *Uniform Evidence Law* at [EA.96.30]ff; *Uniform Evidence in Australia* (3 ed, 2020) at Pt 3.6-1ff.

Section 94(4), which was inserted into the Act in 2020 and affects hearings which commenced from 1 July 2020, states that any principle or rule of the common law or equity preventing or restricting the admissibility of tendency or coincidence evidence is not relevant when applying Pt 3.6.

The following discussion of the caselaw must be read with the terms of s 94(4) in mind. *Taylor v R* [2020] NSWCCA 355 contains a useful summary of the caselaw: at [94]–[122].

In determining the probative value of evidence for the purposes of ss 97(1)(b) and 137, a trial judge should assume the jury will accept the evidence and, thus, should not have regard to the credibility or reliability of the evidence: *IMM v The Queen* at [51]–[52], [54], [58]; *The Queen v Bauer* at [69].

For evidence to be admissible as tendency it is not necessary that it exhibit an "underlying unity", "a modus operandi" or a "pattern of conduct": *Hughes v The Queen* at [34] approving the approach in *R v Ford* [2009] NSWCCA 306, *R v PWD* [2010] NSWCCA 209, *Saoud v R* (2014) 87 NSWLR 481 and disapproving *Velkoski v R* (2014) 45 VR 680 at 682. It is not necessary that the common features be "striking". What is needed is a sufficient link between the distinct events as to mean that one piece of conduct has significant probative value as regards another. That link need not be peculiar: *Decision Restricted* [2022] NSWCCA 246 at [93]; *The Queen v Bauer* at [57]. There is no general rule requiring close similarity between the tendency evidence and the offence: *TL v The King* [2022] HCA 35 at [29]. Depending upon the issues in the trial, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it: *Hughes v The Queen* at [37]. Section 97(1) does not condition the admissibility of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. Commonly there may be a similarity between the tendency asserted and the offences charged: *Hughes v The Queen* at [39].

A "close similarity" between the tendency evidence and the charged offence will almost certainly be required where the evidence is adduced to prove the identity of an offender: *Hughes v The Queen* at [39]. However, this should be understood as referring to situations where there is little or no other evidence of identity apart from the tendency evidence and the identity of the perpetrator is "at large": *TL v The King* at [30], [38].

The test posed by s 97(1)(b) is whether the disputed evidence, together with other evidence, makes significantly more likely any facts making up the elements of the offence charged: *Hughes v The Queen* at [40]. In the case of multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible: *Hughes v The Queen* at [40].

Where there is cross-admissible tendency evidence between two or more complainants, it is an error to group the conduct of each complainant together then formulate an alleged tendency in a manner specific to both of them: *Kanbut v R* [2022] NSWCCA 259 at [65]. Further, the tendency should not be expressed in precisely the same terms as the facts making up the charged offence: *Kanbut v R* at [97]; *Hughes v The Queen* at [41].

Matters that must be considered under s 97

In assessing whether evidence has significant probative value in relation to each count, two interrelated but separate matters must be considered: first, the extent to which the evidence supports the tendency; and, second, the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but of whether an offence was committed, it is important to consider both matters: *Hughes v The Queen* (2017) 263 CLR 338 at [41].

Therefore, there is likely to be a high degree of probative value where: (i) the evidence, alone or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged: *Hughes v The Queen* at [41].

Unlike the common law preceding s 97(1)(b), the statutory words do not permit a restrictive approach to whether probative value is significant. However, the

open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means it is inevitable that reasonable minds might reach different conclusions: *Hughes v The Queen* at [42]; *The Queen v Bauer* (2018) 266 CLR 56 at [61].

Prejudicial effect of tendency evidence

If the evidence is admissible under s 97, it must then satisfy s 101, which is concerned with balancing its probative value against its prejudicial effect. Since 1 July 2020, the test in s 101(2) is whether the probative value of the evidence outweighs the danger of unfair prejudice — the word "substantially" was removed. As to the transitional provisions for these amendments, see *Decision Restricted* [2022] NSWCCA 246 at [51]–[52]. In *The Queen v Bauer* (2018) 266 CLR 56 at [73], the High Court described prejudice as conveying the idea of harm to an accused's interests by reason of a risk the jury would use the evidence improperly in some unfair way. See also *Hughes v R* [2015] NSWCCA 330 at [189]–[193]. In *Hughes v The Queen* (2017) 263 CLR 338 at [17], the High Court articulated how tendency evidence may occasion prejudice to an accused:

> The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

In determining the prejudicial effect that evidence may have on an accused, it is legitimate and appropriate for the judge to take into account the ameliorating effect of any directions that may reduce the prejudicial effect: *Mol v R* [2017] NSWCCA 76 at [36]; *DAO v R* (2011) 81 NSWLR 568 at [171]. It is important that the prejudice to a defendant be specifically identified for the purposes of the weighing exercise required by s 101 and in considering appropriate directions: *BC v R* [2015] NSWCCA 327 at [107]–[110]; *Mol v R* at [36].

Concoction and contamination

Section 94(5) of the Act, which took effect on 1 July 2020, provides that in determining the probative value of tendency or coincidence evidence the court must not have regard to the possibility the evidence may be the result of collusion, concoction or contamination. Previously, *The Queen v Bauer* (2018) 266 CLR 56 at [69]–[70] had exempted from an exclusion of consideration of credibility and reliability a risk of contamination, concoction or collusion that is so great it would not be open to the jury rationally to accept the evidence. The Second Reading Speech of the Attorney General (Evidence Amendment (Tendency and Coincidence) Bill 2020, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1917) included: "Proposed section 94(5) … closes that small gap left open by the courts …".

[4-226] Standard of proof — s 161A Criminal Procedure Act 1986

Section 161A of the *Criminal Procedure Act* 1986 was inserted by the *Stronger Communities Legislation Amendment (Miscellaneous) Act* 2020 and took effect on 1 March 2021: s 2, *Stronger Communities Legislation Amendment (Miscellaneous) Act*.

Section 161A(1) states that when evidence is adduced as tendency or coincidence evidence, the jury must not be directed that evidence needs to be proved beyond reasonable doubt. The only exception is provided for in s 161A(3) when the case is one where there is a significant possibility the jury will rely on that evidence as being essential to its reasoning in reaching a finding of guilt: see *Shepherd v The Queen* (1990) 170 CLR 573; *The Queen v Bauer* at [86]. Such cases are likely to be rare. An example is *Adams v R* [2017] NSWCCA 215.

In *JS v R* [2022] NSWCCA 145, it was held at [47] that s 161A(1) was not restricted to only uncharged acts but also had application to charged acts which were cross-admissible on a tendency basis.

It is appreciated that the structure of a summing-up is a matter for the personal preference of judges. However, consideration should be given as to when a tendency direction might best be given to minimise the risk of confusion on the jury's part as to any standard of proof to be applied. For example, it may be given before the directions about the onus and standard of proof and the essential elements of the offence/s. Alternatively, it may be given shortly after directions concerning the drawing of inferences. The timing may vary depending on the issues in the particular trial.

The suggested direction at **[4-227]** is based on the text of s 161A. As with all suggested directions, the direction will require adaptation to suit the evidence and issues arising in the case at hand. The observations in *JS v R* should also be taken into account, including at [40] that the directions need to be crafted carefully to avoid undermining general directions concerning proof beyond reasonable doubt for each charge, and at [41] that the important direction is, that having weighed *all* of the relevant evidence, the jury must be satisfied beyond reasonable doubt that each element of each charge has been established. It was held in *JS* that such directions may also be necessary in relation to cross-admissible charged acts: [41].

In *BRC v R* [2020] NSWCCA 176, it was held that a warning a jury should not reason that because the accused had committed one or more other acts relied upon to establish a tendency the accused was a person of "bad character" may negate a tendency direction: Simpson AJA at [72]; Hamill J similarly at [96]. It was also held that a warning the jury "cannot punish" an accused for conduct the subject of other charges in the indictment would be inapposite: Simpson AJA at [74]. Hamill J likened this to a "no substitution" warning and agreed it was only apposite in respect of uncharged conduct: at [103], [105].

[4-227] Suggested tendency evidence direction — applies to charged acts, other acts or combinations thereof

The following suggested direction complies with s 161A(1) *Criminal Procedure Act* 1986 in not directing that tendency evidence needs to be proved beyond reasonable doubt. It will require modification by directing as to that standard of proof where the exception in s 161A(3) applies.

A tendency may be proved by evidence of "the character, reputation or conduct of a person, or a tendency that a person has or had": s 97(1) *Evidence Act*. The suggested direction refers only to "conduct" and will require modification in a case in which it is sought to be proved in an alternative way.

Inferential reasoning is usually involved in deciding whether a tendency has been established so it will be helpful if the jury has already been directed as to the care required in the drawing of inferences generally.

Trial judges should be alive to any possible prejudicial misuse of tendency evidence that might arise in a particular case and add any further warning that may be required.

Part of the Crown case is that the accused had a tendency to [*short description of the tendency*].

The Crown says you would be satisfied the accused had this tendency because of [*his/her*] conduct in [*describe the conduct relied upon by the Crown, be it the subject of counts in the indictment, or not, or both*].

The Crown says this conduct reveals the accused had a tendency to [*short description of the tendency*] which makes it more likely [*he/she*] committed the offence(s) charged in the indictment.

You will need to consider the evidence relating to this alleged conduct of the accused and decide whether [*he/she*] did in fact conduct [*him/herself*] in the way the Crown alleges. In doing so, you do not consider each of the acts in isolation. You should consider all the evidence and decide what conduct you are satisfied occurred.

If you decide that all, or at least some, of the conduct occurred, you then need to consider whether it enables the inference to be drawn that the accused had the tendency to [*short description of the tendency*].

You will recall the direction I gave to you about the care that needs to be applied to the drawing of inferences. I directed you to consider whether there might be alternative explanations for the evidence. I directed you that you should not draw an inference from the direct evidence unless it is a rational inference in the circumstances. You should bear in mind those directions when you are considering this part of the evidence.

If you are not satisfied that any of the conduct the Crown relies upon occurred, then there is no basis upon which the tendency could be inferred. In these circumstances, you must put the whole issue of tendency to one side and confine your consideration to the other parts of the Crown's case.

If you find the accused did [*short description of the tendency*], then you can use that in considering whether it is more likely [*he/she*] committed the specific offences with which [*he/she*] is charged. However, it is essential you consider in relation to each charge whether the accused [*acted in that particular way/had that particular state of mind*] on that specific occasion.

Finding the accused did have the tendency the Crown alleges is not enough to prove guilt. It may assist the Crown to prove the accused committed the offences, but it is not enough by itself. The question is whether it makes it more likely the accused conducted [*him/herself*] in the way the Crown alleges on any of the occasions that are the subject of the charges. That is the only way the accused's tendency to [*short description of the tendency*] may be used.

Ultimately, you must decide whether the specific offences with which the accused has been charged have been proved. That decision must be based upon the evidence relevant to each of the charges. This includes the evidence of the complainant about what the accused did. It will include the tendency alleged by the Crown, provided you are satisfied it has been established. It will also include [*briefly describe other categories of evidence that are relied upon*].

When considering whether a charge has been proved, you will have to decide whether the Crown has proved the essential elements of that charge. Shortly I will be telling you what those essential elements are for each of the charges.

[Add, if appropriate — usually where the conduct relied upon is not the subject of a count in the indictment: In directing you that the tendency evidence cannot be used other than in the way I have described, part of what I am saying is that you must not substitute the conduct of the accused on some other occasion for the conduct that is relied upon by the Crown to prove a particular charge.**]**

[Add, if appropriate: The evidence the Crown relies upon to establish that the accused had this tendency is of a type that might provoke people to have an emotional response to it because it might be regarded as a distasteful way for a person to have behaved. You must be careful to avoid allowing any emotional response or prejudice to distract you from a calm and objective assessment of this issue.**]**

[Add, if appropriate: Some of the evidence before you that is relied upon by the Crown to prove the tendency alleged concerns incidents that are not the subject of any charge in the indictment. If you are not satisfied that an incident that is not the subject of a charge occurred, then the evidence relating to it should be put completely aside. There is no other issue in the case to which it is relevant.**]**

I will now summarise the case for the Crown and the case for the accused on this issue of tendency.

The Crown argues [*summarise arguments as to how the conduct is said to establish the tendency and how the tendency is said to be relevant in proving the charges*].

The defence argues [*summarise the counter arguments*].

[4-230] Tendency evidence in child sexual assault proceedings — s 97A

Section 97A applies to proceedings in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue. It took effect on 1 July 2020. The Attorney General described the provision as altering the operation of s 97(1)(b) for child sexual abuse prosecutions in order to facilitate greater admissibility of tendency evidence (see Second Reading Speech, Evidence Amendment (Tendency and Coincidence) Bill 2020, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1914).

The transitional provisions for the amendment state s 97A does not apply where the hearing of proceedings began before the amendment commenced: Sch 2, cl 28. Where the application of the transitional provisions is in issue, it will be necessary to identify the relevant "hearing" of the proceedings and to determine when it began: *JW v R* [2022] NSWCCA 206 at [54]. For example, with respect to fitness to plead inquiries and special hearings under the *Mental Health and Cognitive Impairment Forensic*

Provisions Act 2020 (and its predecessor, the *Mental Health (Forensic Provisions) Act* 1990 (rep)), fitness inquiries are a preliminary step and the special hearing is the substantive hearing of the underlying proceedings: *JW v R* at [57]–[58].

Under s 97A(2) there is a presumption that tendency evidence about the following will have significant probative value for the purposes of ss 97(1)(b) and 101(2):

(a) the sexual interest the defendant has or had in children (regardless of whether they have acted on the interest)

(b) the defendant acting on a sexual interest they have or had in children.

A court retains a discretion to determine such evidence does not have significant probative value if satisfied there are sufficient grounds to do so: s 97A(4). However, s 97A(5) lists the following matters (whether considered individually or collectively) the court is *not* to take into account in determining whether there are sufficient grounds, unless there are exceptional circumstances in relation to those matters:

(a) the tendency sexual interest or act is different from the sexual interest or act alleged in the proceeding

(b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred

(c) the personal characteristics of the subject of the tendency sexual interest or act (for example their age, sex or gender) are different to those of the subject of the alleged sexual interest or act

(d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act

(e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act,

(f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features

(g) the level of generality of the tendency to which the tendency evidence relates.

The terms "sufficient grounds" (in s 97A(4)) and "exceptional circumstances" (in s 97A(5)) are not defined. As to the former, the Attorney General, during the Second Reading Speech introducing this amendment, said (Second Reading Speech, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1915):

> such grounds should be considered in light of the objective of this reform to facilitate greater admissibility of tendency evidence and, specifically, the intent of the proposed section 97A to facilitate greater admission of tendency evidence in child sexual offences.

And of the latter:

> The threshold of exceptional circumstances … was chosen intentionally … to set a high bar. Further, it is intended that the exceptional circumstances must relate to those specific matters [identified in s 97A(5)], either individually or [in] combination, rather than relating to any other aspects of a particular matter. Matters outside those specifically enumerated in [s 97A(5)] should not be taken into account … to determine whether the exceptional circumstances threshold has been met.

[4-235] Coincidence evidence

The admissibility of coincidence evidence is governed by s 98 *Evidence Act*. It requires two preconditions: (a) the giving of notice and (b) that the evidence has "significant probative value".

See generally *Criminal Practice and Procedure NSW* at [3-s 98.1]ff; *Uniform Evidence Law* (15 ed, 2020) at [EA.98.60] ff; *Uniform Evidence in Australia* (3 ed, 2020) at 98-1.

(a) The requirement to give notice was considered in *R v Zhang* [2005] NSWCCA 437 at [131] and *Bryant v R* [2011] NSWCCA 26. As to the dispensing of the requirement of notice for the tendering of coincidence evidence, see s 100 and generally *R v Harke*r [2004] NSWCCA 427.

(b) The approach to the admissibility of coincidence evidence was considered in *DSJ v R* (2012) 84 NSWLR 758 at [6]–[9], [11], [56], [72]–[82], especially as to the role of the judge and that of the jury in the finding of facts. The decision approved *R v Zhang*. See also the discussion in *R v Gale* [2012] NSWCCA 174 at [29]–[31]. These three decisions were explained and applied in *R v Matonwal* [2016] NSWCCA 174 at [70]–[76]. As to the difference between coincidence and tendency evidence: see *O'Keefe v R* [2009] NSWCCA 121; *R v Nassif* [2004] NSWCCA 433 at [51]; *Doyle v R* [2014] NSWCCA 4 at [109].

If the evidence is admissible under s 98, it must then satisfy s 101, which is concerned with balancing its probative value against its prejudicial effect. The questions posed by ss 98 and 101 turn on a mode of reasoning based on the improbability that something was a coincidence: see the explanation in *Selby v R* [2017] NSWCCA 40 at [24]–[26]; *Ceissman v R* [2015] NSWCCA 74 at [42]. The improbability that something was a coincidence is not displaced by the fact that the two (or more) events bear some dissimilarities. The question is whether the dissimilarities are relevant in that they undercut the improbability of something being a coincidence and whether they detract from the strength of the inferential mode of reasoning permitted by s 98: *Selby v R* at [24], [26].

As to the possibility of concoction, see **Tendency evidence** at **[4-225]** above.

[4-237] Suggested direction where coincidence evidence admitted as part of a circumstantial case

In cases where the coincidence evidence is not the only evidence against the accused, there is no requirement that the coincidence evidence be proved beyond reasonable doubt: s 161A(1) *Criminal Procedure Act* 1986. However where there is a significant possibility that a jury will rely on the coincidence evidence as being essential to its reasoning in finding guilt, then it will have to be proved beyond reasonable doubt: s 161A(3) *Criminal Procedure Act* 1986. See **[4-226] Standard of proof — s 161A Criminal Procedure Act 1986**.

See the discussion at [4-200] **Introduction** concerning the timing of a direction when such evidence is given.

The coincidence evidence may arise from the charges in the indictment, in that the joinder of the charges was based upon the admissibility of each of the charges

as evidence of coincidence in respect of each of the other charges, see for example *O'Keefe v R* [2009] NSWCCA 121. In such a case the suggested direction will need to be amended. However, simply because the charges are joined on the basis of the availability of coincidence reasoning, the judge is not required to direct the jury that it must find one of the offences proved beyond reasonable doubt before it can use that charge as basis of coincidence reasoning: *Folbigg v R* [2005] NSWCCA 23 at [103].

The suggested direction concerns proving the accused's identity but the coincidence evidence can be used as proof of a state of mind, for example, to rebut accident. Coincidence evidence is a form of circumstantial evidence and will usually form part of the circumstantial case together with other evidence that may indirectly prove the guilt of the accused.

As should be apparent to you, the accused is charged only with the offence/s stated in the indictment. You have before you evidence the Crown relies upon as establishing [*he/she*] committed [*that/those*] offence/s.

[*Briefly refer to that evidence other than the coincidence.*]

However, as part of its case against the accused, the Crown has led evidence the accused … [*specify the coincidence evidence*].

That evidence is before you because sometimes there may be such a strong similarity between two different acts and the circumstances in which they occur that a jury would be satisfied the person who did one act (or set of acts) must have done the other/s. That is to say, there is such a significant similarity between the acts, and the circumstances in which they occurred, that it is highly improbable the events occurred simply by chance, that is, by coincidence. The improbability of two or more events occurring by chance, or coincidently, may lead to a conclusion an accused person committed the act (or had the state of mind) the subject of the charges.

In this case, the Crown says that, provided you are satisfied the accused did … [*specify conduct which is the basis of the coincidence evidence*], then [*that/those*] act/s, and the circumstances in which [*it/they*] [*was/were*] done, were so similar to the act/s alleged in the indictment, that you would conclude beyond reasonable doubt that the accused must have committed the offence/s with which [*he/she*] has been charged.

The evidence of the pattern of behaviour can only be used in the way the Crown asks you if you find two matters: firstly, that the accused did the other acts; and secondly, that they are so similar to the acts giving rise to the charge, that you find it is highly improbable both acts were committed by a different person. If you accept those two matters, then you can use that evidence, together with the other evidence in the Crown's case, to be satisfied beyond reasonable doubt that the accused committed the acts giving rise to the offence/s charged in the indictment.

However this is the only way you can use the evidence of other acts. You cannot reason that because the accused may have committed the other acts [*he/she*] is the type of person who will commit criminal activity generally or that [*he/she*] is a person who is likely to have committed the offence/s charged. The evidence is not placed before you for that type of general reasoning. You cannot punish the accused for other conduct attributed to [*him/her*] by finding [*him/her*] guilty of the charge/s in the indictment.

[4-240] Suggested direction where coincidence evidence relied upon for joinder of counts of different complainants

Coincidence evidence may be admitted to bolster the evidence of the witnesses, for example in a case where the evidence of two complainants is admitted in respect of charges in the indictment of offence committed against each: *R v F* [2002] NSWCCA 125; *Saoud v R* (2014) 87 NSWLR 481 at [49]–[53]. If the evidence of the two witnesses shows sufficient similarity to be admissible as coincidence evidence, it can be used to prove that the two witnesses would not make up those versions independently and by chance. In such a case the issue of concoction may arise and require a direction to the jury that they should reject the possibility of concoction before using the evidence for coincidence reasoning.

On the indictment there are allegations against the accused made by two complainants [*complainant A and complainant B*]. Of course what [*complainant A*] says about what [*he/she*] alleges the accused did to [*him/her*] is primary evidence relied upon by the Crown to prove the charge/s in respect of [*her/him*]. It is the same situation with [*complainant B*]. Ultimately you have to be satisfied beyond reasonable doubt that each complainant is honest and accurate in [*his/her*] allegations upon which the charges are based.

[*Detail in respect of each complainant the allegation and the evidence in respect of each complaint, for example, evidence of complaint, if any.*]

As I have explained to you, although the trial of the accused in respect of each of the complainant's allegations is being heard at the same time you still have to reach separate decisions on each of the allegations made by each of the complainants.

The trials of the charges concerning the two complainants are being heard together because the Crown says you can use the evidence given by one of the complainants as evidence against the accused in respect of the charges involving the other complainant. The Crown argues that, in determining whether it has proved beyond reasonable doubt the allegations made by [*complainant A*] and giving rise to the charges involving [*her/him*], you can take into account, in the way I shall explain to you, the evidence given by [*complainant B*] and visa versa.

The Crown argues that, because the allegations made by each of the complainants against the accused are so similar in the particular conduct attributed to the accused, it is highly likely that each is telling you the truth in giving [*his/her*] separate accounts. The Crown in effect says the accused has a particular and unusual way of conducting [*himself/herself*] or a peculiar pattern of behaving which is apparent from the accounts given by [*complainant A and complainant B*] when they are considered together. The Crown's argument is that the possibility of each making allegations that are so similar by chance or coincidence is so remote that the only explanation is the accused acted in the same way towards both of them and, therefore, their accounts are true. The Crown alleges that the similarities in the allegations are as follows:

[*Outline the similarities relied upon by the Crown as its coincidence evidence*].

The Crown's argument can only succeed if: firstly, you find that those similarities are present in respect of the allegations made by [*complainant A and complainant B*] and, secondly, that they are so similar they amount to a particular and peculiar pattern of behaviour such that it is highly improbable that each could be giving such an account

by sheer chance or coincidence. In other words the Crown argues the accounts are such that the only explanation for their similarity is that they are true accounts of what the accused did to each. The more similar the accounts, then the less likely it may be that the accounts can be explained by chance or invention.

Of course if you do not accept that such similarities exist, or you reject the argument that they disclose a particular pattern of behaviour attributed to the accused, then you would reject the Crown's argument and look at the evidence of [*complainant A and complainant B*] independently without having regard to the evidence of the other.

[*Refer to arguments of defence including dissimilarities and, if appropriate, the possibility of concoction accounting for the similarity in the allegations.*]

You should understand that this argument of the Crown is the only reason why the allegations made by [*complainant A and complainant B*] are being dealt with together in the one trial. If you do not accept the Crown's argument, then you must disregard any similarities in the accounts and deal with the charges involving [*complainant A and complainant B*] completely separately. You cannot use the evidence of one to prejudice the accused in respect of the charges involving the other if you reject the Crown's argument as to the accounts disclosing a pattern of behaviour that can be relied upon as proof of the charges.

[The next page 651]

Unfavourable witnesses

***Evidence Act* 1995 (NSW), s 38**

[4-250] Introduction

A party calling a witness can be permitted to cross-examine the witness in accordance with s 38 *Evidence Act*. Such cross-examination can only be permitted with leave and, therefore, s 192 of the Act applies. The evidence can be rejected under s 137 of the Act if it is unduly prejudicial within the terms of that section.

A prior inconsistent statement can be admissible as to the truth of its contents under s 60 of the Act.

As to unfavourable witnesses see generally: *R v Le* (2002) 54 NSWLR 474, *Adam v The Queen* (2001) 207 CLR 96, *R v Ryan (No 7)* [2012] NSWSC 1160, *DPP v Garrett (a Pseudonym)* (2016) 257 A Crim R 509; *Criminal Practice and Procedure NSW* at [3-s 38.1]ff; *Uniform Evidence Law* at [1.2.3260]ff; and *New Law of Evidence* at 38.1ff.

It may be necessary to warn the jury under s 165 of the Act as to the potential unreliability of a prior inconsistent statement because of its hearsay nature.

[4-255] Suggested direction — prior inconsistent statement by a Crown witness

[*If the judge wishes to explain the usual circumstances under which cross-examination occurs the following may be said:*

In the usual case the party who calls a witness is not permitted to cross-examine the witness: that is, the party cannot seek to test the honesty or accuracy of the witness about the evidence given by [*him/her*]. In the usual case it is the opposing party who has the right to test a witness by cross-examination.]

However, in relation to the witness, [*name of witness*], I permitted the Crown to ask [*him/her*] questions concerning the evidence given by [*him/her*] in light of a statement that [*he/she*] had previously made. This was because it appeared to me that there was some inconsistency between the evidence given initially by [*name of witness*] when called by the Crown and what [*he/she*] said in the statement.

As with all witnesses, it is a matter for you to decide what if any of [*name of witness*] evidence you accept as honest and reliable.

You can conclude that, in spite of the previous statement made by [*name of witness*], the evidence given by [*him/her*] in Court should be accepted, either wholly or in part, and be used by you in reaching your verdict.

On the other hand you may, having regard to all the circumstances in which [*name of witness*] statement was made, choose to accept it either wholly or in part instead of the evidence given by [*him/her*] in Court. You can also choose to accept some part of what [*name of witness*] said in Court and what [*he/she*] said in the statement as long as you make your decision logically, rationally and by applying your common sense. You can also reject everything [*name of witness*] has said about this matter.

As I said earlier it is a matter for you to decide what, if any, of [*name of witness*] evidence that you accept as honest and reliable.

[*If necessary add*

In relation to the statement made by the witness you will take into account that it was of course not on oath. Further I warn you that it may be unreliable because [*state reasons by reference to s 165* Evidence Act].]

[The next page is 661]

Procedures for fitness to be tried (including special hearings)

[4-300] Introduction

The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (the Act), prescribes criminal procedures for the Supreme Court and District Court for persons affected by mental health and cognitive impairments. The Act replaced the *Mental Health (Forensic Provisions) Act* 1990 (the 1990 Act) and commenced on 27 March 2021.

A "defendant", the term generally used throughout the Act, is defined in s 3(1) to include an accused.

Part 4, Div 2 of the Act deals with fitness to stand trial (see [4-310]) and Pt 4, Div 3 deals with special hearings, including the special verdict of act proven but not criminally responsible on the ground of a mental health impairment or cognitive impairment (see [4-315]).

When a fitness inquiry is held, the court is obliged to consider "whether the trial process can be modified, or assistance provided, to facilitate the [accused's] understanding and effective participation in the trial", so as to avoid a determination of unfitness: s 44(5)(a). An example may be introducing frequent breaks to enable an accused with an intellectual disability to receive regular explanations in language they can understand as to what is happening in the proceedings, or permitting a support person to be seated alongside the accused. It is important to clarify with the parties precisely what is being sought.

For the procedures where fitness is raised in relation to federal offences see [4-305].

See generally, *Criminal Practice and Procedure NSW* at [17-s1].

[4-302] Application of the Act

The Act applies to:

- proceedings which had commenced but were not completed before 27 March 2021 if the accused's unfitness to be tried was raised before then
- a fitness inquiry or special hearing which commenced under the 1990 Act but was not completed before 27 March 2021: Sch 2, Pt 2, cl 7.

Section 38 of the 1990 Act continues to apply to proceedings where the defence of not guilty by reason of mental illness was raised before 27 March 2021 until a determination is made as to whether a special verdict should be entered or the defence is no longer being raised. However, if a special verdict of not guilty by reason of mental illness would, but for the new Act, have been found the court must instead find the special verdict of act proven but not criminally responsible: Sch 2, Pt 2, cl 5. In *R v Tonga* [2021] NSWSC 1064, Wilson J considered what was meant by "the commencement of proceedings" in the context of a mental illness (or impairment) defence under Pt 3 of the new Act, and concluded the proceedings commenced when the Crown presented the indictment: at [6]–[10]; see also *R v Siemek (No 1)* [2021] NSWSC 1292 at [9].

Part 2 of the 1990 Act continues to apply to criminal proceedings where, before 27 March 2021, a limiting term had been nominated or an order made under s 27 of that Act: Sch 2, Pt 2, cl 7A.

[4-304] Statutory definitions of mental health and cognitive impairments

The Act contains definitions of a "mental health impairment" and a "cognitive impairment". Previously the question of whether a person suffered a mental health impairment was determined in accordance with the common law. A person suffering from a cognitive impairment did not necessarily fall within the parameters of the 1990 Act.

Introducing these separate categories of impairment is one of the most significant changes made by the Act to the law as it was under the 1990 Act. Each are defined in the Act. The category into which an accused person falls will have significant consequences if there is a finding that they are not fit to be tried, with the need to refer the matter to the Mental Health Review Tribunal potentially obviated. For an accused with a cognitive impairment, it is ordinarily unlikely that their condition will change, or that they will become fit to be tried with time and treatment. See further, K Eagle and A Johnson, "Clinical issues with the Mental Health and Cognitive Impairment Forensic Provisions Act 2020" (2021) 33(7) *JOB* 67.

The NSW Law Reform Commission in its Report 135, *People with cognitive and mental health impairments in the criminal justice system: diversion*, 2012, pp 134–135, discussed the problems associated with conflating the concepts of mental illness and cognitive impairment and the disadvantages caused to those suffering from the latter as a result. This was part of the rationale for the recommendation that a separate statutory definition be included in the legislation [see recommendation 5.1–5.2].

A "mental health impairment" is defined in s 4 of the Act. A person has such an impairment if:

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory

(b) the disturbance would be regarded as significant for clinical diagnostic purposes, and

(c) the disturbance impairs the person's emotional wellbeing, judgment or behaviour: s 4(1).

See s 4(2) for a non-exhaustive list of the disorders from which a mental health impairment may arise.

A person does not have a mental health impairment if their impairment is caused solely by the temporary effect of ingesting a substance or by a substance use disorder: s 4(3).

A "cognitive impairment" is defined in s 5. A person has such an impairment if:

(a) the person has an ongoing impairment in adaptive functioning

(b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and

(c) the impairments result from damage to or dysfunction, developmental delay or deterioration of their brain or mind that may arise from a condition set out in s 5(2) or for other reasons.

Section 5(2) provides that a cognitive impairment may arise from any of the following conditions but may also arise for other reasons:

(a) intellectual disability,

(b) borderline intellectual functioning,

(c) dementia,

(d) an acquired brain injury,

(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,

(f) autism spectrum disorder.

[4-305] Fitness — federal offences

The *Crimes Act* 1914 (Cth) makes special provision for federal offenders in Pt IB, Div 6. In *R v Baladjam [No 13]* (2008) 77 NSWLR 630, it was held that the issue of the fitness of an accused charged with a federal offence could be determined by a judge in accordance with the relevant State procedures without infringing s 80 of the Constitution.

The State procedures for special hearings (conducted when an accused has been found unfit) found in Pt 4, Div 3 do not apply to federal offenders. The procedure to be followed is set out in s 20B of the *Crimes Act*. See, in particular, ss 20B(3) and 20B(5)–(7). Following commencement of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 on 27 March 2021, there is some greater commonality between the two fitness schemes. For example, ss 20BB and 20BC of the *Crimes Act* require a court determining the fitness to be tried of a federal offender to also determine whether or not they will become fit to stand trial within 12 months.

However, differences remain between the two schemes. Once a court finds a federal offender unfit to be tried, a determination must be made as to whether there is a prima facie case in respect of the offence: s 20B(3). The evidence that may be given to assist in determining this, and the course that may be taken by the accused is set out in s 20B(7). Once that decision is made, the court then goes on to determine whether or not the accused will become fit within 12 months.

Note: where fitness is raised with respect to an accused charged with State and federal offences, it is necessary to ensure that the requirements of both regimes are complied with.

[4-306] The procedural pathways when fitness is raised

When Pt 4 applies, at various stages of the proceedings the court will need to make decisions about the interim or long-term placement of the person facing criminal charges before the court. A court may seek assistance in such decisions from Justice Health and the Forensic Mental Health Network (FMHN) and/or the Mental Health Review Tribunal (MHRT).

The **Table** at **[4-320]** informs judicial officers and practitioners as to the procedural steps and how and when information and/or recommendations may be sought from the FMHN and the MHRT. Not every procedural detail of Pt 4 of the Act is addressed. See the glossary of relevant terms after the **Table** at **[4-320]**.

The FMHN is part of NSW Health and provides:

- direct mental health care to those in correctional centres and the high security Forensic Hospital, and
- oversees the care provided by Local Health Districts to forensic patients in hospital and community settings.

When the accused has a cognitive impairment Justice Health and the FMHN will not assess and manage them. In such cases, it will be necessary for the defence to obtain an appropriate report, which is usually prepared by a psychologist or neuropsychologist. The **Procedure Table** at **[4-320]** indicates when that might be necessary. If the accused has a mental health impairment and dementia (a cognitive impairment) then the FMHN is likely to be involved.

The MHRT has prescribed statutory functions under Pts 5 and 7 of the Act. When a court is considering disposition decisions, the FMHN, the MHRT or, in the case of an accused who is cognitively impaired, an appropriately qualified professional may be able to assist with a report which includes recommendations concerning the appropriate care and treatment of the person.

[4-310] Part 4, Div 2 — procedures when fitness raised

Part 4 of the Act is headed "Fitness to stand trial". It applies to criminal proceedings in the Supreme and District Courts: s 35. The question of a person's unfitness to be tried for an offence:

- may be raised by any party to the proceedings or by the court: s 39
- should, so far as practicable, be raised before the person is arraigned but may be raised at any time during the hearing of the proceedings and more than once: ss 37(1), (2)
- is to be determined by the judge alone on the balance of probabilities: ss 38, 44(1).

An inquiry into an accused's unfitness to be tried must not be conducted in an adversarial manner and the onus of proof does not rest on a particular party: ss 44(4), (5).

The fitness test

Section 36 now creates an explicit statutory test for fitness, based on the principles set out in *R v Presser* [1958] VR 45, which were applied in *Kesavarajah v The Queen* (1994) 181 CLR 230. Section 36(1) provides that a person will be unfit to be tried if, because they have a mental health or cognitive impairment, they cannot do one or more of the following:

(a) understand the offence the subject of the proceedings,

(b) plead to the charge,

(c) exercise the right to challenge jurors,

(d) understand generally the nature of the proceedings as an inquiry into whether the person committed the offence with which the person is charged,

(e) follow the course of the proceedings so as to understand generally what is going on,

(f) understand the substantial effect of any evidence given against the person,

(g) make a defence or answer to the charge,

(h) instruct the person's legal representative so as to mount a defence and provide the person's version of the facts to that legal representative and to the court if necessary,

(i) decide what defence the person will rely on and make that decision known to the person's legal representative and the court.

The list is not exhaustive and does not limit the grounds on which a court may consider a person to be unfit to be tried for an offence: s 36(2).

Once fitness is raised, the pathways in the proceedings, and the points during proceedings at which FMHN assistance and information may be available, are set out in the **Table** at [4-320].

[4-315] Part 4, Div 3 — procedures for special hearings

Where a court determines the accused is unfit to be tried, it conducts a special hearing: ss 54, 56. The procedures for special hearings only apply to State offences. For Commonwealth offences see Pt IB, Div 6 *Crimes Act* 1914 (Cth).

A special hearing is conducted by judge alone unless an election for a jury is made by the accused, their lawyer or the prosecutor: s 56(9).

Special hearings are conducted as nearly as possible as a criminal trial, although the court may, if it considers it appropriate, modify the court's procedures to facilitate the accused's effective participation: s 56(1), (2).

The accused is taken to have pleaded not guilty and may raise any defence that could properly be raised if the special hearing was an ordinary criminal trial: s 56(5), (6). This permits the accused to raise the defence of mental health impairment or cognitive impairment in Pt 3 of the Act.

The verdicts available include:

(a) not guilty

(b) a special verdict of act proven but not criminally responsible

(c) that on the limited evidence available, the accused committed the offence charged, or

(d) that on the limited evidence available, the accused committed an available alternative offence: s 59(1).

If the court finds the accused committed the offence, and would have imposed a sentence of imprisonment, it must impose a limiting term: ss 63–65.

See step 5–5B at [4-320].

If the verdict is act proven but not criminally responsible or simply not guilty, the accused is dealt with in the same manner as if that verdict was given in a normal trial: s 60.

[4-320] Part 4 procedure

Step 1: Fitness is raised	Section
Upon fitness first being raised the court may **dismiss** the charge (without conducting an inquiry) if of the opinion, having regard to any of the following, that it is inappropriate to inflict any punishment— (a) the trivial nature of the charge or offence, (b) the nature of the accused's mental health impairment or cognitive impairment, (c) any other matter the court thinks proper to consider.	42(4)
OR the court may make orders concerning the accused before holding an inquiry into the person's fitness including to: • adjourn proceedings • grant bail • remand in custody (not exceeding 28 days) • request the accused to undergo a psychiatric or other examination • request that a psychiatric or other report relating to the accused be obtained • discharge a jury • any other order that the court considers appropriate. Under s 43 where the accused is remanded in custody or bail is granted (but not met) the standard remand warrant is issued. Where the accused is granted bail and bail is to be entered at court, standard bail forms are used. See **step 3** when bail is granted. **Note 1:** The court, the accused or the prosecutor may raise the question of an accused's unfitness to be tried: s 39. **Note 2:** If fitness is raised before arraignment, the court must determine whether an inquiry should be conducted before hearing proceedings: s 40(1). If raised after arraignment, it must be dealt with in the absence of the jury: s 41. **Note 3**: If reports are ordered under s 43(d) or (e) discuss an appropriate timetable with the parties. The FHMN does not provide reports for accused persons suffering from a cognitive impairment. Reports should address whether, if the accused is found unfit to be tried, they will be likely to become fit within 12 months. **Note 4**: In appropriate cases where the accused has a cognitive impairment discuss with the parties whether consideration should be given to adapting or modifying the trial process.	43

Step 2: Court holds inquiry	Section
See inquiry procedure at s 44 including matters to consider in determining fitness such as whether the trial process can be modified, the complexity of the trial, and whether the accused person is represented.	44

Step 2: Court holds inquiry	**Section**
After an inquiry:	
1. If the accused is found **fit** to be tried, proceedings recommence or continue in accordance with the appropriate criminal procedures. Where the accused has been committed for trial, the court may remit matter to a magistrate for a case conference.	46, 52
2. If the accused is found unfit to be tried, the court must also determine whether, on the balance of probabilities, during the next 12 months, the accused: • **will not** become fit to be tried — **see step 2A** • **may** become fit to be tried — **see step 2B**	47, 48, 49
Note 1: To assist in determining whether or not the accused is likely to become fit within 12 months, it may be necessary for the court to hear evidence from the psychiatrists and/or psychologists who prepared reports for the hearing: see, for example, *R v Risi* [2021] NSWSC 769.	
Note 2: A finding under s 47(1)(b), that an accused *will not* become fit, should only be made if there is a real certainty about their lack of fitness during the relevant 12-month period because the effect of such a finding is to exclude the MHRT from an assessment of the accused: *R v Risi* [2021] NSWSC 769 at [55].	
If the court finds the accused is unfit to be tried, it can make the following orders: • adjourn proceedings • grant bail (see **step 3**) • remand in custody • discharge a jury • any other order the court thinks appropriate. See order where bail is granted or where order is to remand the accused.	47(2)

Step 2A: Court finds accused unfit and will not become fit within 12 mths	**Section**
If the court, after an inquiry, finds the accused will not become fit within 12 months, the court holds a special hearing under Pt 4, Div 3 — **see step 5**	47(1)(b), 48
Note 1: Before holding a special hearing, the court must obtain advice from the DPP as to whether or not further proceedings will be taken: s 53(2). Where no further proceedings will be taken, the court must order the accused's release: s 53(3).	53
Note 2: As to the meaning of "will not" see *R v Woodham* [2022] NSWSC 1154 at [18]–[23].	

Step 2B: Court finds accused unfit but may become fit within 12 mths — referral to MHRT	**Section**
If the court determines the accused is unfit to be tried and **may** become fit to be tried within 12 months it must refer them to the MHRT for review: s 49(1). **See step 4** . The court may grant the accused bail for no longer than 12 months on being notified of a determination of the MHRT under s 80 that the accused has become fit to be tried: s 49(2).	49

Step 2B: Court finds accused unfit but may become fit within 12 mths — referral to MHRT	**Section**
While an accused can be remanded in custody, it is doubtful the court has either the power to order they be detained in a particular facility or type of facility (*R v Risi* at [59]–[60]) or to refer the matter back to the DPP to consider whether the prosecution continue (*R v Risi* at [61]).	47(2)(d), (e)

Step 3: Bail	**Section**
If bail is granted for an accused suffering from a mental health impairment, the FMHN will, if requested, assess them for suitability for care by *community mental health services* while on bail, when the court finds the person is: (a) unfit to be tried; and (b) suffers from a mental health impairment. To arrange an assessment and report by FMHN and, where appropriate, care and/or treatment whilst on bail, it is suggested the court: 1. Include a bail condition that the person attend FMHN for assessment if directed to do so by the Statewide Clinical Director Forensic Mental Health of FMHN. 2. Adjourn the proceedings with liberty to relist the matter upon provision of a report by FMHN. 3. Contact the office of the Statewide Clinical Director Forensic Mental Health (FMHN phone: 02 9700 3027) to arrange assessment. 4. Provide any psychiatric or psychological reports filed in the proceedings. Within eight weeks FMHN will provide a report to the court, the DPP and the person's legal representative indicating the outcome of the assessment, which: (a) If the person is suitable for community care, makes a referral of the person to a *community mental health service*; or (b) If the person is not suitable for community care, makes recommendations for treatment other than in a community setting. Upon receipt of the report the court, DPP or person's legal representative may relist the matter and the court may amend bail conditions or make other appropriate orders. If bail is granted for an accused suffering from a *cognitive impairment*, note that the FMHN cannot provide reports and the defence must provide reports and information to the court as to an appropriate placement so that appropriate bail conditions may be framed.	

Step 4: Referral to MHRT	**Section**
The MHRT must review the accused as soon as practicable upon referral by the court under s 49(1) to determine whether they have become fit.	78(b), 80
1. If the MHRT determines the accused has become fit, the MHRT notifies the court, DPP and the accused's legal representative and the proceedings recommence in accordance with the appropriate criminal procedures: s 50.	50
2. If the MHRT determines the accused has not and will not, become fit within 12 months following a review, then the MHRT notifies the court, DPP and the accused's legal representative and a special hearing under Div 3 is held: s 51.	51

Step 4: Referral to MHRT	Section
The court must obtain advice from the DPP as to whether or not further proceedings will be taken by the Director in respect of the offence: s 53(2). If the DPP advises no further proceedings will be taken the court must order the accused's release: s 53(3). If further proceedings will be taken — **see step 5**.	53
3. If the MHRT determines the accused is unfit but may become fit within 12 months, the MHRT reviews the accused in accordance with Pt 5, Div 3 (s 80) — **see step 4A**. The MHRT must make the determination as to fitness on the balance of probabilities: s 80(3).	80
On review, the MHRT may make an order as to: 1. the patient's detention, care or treatment in a mental health facility, correctional centre, detention centre or other place, or 2. the patient's release (either conditionally or subject to conditions). Matters the MHRT must consider when determining whether to release a forensic patient are set out in s 84. The conditions that may be imposed on release are set out in s 85.	81

Step 4A: Ongoing MHRT review for an accused found unfit	Section
The MHRT will continue to review an accused (now a forensic patient) who is unfit and detained until the special hearing has been conducted. If the MHRT is of the opinion that a forensic patient has become fit to be tried, the MHRT will notify the court, DPP and the accused's legal representative: ss 53(1)(c), 80(2)(a).	78–80
(a) If the DPP does not proceed with the prosecution, the person is released: s 53(3).	53
(b) If the DPP proceeds with the prosecution, the person stops being a forensic patient and the matter continues as ordinary criminal proceedings (s 50(1)). The court must not hold a further fitness inquiry merely because the MHRT notifies the court the defendant has become fit: s 50(2). **Note**: A forensic patient is defined in s 72. The definition does not include an accused found unfit to be tried who has been released on bail: s 72(2).	50

Step 5: Special hearing	Section
Special hearing	59(1)
Procedures for special hearings are set out in s 56. A special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings: s 56(1). The matter is determined by judge-alone unless a party elects to have the matter determined by a jury: s 56(9). There are three possible verdicts:	56
1. Not guilty (a) person ceases to be a forensic patient (b) no disposition decision	59(1)(a), 60

Step 5: Special hearing	Section
2. Special verdict of act proven but not criminally responsible (NCR) **see step 5A**	59(1)(b)
3. A qualified finding of guilt based on limited evidence **see step 5B**	59(1)(c), (d)
The court may make an order for a report by a forensic psychiatrist (or person of a class prescribed in the regulations) not currently treating the defendant, addressing whether the defendant's release is likely to seriously endanger theirs or the public's safety. **Note**: If a jury is determining the special hearing, a direction such as that at [4-331] will be required: see s 56(11).	66

Step 5A: Act proven but not criminally responsible	Section
Where a special verdict of act proven but not criminally responsible (NCR) is given, the court makes orders as prescribed by s 33 including:	59(1)(b), 61
1. **Remand in custody until further order made under s 33** 2. **Detention in place and manner as court thinks fit until released by due process of law**; or 3. **Unconditional or conditional release** (before making such an order, the court may request a report by a forensic psychologist not currently involved in treating the accused as to their condition and whether they are likely to seriously endanger their safety or that of any member of the public. The accused is not to be released unless the court is satisfied on the balance of probabilities that the accused's safety or that of the public will not be seriously endangered by their release). 4. **Such other order court considers appropriate**	33
Unless an order is made for the accused's unconditional release, the court must refer them to the MHRT to be dealt with under Pt 5 — see note in s 33.	67
For an accused suffering from a mental health impairment, the court may be assisted by the FMHN with recommendations as to an appropriate placement. Upon a finding of act proven but not criminally responsible the FMHN, if requested, will provide a report to the court. The procedure to obtain this information is similar to obtaining a sentence assessment report and is as follows: 1. Adjourn the proceedings (the FMHN requires at least 8 weeks to conduct an assessment and prepare a report) 2. The court may direct that during the adjournment: (a) Detention at the *Long Bay Hospital* (**not** Long Bay Forensic Hospital) unless an alternative appropriate interim placement is identified by the person's legal representative (b) The office of the Statewide Clinical Director Forensic Mental Health (FMHN phone: 02 9700 3027) arrange for FMHN to provide a disposition report to the court before the next court date. The report will address: (i) If the court is considering releasing the person: Recommended conditions as to care and/or treatment in the community.	66

Step 5A: Act proven but not criminally responsible	Section
(ii) If the court is considering detaining the person: Recommended placement in a prison or mental health facility. (The court later considers the recommendations of the FMHN report). See order for release under s 33 and order for detention. **Note**: The defence will need to make arrangements to obtain a report for an accused suffering from a cognitive impairment. If the accused is in custody and suffering from a cognitive impairment only, then such a report may be obtained from the Specialist Disability Service of Corrective Services.	

Step 5B: Offence committed on limited evidence	Section
If the court finds that on the limited evidence before it, the accused committed the offence charged or an alternative offence (a qualified finding of guilt) then:	59(1)(c), (d), 62
1. If the court would not have imposed imprisonment, the court may impose a penalty or make any other order it might have made on conviction of the accused in a normal criminal trial. The court must inform the MHRT. **Note**: in such cases, the accused is not a forensic patient and, unless an order is made requiring supervision by Community Corrections, there is no State supervision.	63(3), (6)
2. If the Court would have imposed a sentence of imprisonment, it must: (a) nominate a limiting term, (b) refer the person to the MHRT; and (c) make an interim order with respect to custody. See order under s 65. In determining a limiting term or other penalty the court must take into account factors in s 63(5). **Note 1**: See **step 5A** as to reports that may be provided pursuant to s 66. **Note 2**: The defence will need to make arrangements to obtain a report for an accused suffering from a cognitive impairment. If the accused is in custody and suffering from a cognitive impairment only, then such a report may be obtained from the Specialist Disability Service of Corrective Services. **Note 3**: On application by the Attorney General, the court may order an extension or interim extension of the defendant's status as a forensic patient under ss 121, 130 respectively and an examination under s 126(5). See *AG (NSW) v Bragg (Preliminary)* [2021] NSWSC 439 at [19]–[32] and *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* [2022] NSWSC 537 at [12]–[32] in respect of the statutory requirements and various tests to be applied when determining whether to grant an extension order.	63(2), 65

Step 6	Section
The MHRT continues to review a forensic patient who has been found unfit and ordered to be detained, following a special hearing. If the MHRT is of the opinion that a forensic patient has become fit to be tried, the MHRT will notify the Court and the DPP. **See step 4A**.	

Glossary/abbreviations

Cognitive impairment: defined in s 5 of the Act. See **[4-304]**.

Community mental health service: generally means a Local Health District. Local Health Districts are constituted under s 17 *Health Services Act* 1997. They provide a range of health services for residents of their area including mental health services. Eight Local Health Districts cover the Sydney metropolitan region, and seven cover rural and regional NSW.

Disposition decision: an interim or final order in accordance with the powers conferred by the Act determining where a person will be placed.

FMHN: Forensic Mental Health Network. Part of the Justice and Forensic Mental Health Network, a statutory health corporation constituted under the *Health Services Act* 2011: Sch 2. The FMHN is the principal service provider and coordinating agency for forensic mental health services in NSW.

Forensic Hospital: a "high secure" forensic mental health facility located at 1300 Anzac Parade, Matraville, administered by NSW Health (Justice Health).

Forensic patient: defined in s 72 as a person who is detained in a mental health facility, correctional centre, detention centre or other place, or released from custody subject to conditions, pursuant to an order under:

1. ss 33, 47, 50, or 65 of the Act , or
2. s 7(4) *Criminal Appeal Act* 1912 (including that subsection as applied by s 5AA(5) of that Act).

A defendant who has been found unfit and released on bail is not a forensic patient: s 72(2).

A forensic patient can be made the subject of an extension order (see Pt 6 of the Act). Section 158 provides that, at least 6 months before the expiry of a limiting term or extension order to which a forensic patient is subject, the MHRT must inform the Ministers responsible for the Act of the date the limiting term (or if applicable extension order) will expire. Part 6 Div 3 sets out the process by which the Supreme Court can (on application of the relevant Minister) make an order for the extension of a person's status as a forensic patient.

Inquiry: an inquiry under Pt 4 Div 2 of the Act conducted by judge alone in order to determine whether a person is unfit to be tried for an offence.

Long Bay Hospital: A hospital within Corrections. Maximum security hospital jointly administered by Corrective Services and the NSW Department of Health (Justice Health) with three wards allocated for long-term and short-term forensic patients. Located at 1300 Anzac Parade, Matraville**.**

Mental health impairment: defined in s 4 of the Act. See [4-304].

NCR: act proven but not criminally responsible.

Reports: a report prepared, in the context of proceedings under the Act, by the FMHN at the request of a court to assist in determining a disposition decision. The power to order such a report arises under either s 33 or s 66 of the Act. The types of matters addressed by a report include, for example:

1. In the case of a person on bail or to be released into the community, suggestions as to appropriate conditions taking into account the terms of s 33(3) of the Act
2. In the case of a person detained in a mental health facility, advice on:
   (a) Placement options appropriate for the person given their mental health impairment and current clinical presentation; including:
      (i) Community release if appropriate in respect of the circumstances and permissible under the Act
      (ii) Interim placement options
      (iii) Long-term placement options (which may include Long Bay Hospital, Forensic Hospital, or another *mental health facility*)
   (b) Timeliness of placement options and interim placement options.

Special hearing: in a special hearing, the person is taken to have pleaded not guilty. The purpose is to ensure acquittal unless an offence is proved to the criminal standard: Pt 4, Div 3.

[4-325] Forms of orders for referrals to the Mental Health Review Tribunal under State law

Orders — fitness

I find the accused unfit to be tried and that they *may* become fit to be tried within twelve months.

In accordance with s 49 *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020, I refer this matter to the Mental Health Review Tribunal.

I direct the court registry to provide the following documentation to the Tribunal:

1. a copy of this finding
2. a copy of any orders made for detention or bail
3. a transcript of these proceedings
4. a copy of any psychiatric reports tendered to the court during these proceedings
5. a copy of any additional reports tendered as evidence to the court pertaining the person's fitness to stand trial, and
6. the police fact sheet (if available).

[4-327] Documentation required in referral of court matters to Mental Health Review Tribunal

The Tribunal reviews forensic patients under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 including where the court finds:

- the accused is unfit to be tried or is unfit but may become fit within 12 months
- the accused is guilty on the limited evidence available and subject to a limiting term, and
- the act constituting the offence is proven but the accused is not criminally responsible

Where a person has been referred to the MHRT by the court, the Tribunal requires a copy of:

- the order of the court finding the person unfit
- the indictment (or court attendance notices for defendants not yet committed for trial)
- the transcript of the court proceedings
- the judgment of the court finding the person unfit
- any psychiatric reports tendered during the fitness proceedings
- any additional reports tendered as evidence to the court pertaining to the person's fitness to stand trial,
- the police facts, agreed facts or the Crown Case Statement (if available),
- any victim impacts statements (if relevant).

[4-330] Extension orders

Sections 121 and 122 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 empower the Supreme Court to make an order extending a person's status as a forensic patient where there is a high degree of probability that—

(a) the forensic patient poses an unacceptable risk of causing serious harm to others if the patient ceases to be a forensic patient, and

(b) the risk cannot be adequately managed by other less restrictive means.

See *AG (NSW) v Bragg (Preliminary)* [2021] NSWSC 439 at [25]–[28] and *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* [2022] NSWSC 537 at [21]–[25] for interpretation of the terms "high degree of probability", "serious harm" and "unacceptable risk". See also, guidance on assessing whether the risk can be managed by other less restrictive means: *AG (NSW) v Bragg (Preliminary)* at [29] and *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* at [26]–[31].

The matters to consider when determining whether to make the order are set out in s 127(2) and include the safety of the community, and reports from registered psychologists, psychiatrists, or registered medical practitioners. If, following the preliminary hearing, the court is satisfied the matters alleged in the documentation supporting the application would, if proved, justify the making of an extension order, the court must make orders appointing two qualified psychiatrists, or two registered

psychologists, or two registered medical practitioners, or any combination of two persons aforementioned, to conduct separate examinations of the forensic patient and to give reports to the court, and direct the forensic patient to attend those examinations: s 126(5). Whether the making of an extension order would be "justified" depends, in part, upon s 122, which governs when an extension order can be made: *AG (NSW) v Bragg (Preliminary)* at [23].

Sections 130 and 131 allow the Supreme Court to make interim extension orders. The court's task is not to assess the matters alleged in the documentation or to attempt to predict what would be the result on the final hearing of the matter: *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* at [18]. The words "would … justify the making" of an interim order in ss 126(5) and 130(b) impose a lower standard than that which applies to the making of the final order itself. There is only a requirement to be satisfied the making of a final order would be justified, in the sense of being reasonably open, in the light of the matters alleged in the supporting documentation, assuming them to be proved: *AG (NSW) v Bragg (Preliminary)* at [31]; *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* at [32].

[4-331] Suggested direction — the nature of special hearing

The appropriate directions to be given to a jury determining a special hearing were considered in *Subramaniam v The Queen* [2004] HCA 51 in respect of the identical predecessor provision, s 21(4) *Mental Health (Forensic Provisions) Act* 1990.

The High Court held that directions given in that case were inadequate and the court drafted an appropriate direction to assist trial judges — it was acknowledged that precisely what was to be said to the jury would need adaption to the particular facts but gave the following guide as to what should be said:

> The court [*or Mental Health Review Tribunal where s 80 applies*] has found that the accused is unfit to be tried on the present charge(s) in the normal way because [*he/she*] does not have the mental [*and/or cognitive*] capacity to understand the basic requirements of a fair and just trial. Consequently, the law requires the accused be tried under a special procedure.
>
> The accused's unfitness for a normal trial may or may not be apparent to you as the trial proceeds. That is because unfitness for trial, may arise for any one or more of several reasons. [*He/she*] may not understand the nature of the charge against [*him/her*], or be able to decide whether [*he/she*] has a defence to it. [*He/she*] may not be able to make a rational decision about whether [*he/she*] is guilty or not guilty, or how to plead to the charge. [*He/she*] may not be able to understand generally the nature of the criminal proceedings and what their course and outcome may mean to [*him/her*]. The unfitness may be an unfitness to give [*his/her*] lawyers instructions about what [*his/her*] defence is or how the prosecution evidence is wrong, or should be questioned, or it may be an inability to apply [*himself/herself*] to the proceedings in an informed or constructive way. Whether or not any one of these matters is apparent to you, you must accept that the accused is unfit to be tried in a normal way because the law insists an accused have the mental capacity to do all of these things.
>
> How then is this special hearing to be conducted and in what ways does it differ from a normal criminal trial? Well, it could be different in one or more of the ways to which I

have referred, that is, in the way in which [*the accused*] is able or unable to participate or contribute to [*his/her*] defence. In every criminal trial an accused may or may not choose to give evidence. That remains so in a special hearing such as this, but an unfit person may not be capable of making a reasoned decision about that, or indeed other matters concerning the hearing. At a special hearing the accused is taken to have pleaded not guilty to the charges against [*him/her*], unlike in a normal trial when they may enter a plea of either guilty or not guilty. The law is intended to ensure a special hearing does not prejudice the accused any more than [*his/her*] unfitness already may do. [*He/she*] may raise, or have raised on [*his/her*] behalf whatever defences a fit person could raise in a normal trial. [*He/she*] may, or may not, give evidence. [*He/she*] must, however have legal representation and may not, as some mentally [*and/or cognitively*] fit accused persons do, choose to represent [*himself/herself*].

What are the purposes of a special hearing? The first is to see that justice is done, as best it can be in the circumstances, to the accused and the prosecution. [*He/she*] is put on trial so that the case against [*him/her*] can be determined. The prosecution representing the community has an interest also in seeing that justice be done. A special hearing gives the accused an opportunity of being found not guilty, in which case the charge ceases to hang over [*his/her*] head, and if [*he/she*] requires further treatment it may be given to [*him/her*] outside the criminal justice system.

You also need to keep in mind that you will have to reach your verdict based on the limited evidence available. There are various ways evidence at a hearing of this nature may be limited. For example, the accused may be unable to give evidence, or unable to give adequate instructions to [*his/her*] lawyers about which witnesses might be called to assist [*his/her*] case, or, as to matters on which cross-examination could be based.

The next matter I must explain to you concerns the verdicts you may give in this case. Those verdicts are “not guilty”, “special verdict of act proven but not criminally responsible” or “the accused committed the offence/s based on the limited evidence available”.

If you find the accused not guilty then that is the end of the matter and [*he/she*] will be free to go. If, however, you find that on the limited evidence available [*he/she*] did commit the offence(/s), it is my duty to decide whether, had [*he/she*] been fit to be tried in a normal way, and been convicted, [*he/she*] would have been sentenced to a term of imprisonment, and if so the appropriate term. If I take the view a term of imprisonment would not have been appropriate, I may impose another penalty just as I might in the case of a person fit to be tried, such as a fine, a community correction order or a community release order.

If I nominate a term of imprisonment the accused is referred to the Mental Health Review Tribunal, to decide whether *[he/she]* is still suffering from a mental health [*and/or cognitive*] impairment and whether [*he/she*] should be detained in [*a mental health facility*] for treatment. If the accused should become fit to be tried before the period equivalent to any term of imprisonment I might nominate expires, the accused may be tried in the normal way for the offence. But this would be a matter for the prosecuting authorities to decide.

Finally, if you return a special verdict of act proven but not criminally responsible, it will be my duty to decide whether the accused will be held in custody or released, either with or without conditions. I will only release [*him/her*] if I am satisfied it will

not seriously endanger [his/her] safety or the safety of any member of the public. If the accused is not released unconditionally, [*he/she*] will be referred to the Mental Health Review Tribunal which may make an order about [*his/her*] detention, care, treatment or release. Again, the Tribunal will not release the accused unless satisfied [*his/her*] safety and the safety of the public will not be seriously endangered.

I should emphasise that although I am telling you about the legal and practical consequences of any verdict you may reach in order for you to understand the nature of the special proceeding in which we are engaged, your duty is confined to deciding whether, on the limited evidence available, the prosecution has proved beyond reasonable doubt that the accused committed the offence(s) charged. The consequences of the verdict and what happens to the accused afterwards are matters for the Mental Health Review Tribunal, the prosecuting authorities and the court, not for you.

[4-333] Additional references

Last reviewed: July 2023

See also:

- M Ierace, "Introducing the new Mental Health and Cognitive Impairment Forensic Provisions Act 2020" (2021) 33(2) *JOB* 15.
- Second Reading Speech, Mental Health and Cognitive Impairment Forensic Provisions Bill 2020, NSW, Legislative Council, *Debates*, 16 June 2020, p 51.

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Views and demonstrations

***Evidence Act* 1995 (NSW), Pt 2.3, ss 52, 53, 54**

[4-335] Introduction

Part 2.3 *Evidence Act* 1995 empowers the trial judge, on the application of one or more of the parties, to order that a demonstration, experiment or inspection be held. A demonstration, experiment or inspection occurring in the courtroom does not fall within the sections in this Part of the Act and are regulated by the common law: *Evans v The Queen* (2007) 235 CLR 521 at [30], [105], [223]. General evidentiary provisions such as ss 55 and 137 would apply but not s 192.

[4-340] Views

The power of a court to direct a view and the evidentiary effect of a view is contained in ss 53 and 54 *Evidence Act*. The Victorian Court of Appeal in *Ha v R* (2014) 44 VR 319 at [31]–[34] set out guidelines for conducting a view with reference to the suggested procedure below. The guidelines in *Ha v R* were adopted in *R v Rogerson; R v McNamara (No 10)* [2015] NSWSC 1067 at [16].

The accused may elect not to be present at a view but he or she has a right to attend: *Jamal v R* (2012) 223 A Crim R 585 at [30]–[31]; *Tongahai v R* [2014] NSWCCA 81 at [37]. A failure of a judge to comply with the mandatory requirement under s 53(2)(a) of giving the parties a reasonable opportunity to be present can cause the trial to be fundamentally flawed: *Jamal v R* at [41]. A court cannot compel an accused to attend a view: *Tongahai v R* at [25]–[26].

It is normal to nominate a person, often the Officer in Charge of the investigation, to be the shower for the purposes of indicating relevant aspects of the scene to the jury during the view in accordance with the evidence given in court.

A transcript should be made of the view. It is suggested that the police be asked to take a video recording of the view, if practicable, so that it can later be tendered in evidence. The recording should be made so as not to disclose members of the jury, but to record what is said by the shower and, if possible, any questions asked by the jury and the answers given by the shower.

The preferable course in relation to questions asked by the jury is for them to be put in writing and then vetted by the judge, in consultation with counsel if necessary, prior to being asked of the shower by the judge.

It is usual to swear the court attendants who accompany the jury to and from the view prior to departing from the court. This is to ensure that no person is allowed to communicate with the jury except at the view in the presence of the judge. It is also usual to swear the shower. See the suggested oaths and affirmations at [4-347].

The Victorian Court of Appeal in *Ha v R* at [33] said that there was "much to be said for the guidance to be found in the New South Wales [Criminal Trial Courts] Bench Book" in relation to nominating and swearing a "shower", making a transcript of the view, video recording it and ensuring that all questions asked by the jury be put in

writing and vetted by the judge prior to being asked of the shower. The court in *Ha v R* also said a record of what occurred could be made by causing a shorthand note to be made, which is later read into the trial transcript; or by the judge making, or arranging for, some form of summary to be made, which is later read into the transcript. Priest JA (Maxwell P and Weinberg JA agreeing) at [31] said: "At the very least, the judge, upon returning to court, should — with any necessary input from counsel — describe what occurred with moderate detail".

A jury has been permitted to have a view during deliberations where it was requested by the defence: *R v Delon* [1992] 29 NSWLR 29.

[4-345] Suggested direction — view

A suggested direction to be given to the jury prior to the view, which may be adapted to the special circumstances of the case, is set out below.

Arrangements have now been made for you to be taken to [*specify the scene*]. While you are away from the court you will be under the charge of court officers who are required to supervise your journey to and from the scene.

You are being taken to view the scene where the incidents giving rise to the charge(s) took place because counsel believe that it will assist you to understand the evidence in a realistic setting and, therefore, aid you in resolving the issues that will ultimately be placed before you. What you observe during the course of the inspection of the scene will constitute evidence in the case, and is to be treated by you as part of the overall evidence upon which you decide whether the Crown has proved its case beyond reasonable doubt.

You will not be permitted to conduct experiments while at the scene.

While you are away from the court house, do not discuss the case in any circumstance when your discussion can be overheard by a person who is not a member of the jury. You will appreciate that all jury discussions must be in the privacy of the jury room. Moreover, do not speak to anyone other than a fellow juror or court officer; and do not let anyone, other than those persons, speak to you. You must, of course, refrain from asking a court officer any question to do with the actual trial. Such a question can only be answered by me.

If you have any question you wish to ask the person who is conducting the inspection of the scene you should indicate the question to me [*by way of a note*] and then I will direct it to the relevant person if I believe that the question is an appropriate one.

[4-347] Oaths and affirmations — view

The following oath/affirmation is suggested for the sheriff's officer and the shower respectively.

Oath/affirmation: sheriff's officer

[Do you swear by Almighty God/Do you solemnly and sincerely declare and affirm] that you will well and truly attend this jury to the place at which the offence for which the accused [*name*] stands charged is alleged to have been committed and that you will

not allow anyone to speak to them [… except the person sworn and appointed to show you the place aforesaid] nor will you speak to them yourself [unless it is to request them to return with you] without the leave of the court.

Please say "I do".

Oath/affirmation: shower

[Do you swear by Almighty God/Do you solemnly and sincerely declare and affirm] that you will attend the jury, and well and truly point out to them the place in which the offence for which the accused [*name*] stands charged is alleged to have been committed and that you will speak to them only as far as relates to describing the place aforesaid.

Please say "I do".

[The next page is 685]

Voluntary act of the accused

[4-350] Introduction

The question of whether there was a voluntary act of the accused that caused the harm to the victim which is the subject of the charge may involve one, or both, of two issues (see *R v Katarzynski* (2005) NSWCCA 72 at [17]):

(a) Was there any act of the accused that caused the harm?

(b) Was the act of the accused that caused the harm a voluntary one?

[4-355] An act of the accused causing the harm inflicted on the victim

This issue is dealt with generally under the topic "Causation" and the general direction given at **[2-310]** can be adapted where the issue is whether there was an act of the accused that caused the harm even though the particular act cannot be identified.

An issue can arise as to whether the act causing the injury was the act of the deceased or the act of the accused where the general directions on causation require considerable amendment. This is not a case where as discussed under causation, the issue is whether there was a break in the chain of causation by some act of the deceased or another person. But rather identifying whether the act causing death was the act of the deceased or the accused. For example, the issue can arise where the victim is given a substance by another person that results in the harm caused. In such a case the resolution of the question may depend upon the capacity of the victim to make a reasoned decision whether to ingest the substance knowing the consequences of doing so: see *Justins v R* [2010] NSWCCA 242; (2010) 79 NSWLR 544.

In *Burns v The Queen* (2012) 246 CLR 334 at [86] it was held that act of ingesting drugs that were supplied by the accused to the deceased, was not the act of the accused. The ingestion of the drugs by the deceased was a voluntary and informed act of an adult.

[4-360] A voluntary act

The issue arises usually where the act causing death can be identified but the question is whether the act was voluntary. This can lead to a consideration of what should be considered to be the act causing death and is a question for the jury.

It is unnecessary for a trial judge to raise the issue of voluntariness with the jury if the evidence clearly suggests no lack of voluntariness: *R v Whitfield* [2002] NSWCCA 501 at [80].

As to voluntariness see generally: *Ryan v The Queen* (1967) 121 CLR 205; *Criminal Practice and Procedure NSW* at [8-s 18.15]; *Criminal Law (NSW)* at [CLP.160].

Where an issue of voluntariness due to automatism arises (as to which, the accused bears an evidential burden of showing a reasonable possibility that the act was not willed: *R v Youssef* (1990) 50 A Crim R 1 at 3), consideration has to be given as to the aetiology of the automatism, since the manner in which the issue is left to the jury depends on the distinction drawn between sane and insane automatism. As to automatism generally, see **[6-050]**.

As to the relevance of self-induced intoxication on voluntariness, see s 428G *Crimes Act* 1900 (NSW).

The particular issue of identifying the act causing death has arisen in homicide cases involving the use of a firearm: see *Ryan v The Queen*; *Murray v The Queen* (2002) 211 CLR 193; *R v Katarzynski* (2005) NSWCCA 72; *Penza v R; Di Maria v R* [2013] NSWCCA 21 at [167] but see also *Ugle v The Queen* (2002) 211 CLR 171 and *R v Whitfield*. The issue in the firearm cases is whether the involuntary discharge of a weapon can be seen as the act causing death in the light of all the evidence surrounding the production and discharge of the weapon. This is a question for the jury.

It is difficult to set out a suggested direction because what needs to be said to the jury will depend upon the particular facts. But the direction should include the following general statements.

[4-365] Suggested direction — voluntary act

The act causing [*the harm*] must be the deliberate act of a person before that person can be held criminally responsible for the consequences of that act. An act is not deliberate if it was not voluntary. To give rise to criminal responsibility the act must be a willed act of the person accused of committing an offence. A spontaneous, unintended reflex action is not itself a voluntary act. In common speech a person will describe an involuntary act as being an accidental one. The Crown must prove beyond reasonable doubt that any act of [*the accused*] upon which it relies as causing [*the harm*] inflicted to [*the victim/deceased*] was a voluntary act: that is, a willed act on the part of the accused. This is distinct from the issue of whether the accused intended certain consequences from his or her act. It is a more fundamental concept that is concerned with the nature of the act itself.

Here [*the accused*] has raised the issue of whether [*his/her*] act resulting in [*the harm*] to [*the victim*] was a voluntary one.

[*Indicate the basis upon which it is asserted the act was not voluntary and the evidence in support.*]

The Crown must prove beyond reasonable doubt that the act alleged as causing [*the harm*] to the [*the victim*] was a voluntary act of [*the accused*]. If you consider that the Crown has failed to eliminate the reasonable possibility that the act [*of the accused*] relied upon by the Crown was not a voluntary one, you must find [*the accused*] not guilty.

[*If the issue of what act of the accused caused the harm arises see the suggested direction for causation at [2-310].*]

[The next page is 691]

Witnesses — not called

[4-370] Introduction

Defence witness

No comment should be made as to the failure of the defence to call a witness who might have been able to assist the defence: *Dyers v The Queen* (2002) 210 CLR 285. If any comment is to be given it is that the jury should not speculate about what a witness not called might have said: *Dyers* at [15].

Crown witnesses

In *Mahmood v Western Australia* (2008) 232 CLR 397 at [27] the High Court held that in a criminal trial:

> … where a witness, who might have been expected to be called and to give evidence on a matter, is not called by the prosecution, the question is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, they should entertain a reasonable doubt about the guilt of the accused.

See also *Louizos v R, R v Louizos* (2009) 194 A Crim R 223 at [57].

[4-375] Suggested comment — witness not called by prosecution

You have heard that [*name of witness*] has not been called by the Crown to give evidence. You can take the fact that there was no evidence from that witness into account when you decide whether the Crown has proved the guilt of the accused.

I am not inviting you to guess what [*name of witness*] would have said if [*he/she*] had been called. You must not do that at all. But in a criminal trial, where the Crown must prove that the accused is guilty beyond reasonable doubt, a jury is entitled to take into account that there was no evidence from a particular person in deciding whether or not there is a reasonable doubt about the accused's guilt … [*refer to the submissions of the defence and Crown on the issue*].

[4-377] Suggested direction — complainant not called on retrial

The appropriate direction to be given where a complainant did not give evidence in person in accordance with s 306B *Criminal Procedure Act* 1986 was considered in *PGM (No 2) v R* [2012] NSWCCA 261 at [91]–[92]. A direction in these terms may also be given where the complainant is a child and their evidence was originally given during a pre-recorded evidence hearing in accordance with the procedure in *Criminal Procedure Act* 1986, Sch 2, Pt 29, Divs 1–4. Note in particular, cl 91 which sets out what a judge must advise a jury in relation to such evidence. See [1-376] for the suggested direction where evidence is given by way of a recording.

Where a witness intermediary is used, see the suggested direction at **[1-370]**.

It must be obvious to you that [*the complainant*] did not personally give evidence before you. Instead a [*video and/or audio recording*] of [*his/her*] evidence from an earlier trial was played to you. This includes the cross-examination of [*him/her*] by [*the accused's*] counsel at that time. The procedure adopted in this trial of playing that recording is usual practice. It is to spare [*the complainant*] from having to attend court to give that evidence again.

You cannot use the fact that [*his/her*] evidence was played to you from a [*video or audio recording*] against the accused. As I said a moment ago, it is usual practice for evidence to be given this way and you should not give the evidence any greater or lesser weight simply because of that. You should also assess the evidence in the same way as you assess the evidence of any other witness.

[*If appropriate*]

You cannot speculate about what [*the complainant*] may have said had [*he/she*] given evidence in person. You simply act upon the evidence before you and assess it to determine whether you are prepared to act upon it.

[The next page is 693]

Witness reasonably supposed to have been criminally concerned in the events

Section 165(1)(d) *Evidence Act* 1995 (NSW)

[4-380] Introduction

Section 165(1)(d) *Evidence Act* 1995, provides that evidence which may be unreliable includes evidence given in a criminal proceeding "by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding".

This category includes a witness referred to at common law as an accomplice: *Sio v The Queen* [2016] HCA 32 at [65]. Section 165(1)(d) recognises that the evidence of accomplices is "apt to be unreliable by reason of a motive to shift blame to the co-offender": *Sio v The Queen* at [65]. The Court of Criminal Appeal has observed that it may be preferable that a trial judge avoids using the word accomplice during his or her warnings to the jury. This is because the use of that word may inadvertently convey the impression that the judge believes that the witness is in fact an accomplice of the accused and therefore, that the trial judge has formed the view that the accused is guilty of the charge before the jury: *R v Stewart* (2001) 52 NSWLR 301 at [126]; *R v Cornelissen* [2004] NSWCCA 449 at [117]. The suggested direction below is drafted to accommodate this observation.

Where a judge is required to make a determination that a witness comes within the expression used in s 165(1)(d), but concludes either that the test in the section is not satisfied or there are good reasons for not giving a warning (s 165(3)), the judge should give reasons: *Kutschera v R* [2010] NSWCCA 150 at [95]–[97]ff.

It is erroneous to give a warning where the evidence of a witness criminally concerned in events is not relied upon by the Crown against an accused: *Proud v R (No 2)* [2016] NSWCCA 44 at [73] (where the evidence which attracted the erroneous direction was that of the accused). A warning is not appropriate "because the aspect of the witness's status that gives rise to the possibility of unreliability is no longer relevant: the potential of the witness to falsely implicate the accused in order to diminish his own culpability ceases to exist": *R v Ayoub* [2004] NSWCCA 209 at [16]. Where the Crown does not rely upon the evidence of such a witness or vigorously disputes the witness's evidence, the jury should be directed to assess the evidence in the ordinary way: *Proud v R (No 2)* [2016] NSWCCA 44 at [70].

The content of the warnings required by s 165(1)(d) will depend upon the particular circumstances of the case. Although it is not necessary that any particular form of words be used in giving the warning, certain elements will generally be required. For example, failure to direct the jury in terms of the experience of the courts concerning the reliability of evidence given by persons reasonably supposed to have been criminally concerned in the events giving rise to the proceedings, will weaken the impact of the warning. A judge who fails to mention such experience when it exists certainly increases the risk of the warning being insufficient: *R v Chen* [2010] NSWCCA 224 at [27].

Section 165(1)(d) uses the expression "a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding". There is no requirement to use that expression in directing the jury. The suggested directions below use an alternative formulation that is more readily understandable by jurors: "a person who was, or might have been, involved in the alleged crime". Much may depend upon the circumstances of the case as to which precise expression is used but it is suggested that the long-winded legal expression in s 165(1)(d) be avoided where possible. Even the word "accomplice" may be used provided that it does not inadvertently convey that the trial judge thinks that the accused is guilty of the crime charged: for example, "a person who the Crown alleges was an accomplice of the accused".

[4-385] Suggested direction

The Crown relies upon the evidence of [*the witness*]. The Crown also asserts that [*the witness*] is a person who was, or might have been, involved in the alleged crime.

The law requires me to give you certain warnings and directions concerning this evidence. They are given in every case in which the Crown relies upon the evidence of a witness who was, or might have been, involved in the alleged crime. They are not given in this case because of any view which I have formed concerning the evidence of [*the witness*].

The need to give such directions arises because the courts have, over the years, a great deal of experience concerning the reliability of evidence given by a witness who was, or might have been, involved in the alleged crime. That experience has shown that the evidence given by such a witness may be unreliable. I do not intend to suggest, however, that such evidence is always unreliable.

My purpose in giving you these directions is only to warn you that the evidence of such a witness may be unreliable and for that reason, you must approach that evidence with considerable caution in the way in which I will outline shortly.

There are many reasons why the evidence of such a person may be unreliable. Possible reasons are:

- It is only natural, you may think, that a witness who was, or might have been, involved in the alleged crime, may want to shift the blame from himself or herself onto others, and to justify his or her own conduct. In the process, the witness may construct untruthful stories, which tend to play down his or her own part in the crime and play up the part of others in the crime, even going so far as to blame quite innocent people.
- Persons who are, or might have been, involved in an alleged crime may make false claims as to the involvement of others out of motives of revenge or a feeling of dislike or hostility.
- Such a person may be motivated to give false evidence in order to qualify for a reduction in his or her own sentence. [Where a discount has already been granted, as is the normal case, the jury should be specifically directed as to the precise extent of the discount and the consequences of failing to give evidence in accordance with his or her undertaking — see bracketed note below.]

- There may be other reasons or motives why false evidence has been given by such a witness. It is not for the accused to establish what they might be. Remember that the Crown has to prove the essential aspects of its case and the accused does not have to prove anything.
- Experience has shown that once such a witness has given a version to the police which incriminates an accused, he or she may feel locked into that version, even if it contained inaccuracies or even if it were substantially untrue.
- **[Where appropriate:** Finally, in relation to the evidence of [*the witness*] a number of [*his/her*] motives for lying, or possibly lying were explored.

  [*The relevant evidence relating to the alleged unreliability of the witness should be referred to.*]

When assessing the evidence of [*the witness*], you must remember the warnings and directions I have just given to you.

[Note: If the witness could lose the benefit of a reduction in sentence if he or she failed to give the evidence he or she undertook to give at the accused's trial, the jury should be informed that if the undertaking was breached s 5DA *Criminal Appeal Act* 1912 is a mechanism by which the benefit of the sentence received by the witness could be removed. The jury would not know such a mechanism existed unless they were so informed by the trial judge: see *R v Stewart* (2001) 52 NSWLR 301 at [18]–[24], [43] applied in *R v Attalah* [2004] NSWCCA 318.**]**

[4-387] No corroborative evidence needed

In *R v Kanaan* [2006] NSWCCA 109, the court said at [217]:

> … the effect of ss 164–165 [*Evidence Act*] (as now interpreted by the High Court) is as follows:
>
> (1) It is not necessary for the evidence of a witness who may reasonably be supposed to have been criminally concerned in the events giving rise to the trial to be corroborated.
>
> (2) The judge, if requested to do so and unless of opinion that there are good reasons not to do so, is:
>
> (a) to give a warning that the evidence of that witness may be unreliable,
>
> (b) to inform the jury of matters that may cause it to be unreliable, and
>
> (c) to warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
>
> (3) The matters to which reference was generally made in the directions which accompanied the common law accomplice warning … should, when appropriate, generally be used when informing the jury of the matters which may cause the evidence of that witness to be unreliable.
>
> (4) The judge may, if satisfied that it is necessary in the interests of justice to do so in the particular case, give a warning that it would be dangerous to convict on the uncorroborated evidence of such a witness, but the judge is *never* under a duty to do so.

[4-390] Exceptional use of the "dangerous to convict" formulation

In *R v Robinson* (2006) 162 A Crim R 88, Spigelman CJ reviewed the impact of ss 164–165 *Evidence Act* on prior case law in the context of a warning about the evidence of a prison informer. His Honour said at [4]–[5] that Parliament intended to enact a fresh start:

> At common law the requirement to give directions in particular cases, including in the form that it was "dangerous to convict" on the uncorroborated evidence of certain categories of witnesses, had started off as rules of practice but had hardened into rules of law…
>
> Section 164 of the *Evidence Act* has swept aside these rules of law. They have been replaced by a new regime in s 165 which both mandates a form of warning (s 165(2)) and preserves the discretion to give additional warnings (s 165(5)).

His Honour cited the approach taken in *R v Kanaan* [2006] NSWCCA 109 at [210]–[217] to accomplice warnings with approval: see [6]–[8].

Later His Honour said at [19]:

> The formulation "dangerous to convict" is a powerful direction, capable of being understood, and in my opinion, is frequently understood, by a jury as, in effect, a direction by the judge to acquit the accused. It is a formulation that is best avoided, save in exceptional circumstances.

Simpson J at [20] and Johnson J at [166] agreed. Although the case concerned warnings in relation to prisoner informers, the comment at [19] clearly has wider application to warnings given under s 165 — including a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding.

R v Kanaan and *R v Robinson* were applied in *R v GAR (No 2)* [2010] NSWCCA 164 at [103].

[4-392] Suggested direction

In these proceedings the Crown relies upon the evidence of [*the witness*] who the Crown contends is a person who was, or might have been, involved in the alleged crime.

In addition to the detailed warnings I have already given to you, I must add a warning that it would be dangerous for you to be satisfied beyond reasonable doubt of the guilt of the accused on the evidence of [*the witness*] unless you are satisfied that his/her evidence is supported or confirmed by other evidence which indicates that such evidence is true.

In this respect, what you must look for is evidence from an independent source which tends to show not only that the crime charged was committed but that the accused was implicated in it in the way alleged by the Crown.

[*The evidence relied upon by the Crown as supportive or confirmatory evidence of the witness should be identified*].

Whether the matters I have mentioned, or any of them, provide support or confirmation of the evidence of [*the witness*] is a matter for you as the judges of the facts. This will depend on whether you accept, as reliable, the relevant evidence, and what, if any, significance you attach to it.

> Finally, even if you do not find any other relevant evidence which supports or confirms the evidence of [*the witness*], you may still convict on that evidence if, after taking into account the warnings I have given you, you are nevertheless satisfied beyond reasonable doubt, after scrutinising the evidence with great care, that it is truthful and reliable.

[4-395] Where evidence not entirely adverse to the accused

The High Court decision of *Jenkins v The Queen* (2004) 79 ALJR 252, which emanated from Victoria, is a common law "accomplice" case. It partly assists in relation to s 165(1)(d) warnings.

The court held, unanimously, that there is no requirement to give the warning where the evidence given by an accomplice is substantially undisputed: *Jenkins v The Queen* at [30], [34]. The court observed that the *Evidence Act* provides that it is not always necessary to warn the jury and that the Act had "substituted a more flexible requirement": *Jenkins v The Queen* at [26].

If there is an issue which the jury might have to resolve in order to reach a verdict of guilty, and an accomplice's evidence relates to that issue, an accomplice warning must be given if the acceptance of that evidence is, or could be, a step taken by the jury in reasoning to a finding of guilt. The relevance of the accomplice's evidence to the issues in the case will usually be apparent from the examination or cross-examination of the accomplice, or from what is said in the closing address. If the evidence of an accomplice is not contested, there will be no issue to which the accomplice's evidence relates which the jury will need to resolve in reasoning to a verdict of guilty and an accomplice warning will not be necessary: *Jenkins v The Queen* at [33].

[4-397] Where an accused gives evidence implicating another accused

The High Court held in *Webb v The Queen* (1994) 181 CLR 41, that when an accused gives evidence implicating another accused, the question whether an accomplice warning should be given and, if so, in what terms, cannot be answered without reference to the unique circumstances of the case: *Webb v The Queen* at 65.

If in such a case the judge considers it necessary or appropriate to give a warning, it must be done in a way which makes clear that the warning relates only to the use of the evidence as against the co-accused and does not lead the jury to believe that the warning attaches to the accused's evidence in his own case: *Webb v The Queen* at 66–67; *Proud v R (No 2)* [2016] NSWCCA 44 at [58]–[73].

These difficulties are helpfully discussed in *R v Diez-Orozco* [2003] NSWSC 1050; *R v Johnston* [2004] NSWCCA 58 at [149] and *R v Jacobs* (2004) 151 A Crim R 452 at [265]–[287] in the context of s 165(1)(d) *Evidence Act*.

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para

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Complaint evidence

[5-000] Introduction

Last reviewed: September 2023

Evidence of complaint by an alleged victim is admissible under s 66(2) *Evidence Act* 1995, where the complainant gives evidence. It is some evidence of the fact the accused conducted themself as alleged in the complaint. The evidence can also be used to show consistency of conduct by the complainant. This type of evidence is not restricted to sexual assault cases. Evidence can be admitted under s 66 as relevant to any offence provided it is first-person hearsay under s 62.

Evidence of complaint can also be admissible under s 65(2) *Evidence Act*, where the person making the complaint is not available to give evidence, for example where the complainant is dead or for some other reason is not available: see cl 4 of the Dictionary.

Further, such evidence can be admitted with leave under s 108(3)(b) in order to re-establish the credibility of a witness. In that case, the complaint can become evidence of the truth of the allegation made in the complaint by the operation of s 60 of the Act unless limited under s 136.

[5-010] Evidence of complaint where witness available to give evidence — s 66(2)

Last reviewed: September 2023

As to the admissibility of complaint under s 66(2): see generally *Papakosmas v The Queen* (1999) 196 CLR 297; *Criminal Practice and Procedure NSW* at [3-s 66.1]; *Uniform Evidence Law* (16th edn, 2021) at [EA.66.60]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 66-2ff.

The use to be made of the evidence can be limited under s 136 of the Act so that it cannot be used as proof of the fact of what was asserted in the complaint, but relevant only to the credibility of the alleged victim. This limit, however, would not generally be applied to complaint evidence admitted under s 66(2): see generally: *R v BD* (unrep, 28/7/97, NSWCCA); *Papakosmas v The Queen* at [40]; *Criminal Practice and Procedure NSW* at [3-s 136.1]; *Uniform Evidence Law* (16th edn, 2021) at [EA.136.60]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 136.1ff.

Section 66(2A) sets out matters the court may take into account in determining whether the occurrence was fresh in the memory of the person who made the representation. The phrase "fresh in the memory" is interpreted more broadly than by the High Court in *Graham v The Queen* (1998) 195 CLR 606: *R v XY* [2010] NSWCCA 181 at [78]–[79], [99]; and at [83]–[98]; see also *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56 at [89]. The time that has passed between the alleged offences and the complaint remains relevant but is not determinative: *R v XY* at [79]. It is necessary to consider the facts in each case. In sexual assault cases it is recognised the nature of the offending may be such that the events involved may remain fresh in a complainant's memory for many years: *The Queen v Bauer (a pseudonym)* at [92]; *R v XY* at [85]; *R v Gregory-Roberts* [2016] NSWCCA 92 at [47]–[48]; *Kassab (a pseudonym) v R* [2021] NSWCCA 46 at [339]–[340].

As the evidence is admitted as hearsay, a warning may be required under s 165(1)(a) of the Act: see generally *R v TJF* [2001] NSWCCA 127 where there was delay and the complaint was prompted; *Criminal Practice and Procedure NSW* at [3-s 165.1]ff; *Uniform Evidence Law* (16th edn, 2021) at [EA.165.90]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 165-9ff.

[5-020] Suggested direction — where complaint evidence admitted under s 66(2)

Last reviewed: September 2023

The following direction suits a case in which the fact of an assault is disputed. It may be modified for a case where the act is not disputed but there is an issue as to consent. If use of the evidence has been limited under s 136 *Evidence Act* 1995, the direction should omit reference to the evidence having twofold use and omit the reference to s 60 *Evidence Act* use.

Where the evidence is used to re-establish credibility under s 108(3), the following direction may be used with appropriate adaptation including, of course, omission of references to s 60 *Evidence Act* use.

The directions include any required in accordance with s 294 if delay in complaint is raised.

If it is contended there is a difference between the complainant's evidence and a prior complaint, a direction under s 293A *Criminal Procedure Act* 1986 as suggested at **[5-050]** may be incorporated where indicated. A judge may give a direction under s 293A or s 294 at any time during the trial and may give the same direction more than once: ss 293A(2A); 294(2A). See further at **[5-060]** below.

The Crown relies on the evidence of the complainant having told [*witness*] about the alleged assault by the accused. This is referred to by lawyers as "complaint evidence" or "evidence of complaint". I will use those terms as a shorthand description of this evidence. [*Set out the evidence of complaint.*]

The first issue for you to decide is whether you accept the evidence of complaint. It was/was not disputed by the accused. [*Set out defence contentions if disputed*.]

If you accept the complaint evidence, the following directions apply to how it may be used.

Section 60 use

The first way in which the evidence may be relevant is that it can be regarded as additional evidence the complainant was assaulted in the way [*the complainant*] described. So, not only would you have the complainant having given evidence before you about having been assaulted by the accused. You would also have the description of the assault that was given to [*witness*].

You should have regard to all of the circumstances relevant to making the complaint. In considering using the evidence for this purpose you should consider how consistent the complaint to [*witness*] is with the evidence the complainant gave in court. If there are discrepancies, you should consider why that may be so and whether that has a bearing upon whether you should treat the complaint evidence as additional evidence of the complainant having been assaulted.

[*Set out the competing arguments as to this, if any.*]

[*Where, for a prescribed sexual offence, a s 293A direction is appropriate*, insert the direction suggested at **[5-050]**.**]**

Credibility use

The second way the evidence of complaint may be used is that it can be relevant to the truthfulness of the complainant's evidence in court. The Crown says the fact [*the complainant*] complained to [*witness*] when [*the complainant*] did **[*add if relevant:* *and in the manner in which the complainant did*]** makes it more likely [*the complainant*] is telling you the truth about having been assaulted by the accused.

A matter you might consider in relation to using the evidence for this purpose is whether the complainant's conduct was consistent with the allegation. In other words, did [*the complainant*] act in the way you would expect [*the complainant*] to act if [*the complainant*] had been assaulted as [*the complainant*] claims? Things you might think about in relation to this are the timing of the complaint, in relation to when the assault is said to have occurred **[*if relevant:*** and the way the complainant appeared to [*witness*] when making the complaint**]**.

In considering whether there was consistency between the alleged assault and the complainant's conduct in complaining, you might bear in mind that different people have different personalities. In a given situation they might not all behave in the same way. In this case you are being asked to consider the complainant and the way [*the complainant*] reacted to the experience [*the complainant*] says [*the complainant*] had.

Another matter you should consider is that just because a person says something on more than one occasion it does not mean that what is said is necessarily true or reliable. A false or inaccurate statement does not become more reliable just because it is repeated.

[*If there was a delay in complaint for a prescribed sexual offence, add (s 294(2)):* In relation to the timing of the complaint made to [*witness*], you should bear in mind that a delay in complaining does not necessarily indicate that the allegation is false. There may be good reasons why a victim of a sexual assault may hesitate in making, or refrain from making, a complaint about it. [*Summarise the competing cases as to this*.]**]**

[*In relation to delay in complaint for a prescribed sexual offence* (that is, where the "sufficient evidence" test under s 294(2)(c) is met) add: However, the accused has argued that the delay in making a complaint is inconsistent with the conduct of a truthful person who has been sexually assaulted and so you should regard this as indicating that the complainant's evidence is false. The accused asks you to rely upon the evidence that … [*set out the evidence relied upon by the accused said to justify that the jury should use the delay in assessing the complainant's credibility*].**]**

So, taking into account these matters, the question is whether the evidence of complaint supports **[if s 294(2)(c) applies**: or detracts from**]** the credibility of the complainant.

[*Where the evidence is limited to credibility under s 136 add:* You can only use the evidence of complaint in this way. You cannot use it as evidence that the assault occurred. The Crown did not lead the complaint evidence as itself being able to prove the charge. You can only find the charge proved on the evidence given in the courtroom and not what was said at some other place and time to [*witness*].**]**

Conclusion

So, that is how the evidence of complaint may be used in your deliberations. First you must decide whether you accept the complaint was in fact made to [*witness*] and what was actually said. Then you need to consider the various matters I have spoken about. [*A summary of the various matters that should be considered may be useful.*]

[*Summarise the competing cases to the extent that this has not already been done.*]

[5-030] Evidence of complaint where witness not available under s 65(2)

Last reviewed: September 2023

Evidence of a complaint about the accused's conduct can be admitted as evidence of the truth of the allegation under s 65 even though the complainant is not available as a witness, for example in a murder case. Such evidence will usually be admitted as evidence of a relationship between the complainant and the accused and is admitted for the purpose of being used by the jury as evidence of the truth of the allegation made.

The mere fact a complainant refuses to answer questions will not always satisfy the requirement of "all reasonable steps" in the definition of "unavailability of persons" in Pt 2, cl 4(g) of the Dictionary to the Act for the purpose of s 65(1). What constitutes "all reasonable steps" will depend upon the circumstances of the case but some relevant considerations include: the nature of the case; the importance of the evidence; the higher standard of proof in a criminal trial; and the importance of the liberty of the individual: *RC v R* [2022] NSWCCA 281 at [114]–[115]. The serious consequences of the successful invocation of s 65 emphasises the need for compliance with the conditions of admissibility prescribed by the section: at [116]; *Sio v The Queen* (2016) 259 CLR 47 at [60]–[61].

Section 65(2) is premised upon an assumption that a party is seeking to prove a specific fact and so it requires the identification of the particular representation to be adduced to prove the fact: *Sio v The Queen* at [57]. It is then that the court considers the circumstances of the representation to determine whether the conditions of admissibility have been met under s 65(2): *Sio v The Queen* at [57]. Section 65(2)(d)(ii) is directed at circumstances that of themselves tend to negative motive and opportunity of the declarant to lie: *Sio v The Queen* at [64].

Section 65(2)(d)(ii) requires a court to be positively satisfied that the representation which is tendered was made in circumstances that make it likely to be reliable notwithstanding its hearsay character: *Sio v The Queen* at [64].

The test in s 65(2)(b) is less stringent than that in either s 65(2)(c) or (d) but cases considering those parts of s 65(2) apply to the test in s 65(2)(b) provided the different language of each is borne in mind: *Priday v R* [2019] NSWCCA 272 at [29]–[37]. As to evidence admitted under s 65(2): see generally *Sio v The Queen* at [53]–[74]; *R v Serratore* (1999) 48 NSWLR 101; *R v Toki (No 3)* [2000] NSWSC 999; *Criminal Practice and Procedure NSW* at [3-s 65.1]ff; *Uniform Evidence Law* (16th edn, 2021) at [EA.65.150]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 65-2ff.

As to the unavailability of a witness: see cl 4 of the Dictionary and generally, *Criminal Practice and Procedure NSW* at [3-s 65.15]; *Uniform Evidence Law* (16th edn, 2021) at [EA.65.150]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 65-4.

Because of the variety of the situations in which such evidence can be given, no suggested form of direction is appropriate. However, a suitable direction can be adapted from the first part of the suggested direction in **[5-020]**.

A warning would need to be given as to the fact that the evidence is hearsay under s 165 if it is requested.

[5-040] Evidence of complaint as a prior consistent statement under s 108(3)

Last reviewed: September 2023

Evidence of complaint that is not admitted under s 66(2), can be admitted in examination in chief or re-examination of the complainant by the Crown under s 108(3)(b). The evidence can only be introduced with the leave of the court: see s 192(2).

As to s 108(3)(b): see generally, *Graham v The Queen* (1998) 195 CLR 606; *R v DBG* [2002] NSWCCA 328; *Criminal Practice and Procedure NSW* at [3-s 108.1]; *Uniform Evidence Law* (16th edn, 2021) at [EA.108.150]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 108-3ff.

[5-045] Direction where difference in complainant's account — prescribed sexual offences only

Last reviewed: September 2023

In trials for a prescribed sexual offence, where there is evidence suggesting a difference in the complainant's account that may be relevant to their truthfulness or reliability, it may be necessary to give the jury a direction in accordance with s 293A *Criminal Procedure Act* 1986. A "prescribed sexual offence" is defined in s 3. "Difference" is defined to include a gap or an inconsistency in the account or a difference between the account and another account: s 293A(3). The direction is not given as a matter of course but after submissions have been heard from the parties: s 293A(1). If it is decided the circumstances warrant the direction the jury may be directed that:

(i) people may not recall all the details of a sexual offence or may not describe it the same way each time, and

(ii) trauma may affect people differently, including affecting how they recall events, and

(iii) it is common for there to be differences in accounts of a sexual offence, and

(iv) both truthful and untruthful accounts of a sexual offence may contain differences, and

that it is for the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability: s 293A(2).

This direction may be given at any time during the trial, and the same direction may be given on more than one occasion: s 293A(2A).

[5-050] Suggested direction

Last reviewed: September 2023

The defence case is that [*name of witness*] was not telling the truth, that there were gaps in the account [*the witness*] gave, and that there were differences and inconsistencies between the witness's accounts.

[*Summarise relevant evidence*]

Experience shows that people may not remember all the details of an event including a sexual offence in the same way each time, that trauma may affect people differently and may affect how they recall events, that sometimes there are differences in an account of a sexual offence, and both truthful and untruthful accounts of an event including a sexual offence may contain differences. It is your job, and entirely a matter for you members of the jury, as judges of the facts, to decide whether or not any differences in the complainant's account are important in assessing their truthfulness and reliability.

[5-055] Suggested direction — delay in, or absence of, complaint

Last reviewed: September 2023

This direction must be given when evidence is given, or a question is asked, tending to suggest an absence of, or delay in, making a complaint: s 294(1). The direction must not extend to directing that delay is relevant to the complainant's credibility "unless there is sufficient evidence to justify such a direction": s 294(2)(c).

You have heard evidence that the complainant did not complain about what [*the complainant*] claims the accused did to them until they told [*set out details of when, to whom, and nature of complaint*].

[***Alternatively***: You have heard the complainant did not make any complaint about what [*the complainant*] claims the accused did to [*the complainant*].]

The delay in making a complaint about the alleged conduct of the accused [*or an absence of a complaint*] does not necessarily indicate the allegation the offence was committed is false. There may be good reasons why a victim of sexual assault may hesitate in making, or may refrain from making, a complaint about such an assault.

[***Where appropriate***: You have heard evidence that the complainant did not complain until [*the complainant*] did so to [*specify*] because [*specify the explanation offered*].]

[***Where appropriate*** (that is, where the "sufficient evidence" test under s 294(2)(c) is met):

However, the delay in making a complaint [*or the absence of a complaint*] is a matter that you may take into account in assessing the credibility of the complainant's evidence as to what [*the complainant*] said the accused did. The accused has argued that the delay in making a complaint [*or the absence of a complaint*] is inconsistent with the conduct of a truthful person who has been sexually assaulted and so you should regard this as indicating the complainant's evidence is false. [*The accused*] asks you to rely upon the evidence that … [*set out the evidence relied upon by the accused said to justify that the jury should use the delay in assessing the complainant's credibility*].

This is a matter which you should consider.]

[5-060] Notes

Last reviewed: September 2023

1. The statutory basis for the direction is found in s 294(1)–(3) *Criminal Procedure Act* 1986. The section is headed "Direction to be given by Judge in relation to lack of complaint in certain sexual offence proceedings" which provides:

   (1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest—

   (a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or

   (b) delay by that person in making any such complaint.

   (2) In circumstances to which this section applies, the Judge—

   (a) must direct the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and

   (b) must direct the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and

   (c) must not direct the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a direction.

   (2A) A judge may, as the judge sees fit—

   (a) give a direction in this section at any time during a trial, and

   (b) give the same direction on more than 1 occasion during a trial.

   (3) If the trial of the person also relates to a domestic violence offence alleged to have been committed by the person against the same victim, the Judge may—

   (a) also give a warning under section 306ZR, or

   (b) give a single warning to address both types of offences.

   Sections 294(1), (2)(a) and (b) were previously found in s 405B *Crimes Act* 1900 and s 107 *Criminal Procedure Act*. Section 294(2) was enacted to override the presumption expressed in *Kilby v The Queen* (1973) 129 CLR 460 at 465 that a failure of a person to complain at the earliest reasonable opportunity may be used by the jury as evidence relevant to the falsity of the complaint: *Jarrett v R* (2014) 86 NSWLR 623 at [34]. Section 294(2)(c) (added in 2007) provided, until 1 June 2022, that a judge could not give a "warning" about delay "unless there is sufficient evidence to justify such a warning". Section 294(2) was amended by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 to replace

the words "warn" or "warning" with "direct" or "direction": Sch 2[9]–[12]. These amendments apply to proceedings the hearing of which commence on and from 1 June 2022.

The Court of Criminal Appeal considered an earlier version of s 294(2) in *Jarrett v R* (2014) 86 NSWLR 623 and expressed its reasons using the then language of the provision. However, the Court's conclusions concerning the operation of the provision are unaffected by these amendments.

2. The addition of s 294(2)(c) significantly recasts s 294(2): *Jarrett v R* at [38]. It is complemented by s 294AA (inserted at the same time) which prohibits the judge from directing a jury that complainants as a class are unreliable witnesses and that there is danger of convicting on the uncorroborated evidence of a complainant: *Jarrett v R* at [38]. Section 294(2)(c) restricts the circumstances in which a judge can direct a jury that the delay in, or an absence of, complaint can be taken into account in assessing the complainant's credibility. The court in *Jarrett v R* at [43] held that the circumstances and the nature of the direction will vary from case to case; the test of "sufficient evidence" must be the basis of the direction and it must mould with the mandatory directions required by s 294(2)(a) and (b). In *Jarrett v R* at [43], Basten JA said:

> Without being prescriptive, there must be something in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the "good reasons" why there was no timely complaint for the purposes of par (b), but, if not believed, may form the evidence justifying the warning under par (c).

An inconsistency between a complainant's complaints is "not the basis for a direction based on delay": *Jarrett v R* at [49].

Section 294(2)(c) does not require the giving of a direction that delay in complaint is *not* relevant to a complainant's credibility. Whether delay is relevant to that issue is open for a jury to consider, subject to any specific direction that may be given under s 294(2)(c): *Park v R* [2023] NSWCCA 71 at [118].

[5-070] Delay in complaint and forensic disadvantage to the accused

Last reviewed: September 2023

Where s 165B *Evidence Act* 1995 applies, a direction regarding any forensic disadvantage to the accused is to be given if:

(a) the proceedings are criminal proceedings in which there is a jury: s 165B(1). (The section applies in judge alone trials by virtue of s 133(3) *Criminal Procedure Act* 1986 which requires the judge to take the warnings required to be given to a jury into account: *W v R* [2014] NSWCCA 110 at [126]–[127], [130].)

(b) the court is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay: s 165B(2)

   (i) significant forensic disadvantage includes, but is not limited to, death or inability to locate any potential witness and loss or otherwise unavailability of any potential evidence: s 165B(7)

(ii) delay includes delay between the alleged offence and it being reported: s 165B(6)(a)

(iii) significant forensic disadvantage is not established by mere passage of time by itself: s 165B(6)(b), and

(c) a party makes an application for the direction: s 165B(2).

The need to direct the jury on the forensic disadvantage occasioned to the accused as a result of delay in complaint emanated from the High Court decisions in *Longman v The Queen* (1989) 168 CLR 79 and later *Crampton v The Queen* (2000) 206 CLR 161 at [45]. Section 165B substantially changed the law as declared in those cases.

The onus is on the accused to satisfy the court the delay has caused a significant forensic disadvantage: *Cabot (a pseudonym) v R (No 2)* [2020] NSWCCA 354 at [39].

In *TO v R* [2017] NSWCCA 12 at [167], the Court (Price J; Button and Fagan JJ agreeing) summarised the effect of s 165B with reference to the cases of *Groundstroem v R* [2013] NSWCCA 237 and *Jarrett v R* (2014) 86 NSWLR 623 at [60]–[63]:

1. The duty on the judge to give a direction in accordance with subsection (2) arises only on application by a party and what is said to be the particular significant forensic disadvantage must form part of the application: *Groundstroem v R* at [56].
2. Subsection (5) prohibits the judge from directing the jury "about any forensic disadvantage the defendant may have suffered because of delay" otherwise than in accordance with the section: *Jarrett v R* at [53].
3. There is a duty to inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence, only when the judge is satisfied that the defendant has "suffered a significant forensic disadvantage because of the consequences of delay": *Jarrett* at [53].
4. Subsection (3) provides a rider to the obligation to inform where the judge is satisfied there are "good reasons" for not taking that step: *Jarrett* at [53].
5. Subsection (4) prohibits the judge from suggesting that it would be dangerous or unsafe to convict the defendant "solely because of" the delay or the disadvantage. Otherwise, no particular form of words need be used: *Jarrett* at [53].
6. Whether there has been a significant forensic disadvantage depends on the nature of the complaint and the extent of the delay in the circumstances of the case. The extent of delay is not the test. It is the consequence of delay which is decisive: *Groundstroem* at [61]. The proper focus of s 165B is on the disadvantage to the accused: *Jarrett* at [60].
7. The concept of delay is relative and judgmental. Although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the exception in s 165B(3): *Jarrett* at [61]–[62].
8. If the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction: *Jarrett* at [63].

The focus of s 165B is on the disadvantage to the accused and, unlike *Longman v The Queen*, there is no generalised assumption concerning the reliability of the

complainant's evidence as a consequence of the delay: *Jarrett v R* at [54], [60]. Section 165B(4) specifically prohibits the giving of a "dangerous to convict" *Longman* direction which was considered by the Parliament to be an encroachment on the fact-finding task of the jury: *W v R* at [125]. A failure by a party to apply for a forensic disadvantage direction does not prevent a judge giving such a direction in order to avoid a perceptible risk of a miscarriage of justice: *TO v R* at [181] and [183]. This is supported by the preservation of the common law under s 9(1) *Evidence Act* and by the text of s 165B(5) which include "… but this section does not affect any other power of the judge to give any warning to, or to inform, the jury": *TO v R* at [181]–[182].

The phrase "because of" in s 165B(2) requires that the consequences of delay cause, or is one matter causing, significant disadvantage to the accused: *Cabot (a pseudonym) v R (No 2)* at [71]. Where the accused's conduct significantly contributes to the delay in complaint because of, for example, threats the accused made to a complainant, any forensic disadvantage is a consequence of the accused's own actions, not the delay in complaint: *Jarrett v R* at [62]; *Cabot (a pseudonym) v R (No 2)* at [71]. Misconduct of an accused may also be relevant under s 165B(3) as to whether there are "good reasons" not to give the direction: *Cabot (a pseudonym) v R (No 2)* at [73].

Any warning given under s 165B must not infringe s 294AA(1) *Criminal Procedure Act* which provides, inter alia, that the judge "must not direct a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses". This prohibition includes "a direction to a jury of the danger of convicting on the uncorroborated evidence of any complainant": s 294AA(2). Section 165 *Evidence Act* is "subject to" s 294AA: s 294AA(3). See also **[3-615]** at notes 4 and 5.

[5-080] Suggested direction — delay in complaint and forensic disadvantage to the accused

Last reviewed: September 2023

Note: The suggested direction should be modified so as to deal only with the actual and possible disadvantages encountered in the case at hand and omitting assumptions that may not be applicable.

There is a direction I must give you relating to this issue of the delay in [*or absence of*] any complaint being made by the complainant.

It is most important that you appreciate fully the effects of delay [*or absence of complaint*] on the ability of [*the accused*] to defend themself by testing prosecution evidence [*or bringing forward evidence*] in their own case, to establish a reasonable doubt about their guilt.

In this regard, I refer to the following specific difficulties encountered by [*the accused*] in testing the evidence of the prosecution [*or in adducing evidence*] in their own case … [*these specific difficulties should be highlighted in such a way as to make it clear that delay, for which the accused had not been responsible, had created those difficulties. All additional significant circumstances require comment. These may include:*

- *the delay in instituting the prosecution*
- *the possibility of distortion in human recollection*
- *the nature of the allegations*

- *the age of the complainant at the time of the allegations having regard to the current and previous forms of ss 165A and 165B Evidence Act*
- *the prosecution case is confined to the evidence of the complainant, and*
- *any unusual or special features.*]

These difficulties put the accused at a significant disadvantage in responding to the prosecution case, either in testing the prosecution evidence, or in bringing forward evidence themself to establish a reasonable doubt about their guilt, or both.

The delay means that evidence relied upon by the Crown cannot be as fully tested as it otherwise might have been.

Had the allegations been brought to light and the prosecution commenced much sooner, it would be expected that the complainant's memory for details would have been clearer. This may have enabled their evidence to be checked in relation to those details against independent sources so as to verify it, or to disprove it. The complainant's inability to recall precise details of the circumstances surrounding the incident(s) makes it difficult for the accused to throw doubt on their evidence by pointing to circumstances which may contradict [*the complainant*]. Had the accused learned of the allegations at a much earlier time [*the accused*] may have been able to recall relevant details which could have been used by their counsel in cross-examination of the complainant.

Another aspect of the accused's disadvantage is that had [*the accused*] learned of the allegations at a much earlier time [*the accused*] may have been able to find witnesses or items of evidence that might have either contradicted the complainant or supported their case, or both. [*The accused*] may have been able to recall with some precision what [*the accused*] was doing and where [*the accused*] was at particular times on particular dates and to have been able to bring forward evidence to support [*the accused*].

You should also take into account that because of the delay the accused has lost the opportunity to bring forward evidence from [*set out specific items of evidence lost or no longer available*].

Because the accused has been put into this situation of significant disadvantage [*the accused*] has been prejudiced in the conduct of their defence. As a result, I direct you that before you convict the accused you must give the prosecution case the most careful scrutiny. In carrying out that scrutiny you must bear in mind the matters I have just been speaking about — the fact the complainant's evidence has not been tested to the extent that it otherwise could have been and the inability of the accused to bring forward evidence to challenge it, or to support their defence.

[The next page is 731]

Cross-examination concerning prior sexual history of compainants

[5-100] Introduction

Section 293 *Criminal Procedure Act* 1986 was renumbered as s 294CB on 1 June 2022: *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021: Sch 2[4].

Section 294CB(2) and (3) provide that, for prescribed sexual offence proceedings, evidence relating to the prior sexual history of the complainant is inadmissible subject to exceptions outlined in s 294CB(4)(a)–(f). Evidence falling within the exceptions can only be admitted if its probative value outweighs any distress, humiliation or embarrassment the complainant might suffer as a result of its admission: s 294CB(4).

Section 294CB(5) to (8) set out the procedure for determining whether evidence said to fall within the identified exceptions in s 294CB may be admitted. In summary:

- evidence related to the complainant's sexual reputation, sexual experience or sexual activity cannot be given unless the court has first decided the evidence is admissible: s 294CB(5)
- questions of the admissibility of the evidence or the right to cross-examine the complainant are determined in the absence of the jury: s 294CB(7)
- the accused may be permitted to cross-examine a complainant concerning evidence of the complainant's sexual experience, or lack of it, or participation or lack of participation in sexual activity, if the evidence was disclosed or implied in the prosecution case, and the accused would be unfairly prejudiced if not able to do so: s 294CB(6)
- if the court decides the evidence is admissible, written reasons must be given identifying with clarity the nature and scope of the evidence and the reasons for concluding it is admissible, before the evidence is led: s 294CB(8).

Note: in cases where evidence has been admitted under s 294CB, see also **[5-240]** and the note to the suggested direction **Circumstances in which non-consensual sexual activity occurs — s 292A**.

There has been some controversy associated with s 294CB (previously s 293) since it was first enacted, principally because of its capacity to prejudice an accused in the conduct of their trial. A five-judge Bench was convened in *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 to consider how s 293 (now s 294CB) applied in the context of allegations of previous unrelated false complaints and the correctness of *M v R* (unrep, 15/9/93, NSWCCA) (where it was held, in respect of an earlier version of s 293, that it extended to exclude such evidence). The controversy concerning the section and the relevant case law was summarised by Leeming JA in *Jackmain (a pseudonym) v R* at [88]–[178].

Section 293 (now s 294CB) was designed to exclude, to a significant degree, cross-examination of a complainant's sexual activity or experience with only limited exceptions: *Jackmain v R* at [15]. Its purpose is to protect sexual assault complainants

and prevent embarrassing and humiliating cross-examination of a complainant about their past sexual activities: *Jackmain v R* at [23]–[24]; [233]; [246]–[247]; *GP v R* [2016] NSWCCA 150 at [40].

Section 294CB renders otherwise relevant evidence inadmissible; if the evidence in question is irrelevant, or otherwise inadmissible, it does not fall within the parameters of s 294CB: *Decision Restricted* [2021] NSWCCA 51 at [42]; *R v Morgan* (1993) 30 NSWLR 543 at 544; see also *HG v The Queen* (1999) 197 CLR 414 at [24].

The procedure for determining admissibility

The procedure contemplated by s 294CB(7) (previously s 293(7)) for determining whether evidence is admissible is a voir dire: *Uddin v R* [2020] NSWCCA 115 at [56]. To facilitate the conduct of the voir dire, s 294CB must be read down to permit evidence that would otherwise be inadmissible to be given so the task under ss 294CB(6) and 294(7) can be performed. The effect is that the exclusionary rules in s 294CB(2) and (3) do not apply to evidence given during the voir dire: *Uddin v R* at [53]–[58]; [94]; *Jackmain v R* at [16]; [91]–[95]; [248].

Generally, counsel should provide a detailed written statement of the evidence proposed to be led so the trial judge can determine whether the evidence falls within the parameters of s 294CB(4) and its probative value: *Taylor v R* (2009) 78 NSWLR 198 at [44]–[45]. In *Jackmain v R*, at [248], Wilson J (Johnson J agreeing at [234]) observed that ordinarily the voir dire would be conducted on the documents as "it would be wholly inconsistent with the intention of the legislature … for a complainant to be required to give evidence *viva voce* and endure the sort of humiliating and distressing cross-examination that the Parliament sought to prevent." In an appropriate case, however, it may be necessary for oral evidence to be given: see for example *Uddin v R* at [94], where the oral evidence was to be given by persons other than the complainant.

Before the evidence is given, precise written reasons must be given for admitting the evidence and recording the nature and scope of the admitted evidence (s 294CB(8)): *Taylor v R* at [44]–[47]; *Dimian v R* (unrep, 23/11/95, NSWCCA). However, there is no need for the questions that are to be asked to be specifically identified: *Taylor v R* at [48].

Whether the evidence discloses the complainant has had sexual experience or taken part in sexual activity in s 294CB(3) is determined according to ordinary evidentiary principles: *Uddin v R* at [107].

[5-110] The exclusions in s 294CB(4)

Within the very narrow parameters of the provision, s 294CB(4) (formerly s 293(4)) should be construed broadly in the interests of the accused: *R v Taylor* at [36]; *Decision Restricted* [2021] NSWCCA 51 at [55]–[57]. However, it is important to bear in mind the intent of the legislature in introducing the section and its predecessors. In *GP v R* [2016] NSWCCA 150, Payne JA (McCallum and Wilson JJ agreeing) said at [40]–[41]:

> [Section 294CB] … clearly strikes a balance between competing interests being, on the one hand the interest of preventing distressing and humiliating cross-examination of sexual assault victims about their prior sexual history and on the other, the interest of

> permitting an accused person to cross-examine victims about defined aspects of their sexual history in the circumstances prescribed in the exceptions contained within [s 294CB].
>
> …
>
> [A]n approach to construction which seeks to discern a single purpose, and construing the legislation as though it pursued that purpose to the fullest extent possible may be contrary to the manifest intention of the legislation.

A number of cases have considered aspects of the exclusions in s 294CB(4). As to:

- the meaning of the expression "connected set of circumstances" and "at or about the time of" in s 294CB(4)(a) see, *Jackmain v R* at [189]–[195] and particularly at [191] where emphasis was given to the very short temporal period intended to apply; *Cook (a pseudonym) v R* [2022] NSWCCA 282 at [104]–[118] where it was held an 18-month gap in time between events was insufficiently temporal and ongoing legal proceedings for previous offences were not relevantly connected, but cf Beech-Jones CJ at CL at [17]–[24]; *Elsworth v R* [2022] NSWCCA 276 at [118] where evidence of a sexual experience from five years prior was not considered to be part of the complainant's continuing sexual experience at the time of the charged act; *R v Morgan* (1993) 30 NSWLR 543 (decided under s 409B, the then predecessor provision); *R v Edwards* [2015] NSWCCA 24 at [25]–[30]; *GEH v R* [2012] NSWCCA 150 at [11]–[13] (Basten JA) and [35] (Harrison J); and *Decision Restricted* [2021] NSWCCA 51 at [59]–[60] (Leeming JA, Walton J agreeing), but cf Adamson J at [88]–[91].
- the meaning of "sexual experience" and "sexual activity" in s 294CB(4), see *Elsworth v R* at [119] where it was held such terms did not encompass a complainant's memory of some past experience or activity simply because the memory is held at or about the time of the charged act or is said to be connected to the charged act because past experience informed present conduct. See also *GEH v R* at [63]–[65] for the distinction between the two terms "experience" and "activity".
- the meaning of "relates to" in s 294CB(4)(b), see *Cook (a pseudonym) v R* at [119]–[122], where it was confirmed the phrase is "wide in import" but did not extend to complaint evidence disclosed about a different perpetrator.
- the fact false complaint evidence may have the capacity to fall within the exceptions in s 294CB(4) see: *Adams v R* [2018] NSWCCA 303 at [163]–[177]. Where there is false complaint evidence years remote from the alleged offending, the temporal requirement in s 294(4)(a) cannot be satisfied: *Jackmain v R* at [25]; [190]; [235]; [238]; [240].
- whether evidence of fear and anxiety constitutes "disease or injury … attributable to the sexual intercourse so alleged" referred to in s 294CB(4)(c) see: *GP v R* [2016] NSWCCA 150 at [34], [44]; a psychological condition of diagnosed depression and suicidal ideation falls within the term "disease or injury": *JAD v R* [2012] NSWCCA 73 at [83].
- the phrase "sexual intercourse so alleged" in s 294CB(4)(c)(i) includes only the physical act and excludes issues of consent: *Taleb v R* [2015] NSWCCA 105 at [93].
- the admissibility of evidence of "the presence of semen [which] … is attributable to the sexual intercourse alleged to have been had by the accused" (s 294CB(4)(c)(ii))

see *WS v R* [2022] NSWCCA 77. In that case, a miscarriage of justice occurred because evidence the complainant was raped by another person at a similar time to the relevant offences was excluded, but evidence she had undergone a pregnancy test around that time was admitted. In the circumstances of that case, the court concluded both limbs of s 294CB(4)(c) were satisfied: at [78]–[80] (Macfarlan JA; Walton J agreeing); cf Rothman J at [108]–[111].

In *Decision Restricted* [2021] NSWCCA 51, Leeming JA (Walton J agreeing; Adamson J dissenting) observed, at [64], that when weighing the probative value of the evidence, "the distress, humiliation or embarrassment" to the complainant that is relevant is that which is over and above that which will inevitably occur by giving evidence even without reference to the matters caught by s 294CB. *WS v R* is an example of a case where the probative value of the evidence was found to outweigh the distress, humiliation and embarrassment the complainant might suffer: at [62]–[66], [84].

[The next page is 741]

Directions — misconceptions about consent in sexual assault trials

[5-200] Introduction

Sections 292 to 292E in Ch 6, Pt 5 Div 1, Subdiv 3 of the *Criminal Procedure Act* 1986 were inserted by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 and provide for particular directions to be given during certain sexual assault trials. These provisions follow certain recommendations by the Law Reform Commission after its review of the law on consent: New South Wales Law Reform Commission *Consent in relation to sexual offences* Report No 148, 2020, recommendations 8.1–8.7; Ch 8.

These provisions apply to proceedings which commence on and from 1 June 2022, regardless of when the relevant offence was committed: Sch 2, Pt 42.

The Attorney General said the purpose of these provisions was to "address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially by the tribunal of fact": Second Reading Speech, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, NSW, Legislative Assembly, *Debates*, 19 November 2021, p 58.

The Court of Criminal Appeal has made a number of statements concerning the futility of making assumptions based on misconceptions about how a sexual assault complainant might behave: see, for example, *Khamis v R* [2018] NSWCCA 131 at [56]–[58] (Gleeson JA), [533] (Button J); *Rao v R* [2019] NSWCCA 290 at [98]; *Xu v R* [2019] NSWCCA 178 at [92]; *Maughan v R* [2020] NSWCCA 51 at [2] (RA Hulme J), [13] (Adamson J), [99] (Ierace J). In *Maughan v R* at [2], RA Hulme J described:

> … the futility of assessing the behaviour of sexual assault complainants by reference to stereotypical expectations. The criminal law has moved past the era in which this was often prominent in a defence to a sexual assault allegation. Jurors applying a sensible and mature understanding of human behaviour are far less likely now to be persuaded by such propositions.

[5-210] Summary of the statutory framework

Section 292(1) provides that each of the consent directions in ss 292A–292E apply to the following offences (or attempts to commit those offences) in the *Crimes Act* 1900:

- sexual assault, aggravated sexual assault and aggravated sexual assault in company: ss 61I, 61J, 61JA
- sexual touching and aggravated sexual touching: ss 61KC, 61KD
- carrying out a sexual act and carrying out an aggravated sexual act: ss 61KE, 61KF.

Section 292(2) provides that a judge *must* give any one or more of the consent directions:

(a) if there is a good reason to give the consent direction, or

(b) if requested to give the consent direction by a party to the proceedings, unless there is a good reason not to give the direction.

The directions do not require a particular form of words: s 292(3).

A judge should give reasons explaining the basis of a decision as to whether, or not, to give a direction.

A judge may:

(a) give a consent direction at any time during a trial: s 292(4)(a)

(b) give the same consent direction on more than 1 occasion during a trial: s 292(4)(b).

[5-220] Suggested procedure when considering whether consent directions required

At the earliest opportunity, it is suggested it would be good practice to ask the parties to identify the issues in the trial and which, if any, of the consent directions in ss 292A–292E may be required. The potential timing, and frequency, of the directions to be given could also be addressed then.

The directions will require adaptation to suit the charges and the evidence of the particular case. It is unlikely a "one size fits all" approach could be taken, particularly in cases involving multiple offences and multiple complainants.

Sections 292A–292C and 292E concern consent and the circumstances in which non-consensual sexual activity might occur. Whether any of these directions should be included in the summing-up when addressing proof of consent may require consideration. Certain of them might need to be discussed when dealing with the evidence of the complainant more generally (for example, ss 292C and 292D). Consider the relationship between these provisions and the provisions related to proof of consent in the *Crimes Act* 1900 such as, for example, ss 61HI (Consent generally), and 61HJ (Circumstances in which there is no consent). Directions concerning the same or similar topics might be given at the same time.

Section 292D concerns misconceptions about a person's response to giving evidence: see LRC Report at 8.111–8.119 for an explanation of the rationale for this provision.

[5-230] Suggested direction — responses to giving evidence

[*Summarise the submissions about the conclusions that might be drawn from the manner in which the evidence was given*.] You must bear in mind that trauma may affect people differently, which means some people may show obvious signs of emotion or distress when giving evidence about an alleged sexual offence, but others may not. The absence of emotion or distress does not necessarily mean a person is not telling the truth about an alleged sexual offence, any more than the presence of emotion or distress means they are telling the truth about it.

[5-240] Suggested directions — ss 292A–292C, 292E

Note: Consider the relationship between these provisions and provisions related to proof of consent in the *Crimes Act* 1900 such as, for example, ss 61HI (Consent generally), and 61HJ (Circumstances in which there is no consent). Directions concerning the same or similar topics might be given at the same time.

Circumstances in which non-consensual sexual activity occurs — s 292A

You must bear in mind that non-consensual sexual activity can occur in many different circumstances and between different kinds of people including people who know one another/people who are married to one another/people who are in an established relationship with one another.

Note: Consider the limitation imposed by s 294CB on cross-examination of a complainant about past sexual activity. The need for this direction will only arise if there has already been a ruling admitting evidence of this kind. See further [5-100] **Cross-examination concerning prior sexual history of complainants**.

Responses to non-consensual sexual activity — s 292B

You must avoid making an assessment about whether or not the complainant consented to the sexual activity the subject of the charge/s on the basis of any preconceived ideas you might have about how people respond to non-consensual activity. There is no typical or normal response to non-consensual sexual activity and people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything.

Lack of physical injury, violence or threats — s 292C

[*Summarise the evidence and the parties' arguments on this issue*]. People who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence. The absence of injury or violence, or threats of injury or violence, does not necessarily mean the complainant was not telling the truth about [*describe relevant sexual activity*].

Behaviour and appearance of complainant — s 292E

In cases involving the consumption of alcohol or another drug, consideration should also be given to the evidence in the particular case and whether a direction of this kind is required given s 61HJ(1)(c) identifies, as a circumstance where a person cannot consent, if "the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity".

It is difficult to envisage a case where evidence of a complainant's clothing or appearance would be relevant. It is more likely a direction addressing these aspects of s 292E may be required if other evidence was led in the trial, such as videos or photographs of the complainant taken at the time of the relevant offence, and/or submissions made about those matters.

You should not assume the complainant consented to [*describe relevant sexual activity*] because [*she/he*] [*was wearing particular clothing and/or had a particular appearance / consumed alcohol or another drug / was present in a particular location*].

[The next page is 751]

Expert evidence — specialised knowledge of child behaviour

[5-300] The operation of ss 79(2) and 108C Evidence Act 1995

Last reviewed: June 2023

Section 79(2) *Evidence Act* 1995 provides that "specialised knowledge" based on a person's "training, study or experience" in s 79(1) extends to "specialised knowledge of child development and behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse": s 79(2)(a). The opinion of such a person includes an opinion relating to the development and behaviour of children generally and/or the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences: s 79(2)(b).

Section 108C(1) also permits a party to call evidence from an expert but when it is relevant to the credibility of their own, or the other party's, witness. Section 108C(2) is in identical terms to s 79(2).

Although the concept of "study" has limits, this limb of ss 79(1) and 108C(1) expressly contemplates a person giving evidence of an opinion that is wholly or substantially based on specialised knowledge based on "study" which necessarily involves scrutinising the work of others: *AJ v R* [2022] NSWCCA 136 at [73].

Leave is required for evidence under s 108C but not under s 79(2).

[5-310] Notes

Last reviewed: June 2023

1. In child sexual assault cases it is likely the Crown may seek to rely upon expert evidence regarding children's behaviour. This will be indicated on the Crown Readiness Hearing Case Management Form filed with the District Court. If the defence proposes to rely upon such evidence this will be indicated on the corresponding defence Case Management Form. In such cases, it is prudent to raise this with the parties at the earliest opportunity to ensure any questions related to expertise, relevance and admissibility are dealt with before the trial commences.
2. Where reliance is placed on lengthy expert reports, and a ruling on admissibility is sought, the trial judge should require the adducing party to identify the parts of the report it seeks to adduce in oral evidence. A determination can then be made as to the facts in issue with respect to which the evidence is tendered: *Aziz (a pseudonym) v R* [2022] NSWCCA 76 at [94].
3. Evidence of this kind may not be required if the parties reach agreement as to the trial judge informing the jury of uncontroversial propositions, such as that "victims of child sexual abuse may respond [in ways] contrary to how we might expect victims to respond". General evidence of this kind in an expert report is not calibrated to the issues in the trial, whereas a direction by a trial judge can be: *AJ v R* at [69]; see also Fagan J at [165]–[168].

4. Expert evidence generally will be admissible where it addresses the relationship between a child and a perpetrator (such as "familial situations" compared to non-familial or stranger perpetrators) and the effect on the child's behaviour during and after the abuse. Such evidence is of a type approved in *AJ v R* [2022] NSWCCA 136 at [64]–[66]: *BQ v R* [2023] NSWCCA 34 at [233]–[239].

5. Section 108C [*Evidence Act* 2008 (Vic)] was considered in *MA v R* (2013) 40 VR 564. The provision is materially similar to the NSW provision. The court held that general opinion evidence concerning how a child may react to sexual abuse was admissible. However, it would be a rare case that an expert should be invited to express an opinion as to the actual behaviour of the alleged victim: *MA v R* at [100].

   In *Aziz (a pseudonym) v R* [2022] NSWCCA 76 expert evidence regarding the behaviour of child sexual abuse victims was found to be opinion evidence and admissible under s 108C even though, unlike in *MA v R*, the expert did not express an opinion about the particular complainant's credibility. The evidence was relevant as it was capable of assisting the jury in making its own assessment of the truthfulness of the complainant's account: [92]. In the circumstances of that case, where the evidence was admitted without objection, the expert's evidence was "opinion evidence" because it drew conclusions based on the published research of others in that particular field and was not simply a "literature review": [77], [80]. However, an expert cannot express an opinion about a topic merely because they have read and reviewed the work of others. They must have their own qualifications (that is, training, study or experience) before they can do so: *AJ v R* at [74]–[75], [77]; see also *BI (Contracting) Pty Ltd v University of Adelaide* [2008] NSWCA 210 at [23].

6. In *Clegg v R* [2017] NSWCCA 125 at [122], it was held the judge correctly directed the jury that evidence admitted under s 108C could not be used to decide the truth of charges. The content of a direction for evidence adduced under s 108C will depend on the nature of the opinion evidence led by the Crown. The direction at **[2-1130] Suggested direction — expert witnesses** should be adapted accordingly.

7. The jury does not always need to be instructed the expert evidence says nothing about the credibility of the particular complainant. The need for such a direction will depend on the way the evidence is led, whether it was challenged in cross-examination, the approach taken by defence counsel at trial, and how the Crown uses the evidence in closing address: *BQ v R* at [268]–[269].

[The next page is 761]

Pre-recorded evidence in child sexual offence proceedings — Child Sexual Offence Evidence Program (CSOEP)

[5-400] Introduction

Last reviewed: December 2023

The pilot scheme (proceedings commenced before 29 January 2024)

The *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act* 2015 amended the *Criminal Procedure Act* 1986 (the Act) to insert Pt 29 (now repealed), a pilot scheme, permitting the pre-recording of the evidence of a witness who is a child complainant or child prosecution witness in a trial before the District Court for a prescribed sexual offence ("prescribed proceedings"): cl 82. The definition of "child", for the purposes of the pilot, was a person under 18 years. A prescribed sexual offence is defined in s 3(1) of the Act. All evidence of a child under 16 must be given by way of pre-recorded evidence, and such evidence may be given for a child under 18: cl 84.

These provisions apply to proceedings for a prescribed sexual offence (regardless of when it was committed) in Newcastle or Downing Centre, Sydney District Courts ("prescribed places") that commenced on or after 5 November 2015 but before 29 January 2024: *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act*, cl 83; 2015, s 2 (now repealed); the Act, Sch 2, Pt 44, cl 120, District Court Practice Note 11: "Child Sexual Evidence Pilot".

See further at **[5-410] Requirements for, and conduct of, pre-recorded hearings**.

The current scheme (proceedings commenced on and from 29 January 2024)

The *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act* 2023 (commenced 29 January 2024) amended the Act by inserting new Div 1A, extending the pilot scheme, with some amendments, to all District Courts ("relevant places") in NSW: *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act*, Sch 2, Part 44, cl 119, definition of "Court". Div 1A applies to proceedings:

(a) in relation to a prescribed sexual offence whenever committed, or

(b) if the proceedings relate to more than 1 offence — if at least 1 of the offences is a prescribed sexual offence whenever committed,

including an appeal or rehearing: s 294F.

These amendments apply to all proceedings commenced by a court attendance notice filed, or an indictment presented, in a prescribed or relevant place, on or after 29 January 2024: Sch 2, Pt 44, cl 121–122. Such proceedings are governed by District Court Practice Note 28: "Child Sexual Offence Evidence" (commencing 29 January 2024).

[5-410] Requirements for, and conduct of, pre-recorded hearings

Last reviewed: December 2023

Note: The equivalent provisions applicable under the pilot scheme (Pt 29 of the Act, repealed) are provided in parentheses following each reference to the current provisions of Div 1A. See also Practice Notes 11 and 28.

A child who is under 18 years of age must, subject to a contrary order by the court, give their evidence by way of a pre-recording in accordance with s 294I: ss 294G and 294E. These provisions vary from those under the pilot scheme which required evidence of witnesses *under 16 years* of age when the accused is committed for trial to be given at a pre-recorded evidence hearing: cl 84.

A contrary order under s 294G(1)(a) not authorising a pre-recorded evidence hearing may only be made if the court is satisfied it is in the interests of justice: s 294G(2) (see cl 84(4)).

When determining whether to make an order under s 294G(1)(a), the primary factors for consideration are the wishes and circumstances of the witness: s 294G(3) (see cl 84(5)). Other factors that may be taken into account include:

(a) the availability of court and other facilities necessary for a pre-recorded hearing to take place,

(b) the sufficiency of preparation time for both parties,

(c) the continuity and availability of counsel at both the pre-recorded evidence hearing and the trial,

(d) other relevant matters: s 294G(4) (see cl 84(6)).

A witness is entitled to give their evidence in this way even if they become an adult by the time the accused was committed for trial: s 294E (definition of "witness") (cf cl 84(2) which refers to 16 or more years of age rather than adult).

The pre-recorded evidence hearing must be held as soon as practicable after the accused's first appearance in the court, but not before the prosecution's pre-trial disclosure required by s 141: s 294H (see cl 85(1)). This hearing must take place in the absence of the jury: s 294I(2) (see cl 85(3)).

A witness may give evidence in chief (as provided by s 306U) and be cross-examined and re-examined during the pre-recorded evidence hearing: s 294I(1), and (6) (see cll 85(2), 85(6)). Section 306U entitles a vulnerable person, defined in s 306M to include a child, to give their evidence in chief in the form of a recording made by an investigating official. However, the Child's Interview (commonly referred to as a JIRT interview) is not played during the pre-recorded evidence hearing. The practice is for the child to have had the opportunity to watch their interview (or interviews) about 1 to 3 days before the hearing so it is fresh in their memory. See also **[1-372] Giving evidence of out-of-court representations**. At the balance of the trial, the jury will be shown the JIRT interview, followed by the recording of the pre-recorded evidence hearing. Any edits to the recordings are to be agreed between the parties and sent to the presiding judge and edits will be ordered by the court. If the edits cannot be agreed, the matter is to be relisted before the pre-recorded evidence hearing judge.

A vulnerable person is also entitled to give their evidence orally in the courtroom or from a location outside the courtroom via closed-circuit television facilities: ss 306S, 306W, 306ZB. Where evidence is given from a remote location, the court may order a court officer and a support person also be present at that location: s 306ZD. A vulnerable person is entitled to choose a support person to be present: s 306ZK(2). The court may disallow a chosen support person if it is likely to prejudice the accused's right to a fair trial (eg, the person is a witness in the proceedings): s 306ZK(3A).

Section 164A(3A) clarifies that s 164A (which permits a new judge to be nominated or the jury to be discharged if the former presiding judge is unable to continue proceedings) does not apply: (a) to a pre-recorded evidence hearing, or (b) where the former presiding judge only presides over a pre-recorded evidence hearing and not over proceedings thereafter. It does not matter if a different judge conducts the pre-recorded hearing and the balance of trial, nor whether the parties, accused, witness and witness intermediaries are in different places and appear by audio visual link: s 294I(7)–(8).

Witness intermediaries

Appointment

The court must appoint a witness intermediary to assist with the giving of the child's evidence where the child is under 16 years of age. A witness intermediary may also be appointed by the court on its own motion or on the application of a party to the proceedings, where the witness is 16 or older if the court is satisfied the witness has difficulty communicating: s 294M(3) (see cl 89(3)). Victim Services has established a panel of persons suitable for appointment: s 294M(1) (see cl 89(1)). In *SC v R* [2020] NSWCCA 314, the court observed that it was implicit from the terms of cl 89 (now s 294M) that the intermediary would be on the panel: at [25]. Witness intermediaries are accredited professionals from the fields of speech pathology, social work, psychology, teaching, or occupational therapy.

A witness intermediary cannot be a relative, friend or acquaintance of the witness, or a person who has assisted the witness in a professional capacity (other than as a witness intermediary), or a party or potential witness in the proceedings: s 294M(5) (see cl 89(5)). However this does not prevent a person who has assisted the witness in a professional capacity (other than as a witness intermediary) from being appointed if the court, in the interests of justice, appoints the person, or merely because the person carries out the functions of a witness intermediary for the witness during a criminal investigation that takes place before or after the commencement of proceedings: s 294M(6). In *SC v R*, a speech pathologist, who had conducted one session with the complainant but had subsequently supervised a student working with her, was disqualified from acting as a witness intermediary by cl 89(5)(b) (now s 294M(5)(b)). The court concluded that, in those circumstances, the trial judge's failure to revoke the intermediary's appointment was erroneous: at [68]. The court held that the disqualifying conditions in cl 89(5) (now s 294M(5)) continued to operate after the witness intermediary had been appointed. The prohibition imposed by cl 89(5)(b) (now s 294M(5)(b)) is on appointing an intermediary with a prior professional association with the witness; there is no requirement the assistance provided warrants a conclusion that the intermediary is no longer neutral or impartial; nor is it limited to direct assistance with a therapeutic component or function: *SC v R* at [65]–[66].

Role

The witness intermediary is an officer of the court. Their role is to communicate to the court whether the witness can understand questions put to the witness, and explain to the court and person asking the questions the best way a witness can be asked questions the witness can understand: s 294L(1) (see cl 88(1) which differs slightly). If requested by the court, the witness intermediary must give the court a written report about the communication needs of the witness, a copy of which must be given to the

parties before the witness gives evidence: s 294M(7), (8). A witness intermediary will typically present the report and discuss recommendations at a Ground Rules Hearing convened by the court and attended by counsel: District Court Criminal Practice Note 11. See also **[5-430] Child Sexual Assault List — procedure**.

The *Evidence Act* 1995 applies to witness intermediaries in the same way as it applies to interpreters: s 294N(4), *Evidence Act* 1995, s 22. For the form of the oath or affirmation an intermediary must take before acting as an intermediary see *Criminal Procedure Regulation* 2017, cl 111.

During a pre-recorded evidence hearing, the witness may only give evidence if the witness intermediary is at the place from which the witness is giving evidence, in the court room or at a different place appearing by audio visual link and the witness, Court and a legal practitioner acting in the proceedings is able to see and hear the witness intermediary: s 294N(1). The court and legal practitioner acting in the proceedings must be able to see and hear the giving of evidence and communicate with the witness intermediary and, except for evidence given under Ch 6, Pt 6 or Div 1A by a recording, the jury are able to see and hear the giving of the evidence: s 294N(2).

Where Div 1A applies, s 294O (previously cl 91) requires the court to inform the jury it is standard procedure to give evidence by a pre-recording or to use a witness intermediary in the proceedings and, warn the jury not to draw an inference adverse to the accused or to give evidence greater or lesser weight because the evidence was given by a pre-recording or a witness intermediary was used. See **[5-420] Suggested direction — pre-recorded evidence** below.

[5-420] Suggested direction — pre-recorded evidence

Last reviewed: December 2023

You are about to see [*the complainant's/child witness'*] evidence. It consists of an interview with a police officer that was recorded (called a JIRT interview) and questions asked of the witness in court before [*myself/another judge*] that were recorded. The/A Crown Prosecutor/Trial Advocate, the accused's counsel and their instructing solicitors and the accused were all present when [*the complainant/child witness*] was asked questions in court.

When the recording of the evidence in court took place, the evidence of [*the complainant/child witness*] was taken using an audio-visual link between the room [*the complainant/child witness*] was in and the courtroom. **[***If appropriate:* At that time, a support person and a court/sheriff's officer were in the same room as [*the complainant/child witness*].**]**

[*If appropriate*: You will see there is another person with [*the complainant/child witness*] on the recording/on both recordings. This person is referred to as a witness intermediary. The witness intermediary is appointed by the court and their role is to assist [*the complainant/child witness*] with communication if that is required.**]**

Each of these things I have spoken about does not mean you treat the evidence any differently to the evidence of any other witness you hear in the courtroom. This is all standard procedure. You should not draw any inference against the accused because the

evidence is being given in this way or give [*the complainant's/child witness'*] evidence any greater or lesser weight. You assess their evidence in the same way as you assess the evidence of any of the other witnesses in the trial.

As with the evidence of any witness, it is important that you pay attention to the evidence and understand that all witnesses only give their evidence once. Witnesses do not return to court to repeat their evidence after it has been given and nor is the evidence contained in the recordings played again.

Notes:

1. The suggested direction above is in the terms required by s 294O (see cl 91).
2. At the pre-recorded evidence hearing, the judge should take the parties and the witness through the rules of the court such as:
   - the availability of breaks,
   - if the witness doesn't understand a question, they should let the court or witness intermediary know,
   - the witness should not feel any pressure to agree to a question just because an adult is asking the question,
   - it is important for the witness to tell the truth and only talk about things that really happened,
   - the witness should not guess at an answer. If they can't remember or don't know the answer, they can tell the court,
   - if they hear the words "I object", they should not answer,
   - what are Exhibits/MFIs,
   - the formula for *Browne v Dunn* questions.
3. It is open to the judge to make a direction that defence counsel need not "put their case" to the witness where there is a risk the witness will not be able to understand, the witness is becoming distressed, or there is a risk of gratuitous concurrence — acquiescing to leading questions.
4. The court is permitted to control the questioning of a witness (*Evidence Act* 1995, s 26) and must disallow improper questions put to a witness in cross-examination (*Evidence Act*, s 41).
5. Where a witness is giving evidence from a remote location, there will usually also be a support person and a court officer present. It is important to ask the name of the support person present, to ensure they are not (or are not likely to become) a witness in the proceedings.
6. Further evidence can only be given by a witness with the leave of the court: s 294K(1) (see cl 87(1)). This subsection applies despite anything to the contrary in the *Criminal Procedure Act* or the *Evidence Act* 1995: s 294K(5) (see cl 87(5)). Either party may apply for leave: s 294K(2) (see cl 87(2)). Leave must not be given unless the court is satisfied:
   (a) the witness or party has become aware of a matter of which the party could not reasonably have been aware at the time of the recording, or

(b) it is otherwise in the interests of justice to give leave: s 294K(3) (see cl 87(3)).

The further evidence must, to the extent practicable, be given by pre-recording at a hearing in the same way as the original pre-recorded evidence, unless the court otherwise directs: s 294K(4) (see cl 87(4)).

An important consideration in exercising the power under s 294K must reflect the dominant purpose of protecting child witnesses from the trauma of giving evidence, so far as it is reasonably possible to reduce that trauma. The use of a pre-recorded evidence hearing is seen to go part of the way, but even then, is not to be repeated unless the interests of justice require it: *PJ v R* [2023] NSWCCA 105 at [47]. Furthermore, the concern that repeat hearings will potentially add to a child witness' trauma requires legal representatives appearing at these hearings to be aware of the statutory policy not to provide further hearings and to address at that hearing (and where appropriate, put to the child witness) any matter then known to the applicant and which is sought to be relied upon at trial: *PJ v R* at [48]–[49].

7. The accused and their legal representatives do not have a right to a recording (or copy) of the pre-recorded evidence, but reasonable access to listen to or view the recording must be provided: s 294J. It is desirable that there be prior discussion with the parties about whether, in the circumstances of the individual case, a transcript of the recording should be provided to the jury to assist with comprehension: s 294J (see cl 86(5)). If the transcript is to be provided, it is desirable that the discussion also address whether the transcripts provided to the jurors should be retrieved at the end of the playing of the recording. If there is a possibility of this occurring, jurors should be told so that any notes they may wish to make are not made on the transcript. If transcripts are provided but then retrieved, it is suggested they be placed in individual envelopes with juror identification on the outside so they may be returned to the correct juror if that should later occur.

8. Unless the witness otherwise chooses, they must not be present in the court, or be visible or audible to the court by CCTV or other technology, while a recording made pursuant to s 306U or made at the hearing is being viewed or heard: s 294I(4) (see cl 85(5)).

9. The recording of the evidence should not be marked as an exhibit and should not be sent with the exhibits to the jury when they retire to consider their verdict: *CF v R* [2017] NSWCCA 318 at [63]–[65]; *R v NZ* (2005) 63 NSWLR 628 at [191]–[192], [210](a); *Gately v The Queen* (2007) 232 CLR 208 at [93]. See also *AB (a pseudonym) v R* [2019] NSWCCA 82 at [40]–[42].

10. If the jury requests or the sound quality of the recordings is such that a transcript is being provided to the jury during or after the playing of any of the recorded evidence, the usual directions in relation to the provision of transcripts will need to be given. See **[1-530] Suggested direction — use of the transcripts**.

11. If, during deliberations, the jury ask to view the pre-recorded evidence of the witness this should ordinarily be done by replaying the evidence in court in the presence of the trial judge, counsel and the accused: *Gately v The Queen* at [96]. It is generally undesirable to allow the jury unsupervised access to the

complainant's recorded evidence, although a trial judge has a discretion to do so: *CF v R* [2017] NSWCCA 318 at [82]–[83]; see also *R v NZ* at [196], [210](a). However, in determining the procedure to adopt, consideration should be given to the significance of the evidence in the trial as a whole: *R v NZ* at [212]. A relevant consideration is to maintain the balance of fairness in the trial: *Gately v The Queen* at [80]; *R v NZ* at [169]–[176], [212]; see also *CF v R* at [92].

12. Where the evidence is played to the jury again, consideration should be given to repeating the direction that the evidence is not to be afforded any greater weight than other evidence given in the trial: *R v NZ* at [210](e); see also *JT v R* [2021] NSWCCA 223 at [82]–[89] and also *Stevenson v R* [2022] NSWCCA 133 at [62]–[67].

[5-430] Child Sexual Assault List — procedure

Last reviewed: December 2023

The procedure for child sexual offence matters progressing in the NSW District Court is contained in Criminal Practice Note 28.

Div 1A of the *Criminal Procedure Act* applies to prescribed sexual offences involving child complainants (under 18 years of age at date of committal). All such matters that are committed from the Local Court to the District Court for trial enter the Child Sexual Assault List. All case management is administered from this List.

Callover

- First callover: no later than 14 days after committal for trial
- Court sets timetable for:
  - service of outstanding evidence
  - filing of notice of Crown case (*Criminal Procedure Act* 1986, s 142), defence response (s 143), and Crown response (s 144)
  - pre-trial conferences (s 140)
  - filing of Crown disclosure certificate (s 15A)
  - filing of Agreed Facts (s 191)
  - Ground Rules Hearing [GRH] (listed 1 week prior to PRH)
  - Pre-recorded Evidence Hearing [PRH]
  - Balance of trial
- Witness intermediary appointed and report ordered (s 294M(7))
- Crown to file 2 weeks before PRH the PRH bundle (indictment, Crown Case Statement, ss 142–143 Notices, JIRT interviews, discs, exhibits)

Ground rules hearing

- Witness Intermediary sworn/affirmed. Presents report to court and discusses recommendations.
- Report documents communication needs of witness and recommended modes of questioning (eg, non-tag questions), including use of visual aids (eg, timelines).
- Court and parties may pose questions of Witness Intermediary to seek clarification; recommendations may be amended or added.
- Court makes orders that PRH to be conducted according to Witness Intermediary's recommendations.

Pre-recorded evidence hearing

- PRH is commencement of trial.
- Parties to deliver short opening at start of PRH.
- Connection made with remote witness room: witness, Witness Intermediary, support person and Sheriff's officer identified.
- Witness sworn/affirmed.
- Questioning of witness to be conducted in accordance with orders made at GRH.
- Witness Intermediary permitted to interject where mode of questioning not in compliance with recommendations or where witness requires breaks.
- JIRT recording and any transcript to be marked for identification only and not tendered as an exhibit.

Balance of trial

- All agreed edits to JIRT and PRH recordings to be made in advance of trial.
- Copies of edited discs and transcripts to be provided to court in advance of trial.
- Child witness not to give further evidence without court's leave (s 294K(1)).
- Jury to be given direction regarding pre-recorded evidence **[5-420]**.
- Jury to be played JIRT recording and then PRH recording.
- Any exhibits tendered during the PRH are to be distributed to the jury at the relevant time during the playing of the PRH recording.
- JIRT and PRH recordings and any transcripts to be marked for identification only and not tendered as exhibits.

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Sexual assault communications privilege

[5-500] Introduction

In sexual assault trials, there are special provisions associated with the production, and admissibility, of counselling communications involving victims, or alleged victims, of sexual assault. These are found in Ch 6, Pt 5, Div 2 of the *Criminal Procedure Act* 1986 "Sexual assault communications privilege". It is important to consider how the specific terms of the legislation apply in the circumstances of an individual case; counsel also have a responsibility to assist in this regard: *R v Bonanno; ex parte Protected Confider* [2020] NSWCCA 156 at [13].

Generally, a person in possession of such material cannot be compelled to produce it in trials, sentence proceedings, committal proceedings or proceedings relating to bail: ss 297, 298.

The purpose of the privilege is to limit the disclosure of a broad range of counselling communications in criminal proceedings at the earliest point possible to encourage victims of sexual assault to seek professional assistance: *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [34]; *R v Bonanno; ex parte Protected Confider* at [14].

It is important to note the following:

- A subpoena for a protected confidence cannot be issued without the leave of the court and appropriate notice must be given: ss 297, 298, 299C. Nor can a subpoena be issued without the court having first considered the matters in ss 299C and 299D: *R v Bonanno; ex parte Protected Confider* at [12].
- In certain circumstances the court may waive the requirement for notice: s 299C(5).
- Victims or alleged victims of sexual assault offences cannot be compelled to disclose their counsellor's identity: s 298A.
- When determining issues under Div 2, the court may consider the document or evidence: s 299B. Generally the material should not be disclosed to a party: s 299B(3).
- The matters the court must consider when determining whether to grant leave are set out in s 299D.
- When determining whether access should be granted, s 294CB (formerly s 293), which provides that evidence of a complainant's sexual experience is inadmissible (subject to limited exceptions), may also require consideration.

See also "Sexual assault communications privilege" at [9-000]–[9-600] — in the *Sexual Assault Trials Handbook* for further discussion about the history of the provisions, case law and requirements; and I Nash, "Use of the sexual assault communications privilege in sexual assault trials" (2015) 27(3) *JOB* 21.

[5-510] What communications are protected?

A "protected confidence" is defined in s 296(1) as "a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence." The

definition of a "counselling communication" is broad. Such communications may be protected even if they were made before the relevant sexual assault offence occurred, or if the relevant communication was not made in connection with a sexual assault offence or any condition arising from a sexual assault offence: s 296(2). In *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [18], Basten JA observed that one explanation for expanding the concept of a protected confidence in the way done by s 296(2) was that Parliament wanted to avoid sexual assault victims being discouraged from reporting offences if that course might result in revealing other unrelated disclosures during counselling sessions.

Under s 296(4), the "counselling communication" must be made in confidence:

(a) by a person (the counselled person) to another person (the counsellor) who is counselling the person in relation to any harm they may have suffered, or

(b) to or about the counselled person by the counsellor during that counselling, or

(c) about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process, or

(d) by or to the counsellor, by or to another counsellor, or by or to a person who is counselling or has at any time counselled the person.

"Harm" in s 296(4)(a) is defined in s 295(1) to include "actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear)".

The counselling does not necessarily have to relate to harm suffered as a result of the sexual assault offence charged or any sexual assault offence: *KS v Veitch (No 2)* at [18]–[19]. Noting the potential for conflict between the "expansive provisions of s 296(2)" and the definition of "counselling communication" in s 296(4), Basten JA (Harrison J agreeing) observed that the broad construction of s 296(2) "might have greater force if it covered counselling for any condition, including disabilities, rather than "harm", which implies damage to which one has been subjected by another": at [19].

A person who "counsels" for the purposes of s 296 has "undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and listens to and gives verbal or other support or encouragement to the other person, or advises, gives therapy to or treats the other person, whether or not for fee or reward": s 296(5).

However, the fact a person has qualifications as a counsellor does not result in the inevitable conclusion that their relationship with the victim, and communications made as a result of that relationship, attracts the operation of the privilege. It is important in an individual case to consider whether the person was acting as a counsellor by, for example, providing support, advice, therapy or treatment. For example, in *ER v Khan* [2015] NSWCCA 230, Joint Investigation Response Team and FACS officers holding counselling qualifications were performing investigative functions and were not acting as "counsellors" to the complainant when the relevant communications were made. In that circumstance, the communications were found not to be protected under s 296: *ER v Khan* at [86], [95].

[5-520] Applications for leave

Protected confidence documents cannot be subpoenaed or produced in, or in connection with, any criminal proceedings or adduced as evidence in criminal proceedings except with leave: s 298(2). If leave to issue a subpoena is not sought, a court may nevertheless disregard the irregularity and consider the documents in determining whether access should be granted: *KS v Veitch (No 2)* at [29].

As a preliminary issue, if it appears a protected confider (usually the victim) may have grounds to make an application under Div 2, the court must satisfy itself that the victim is aware of the protections in Div 2 and is given a reasonable opportunity to seek legal advice: s 299.

The onus of proving a particular communication is privileged rests on the person asserting the privilege: *ER v Khan* [2015] NSWCCA 230 at [84]. A claim must be supported by focused and specific evidence (as is the case when a claim of client legal privilege is made): *ER v Khan* at [102]. When there is no evidence directly relevant to characterising the documents the subject of a claim, it may be necessary for the court to examine each document and base a determination on whether the document is a protected confidence and counselling communication from the nature and/or contents of each: s 299B(1); *KS v Veitch (No 2)* at [28] per Basten JA; *ER v Khan* at [97], [104]; *Rohan v R* [2018] NSWCCA 89 at [58]. To that end, a judge may compel the production of documents to enable determination of the question of leave to issue a subpoena: *Rohan v R* [2018] NSWCCA 89 at [58]. Whether it was intended that the requirements of s 299B could be readily applied when an application for leave to issue a subpoena was being determined, when there would normally be no documents available for examination, was the subject of comment by Beech-Jones J in *KS v Veitch (No 2)* at [85], and a matter about which RA Hulme J (Hoeben CJ at CL agreeing) expressed reservations in *Rohan v R* at [59]–[60] and [67].

An application for leave under Div 2 cannot be granted unless the court is satisfied, pursuant to s 299D(1):

(a) the document or evidence will, either by itself or having regard to other documents produced or adduced, have substantial probative value, and

(b) other documents or evidence concerning the matters to which the protected confidence relates are not available, and

(c) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or the contents of a document of substantial probative value: s 299D(1).

As to the operation and ambit of s 299D(1) see *KS v Veitch (No 2)* at [30]–[38]. The issues in s 299D cannot be considered without examining the documents or having sufficient information to make the correct statutory inquiries. A decision concerning whether or not to issue a subpoena cannot be made until the court has considered the matters in s 299D: *R v Bonanno; ex parte Protected Confider* at [12].

The concept of "substantial probative value" in s 299D(1)(a) is concerned with material that is admissible: *KS v Veitch (No 2)* at [37]. When determining whether

subpoenaed material has substantial probative value, the court should examine each document in question and not approach the task by looking at the material in its totality or globally: *PPC v Williams* [2013] NSWCCA 286 at [67], [69].

In determining whether the public interest in preserving confidentiality is substantially outweighed by the public interest in admitting evidence of substantial probative value under s 299D(1)(c), the non-exhaustive list of matters in s 299D(2) must be taken into account. This involves a balancing exercise of the matters listed. In *KS v Veitch (No 2)* the court held, with reference to s 299D(1)(c), that the public purpose of encouraging victims of sexual assault to seek professional help will be undermined if confidentiality is too readily overridden by other public interests, where the court may be satisfied that the particular confider will not suffer significant harm. On the other hand, an assessment that the information has substantial probative value, usually by casting doubt on the complainant's veracity or reliability, militates in favour of disclosure where it could give rise to a doubt as to the accused's guilt: *KS v Veitch (No 2)* at [34].

Consistent with usual principles, if the documents do not come within Div 2 of the Act, the party seeking to have the documents produced must, nevertheless, have a legitimate forensic purpose justifying their production: see *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 at 575; *R v Saleam* (1989) 16 NSWLR 14 at 17–18; *Attorney General for NSW v Stuart* (1994) 34 NSWLR 667 at 681. A "fishing" expedition cannot be allowed: *Alister v The Queen* (1984) 154 CLR 404 at 414.

[5-530] Disclosing and allowing access to protected confidences

Where leave is granted to issue a subpoena there is no subsequent leave requirement on production in answer to that subpoena: *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [23]; *NAR v PPC1* [2013] NSWCCA 25 at [74]; *PPC v Stylianou* [2018] NSWCCA 300 at [12], [15]–[16]. Nor is there a separate leave requirement for a party seeking access to the material produced. In *PPC v Stylianou*, at [18]–[19], the court, after considering the statutory scheme in Div 2, concluded that the District Court had a separate power to grant or withhold access to documents produced on subpoena and that such a power was sourced in the court's implied powers to do what is necessary to enable it to act effectively within its jurisdiction. The court's control over access, long recognised as a necessary part of litigation procedure, and common law principles relating to the inspection of documents subpoenaed in connection with criminal proceedings were expressly preserved by s 306(2): *PPC v Stylianou* at [20].

Access cannot be granted to a party (other than a protected confider) or the parties legal representative until the court is satisfied the preconditions in s 299D(1) have been satisfied: *PPC v Williams* [2013] NSWCCA 286 at [93].

Granting leave for the subpoena does not mean that access to the material produced automatically follows: *PPC v Stylianou* at [19]–[22]. The court's power to grant access to documents containing protected confidences is circumscribed by s 299B(3) which requires satisfaction of one of the two identified conditions: *PPC v Stylianou* at [21]. That is, the documents must not be disclosed unless the court determines the document or evidence does not record a protected confidence or that leave has been granted under Div 2 in respect of the document and disclosing the document would be consistent

with that leave. Satisfying a condition in s 299B(3) is a necessary but not sufficient requirement for access to subpoenaed material under s 298(2): *PPC v Stylianou* at [21]–[22].

To determine the question of access, the court may have to examine some or all of the subpoenaed documents and address the matters in s 299D(1), or any other matters the court would ordinarily take into account, to enable determination of that issue: *PPC v Stylianou* at [22]. That therefore requires consideration of whether the documents or evidence have substantial probative value. See [5-520] above.

The restrictions on admissibility in s 294CB (formerly s 293), which provides that evidence of a complainant's sexual experience is inadmissible, engages s 299D(1) and is therefore relevant to determining whether access should be granted: *KS v Veitch (No 2)* at [37]; *NAR v PPC1* at [29]; *PPC v Williams* at [86]–[87], [90]. It is directly relevant to the question of whether the material has substantial probative value: *PPC v Williams* at [94].

A victim (a principal protected confider) may consent to the production of a protected confidence: s 300(1). For the consent to be effective it must be in writing and expressly relate to the production of a document or adducing of evidence that is privileged: s 300(2). Such a consent amounts to an agreement for both parties to view the material: *NAR v PPC1* [2013] NSWCCA 25 at [53]. However, making a police statement indicating a preparedness to give the evidence contained in that statement, or which permits police to access medical records, does not amount to express consent for the purposes of s 300: *NAR v PPC1* at [52]; *JWM v R* [2014] NSWCCA 248 at [110].

[5-540] Power to make ancillary orders associated with disclosure

Under s 302 the court has powers to make ancillary orders with respect to the disclosure of protected confidences. However, the preconditions in s 299D(1) must be satisfied before making orders under s 302: *PPC v Williams* at [90]–[95].

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para

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Indecent assault

***Crimes Act* 1900 (NSW), ss 61L, 61M**

NOTE: Sections 61L and 61M were repealed with effect from 1 December 2018 by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (s 2, LW 30.11.2018). These provisions continue to apply to offences committed or alleged to have been committed before 1 December 2018: *Crimes Act* 1900, Sch 11, Pt 35. There are new offences in ss 61KC (sexual touching) and 61KD (aggravated sexual touching).

[5-600] Introduction

The basic offence is created by s 61L of the *Crimes Act* 1900, which provides:

> Any person who assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 5 years.

Section 61M is an aggravated form of the offence under s 61L.

[5-610] Suggested direction — s 61L (no aggravating circumstances alleged)

The accused is charged that [*he/she*] assaulted [*the complainant*] and at the time of (or immediately before or immediately after) the assault committed an act of indecency [*on/or in the presence*] of [*the complainant*].

The essential ingredients or facts that the Crown has to prove are:

1. that [*the accused*] assaulted [*the complainant*],
2. that the assault was indecent,

   [*if applicable* or that immediately before or immediately after that assault [*the accused*] committed an act of indecency on/in the presence of [*the complainant*]]
3. that the assault was without the consent of [*the complainant*],
4. that [*the accused*] knew that [*the complainant*] was not consenting,

   [*if recklessness as to consent is an issue omit 4 above and substitute with*:

   that [*the accused*] knew that [*the complainant*] was not consenting, or [*he/she*] realised that there was a possibility that [*the complainant*] was not consenting but [*he/she*] went ahead anyway, or [*he/she*] did not even think about whether [*the complainant*] was consenting or not — in other words, [*he/she*] did not care whether [*the complainant*] was consenting].

Unless the Crown proves every one of these essential ingredients it is your duty to find [*the accused*] not guilty. You can only find [*the accused*] guilty if the Crown proves each of these matters beyond reasonable doubt.

1. **The accused assaulted the complainant**

   To establish this offence, the Crown must first prove beyond reasonable doubt that [*the accused*] by [*his/her*] act assaulted [*the complainant*]. An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused [*the complainant*] fear or pain.

[*Where appropriate* There is no suggestion in the present case that, if [*the accused*] touched [*the complainant*] as the Crown alleged [he/she] did, the touching was lawful.**]**

[*Where there is no touching, substitute*

An assault is an unlawful threat made to [*the complainant*] causing [*him/her*] to fear immediate and unlawful personal violence at the hands of [*the accused*] and where [*the accused*] intended that [*the complainant*] would have such a fear as a result of [*his/her*] threats.**]**

2. **The assault was indecent**

   The Crown must prove beyond reasonable doubt that the assault was indecent. The word "indecent" means contrary to the ordinary standards of respectable people in this community. It is for you to determine the standards prevailing in our community when deciding whether the Crown has satisfied you beyond reasonable doubt that the act alleged in this case was indecent.

   For an assault to be indecent it must have a sexual connotation or overtone. If [*the accused*] touches [*the complainant's*] body or uses [*his/her*] body to touch [*the complainant*] in a way which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent. For example, touching the genitals or anus of a male or the genitals or breast of a female.

[*Where the assault is sexually equivocal*: *R v Harkin* (1989) 38 A Crim R 296 at 301.

If you find the assault does not carry a clear sexual connotation or overtone, the Crown must prove beyond reasonable doubt that [*the accused's*] conduct was accompanied by or went hand in hand with [*his/her*] intention to obtain sexual gratification.**]**

In deciding whether the Crown has proved this essential ingredient of the charge, you should take into consideration all the surrounding circumstances including [*the accused'*] words and/or actions, the respective ages of [*the accused*] and [*the complainant*], any relationship which may have existed between them and the nature of the act relied upon.

[*If in issue, deal with evidence relied on by the Crown and by [the accused] and opposing submissions*.]

Act of indecency alleged "at the time" of the assault

The Crown must also prove beyond reasonable doubt that at the time of the assault, [*the accused*] committed an act of indecency on [*the complainant*]. Although a reading of the charge in the indictment might suggest that the Crown must establish two separate acts, that is, an act that amounts to an assault and a separate act which it alleges was indecent, this is not necessarily so. The Crown can rely upon the same act as amounting to both the assault and the act of indecency. That is what the Crown alleges in this case.

[*Where the act of indecency is charged "immediately before" or "immediately after" the alleged assault, omit the previous paragraph and substitute with*

The Crown must also prove beyond reasonable doubt that the act of indecency relied upon was done [*immediately before/immediately after*] the alleged assault. The word "immediately" generally means "without delay" but where two distinct and separate acts are alleged, one being an assault and the other an act of indecency, clearly some lapse of time must occur between the two acts.

Provided that, after considering all of the circumstances surrounding the acts of [*the accused*], you are satisfied that the act of indecency occurred within a very brief period of time [*before/after*] the assault, so that it would be appropriate to use the word "immediately" as indicating that there was no significant delay between the two acts, the Crown will have made out this element of the offence.**]**

[*Where the Crown alleges that the act of indecency was done "in the presence of" the complainant, add*

The Crown alleges that the act of indecency was done "in the presence of" [*the complainant*]. An act will be done in the presence of another person if it is done within the sight of that other person … [*see also Note 5 at [5-620]. If in issue, deal with relevant evidence for the Crown and [the accused] and opposing submissions*].**]**

3. **The assault was committed without [the complainant's] consent**

   [*Note: The common law definition of consent applies to indecent assault. The statutory definition of consent in s 61HA does not extend to s 61L: see s 61HA(1). Consent is not a defence when the complainant is a child under 16 years: s 77.*]

[*Where consent is in issue, add*

In order to establish that the touching was unlawful and therefore an assault, the Crown must prove beyond reasonable doubt that [*the accused*] touched [*the complainant*] without [*his/her*] consent knowing that [*he/she*] was not consenting. Consent involves the conscious and voluntary permission by [*the complainant*] to [*the accused*] to touch [*the complainant's*] body in the manner that [*he/she*] did. Consent or the absence of consent can be communicated by the words or acts of [*the complainant*].

The Crown must prove beyond reasonable doubt that [*the complainant*] was not consenting to [*the accused's*] act.**]**

4. **The accused knew that the complainant was not consenting**

   The Crown must also prove beyond reasonable doubt that [*the accused*] knew [*the complainant*] was not consenting. This is the fourth ingredient. You are concerned with the actual state of mind of [*the accused*] at the time of the act amounting to the assault. It is [*the accused's*] mind you should consider. It's not a question of what you would have realised, or thought, or believed. It's not a question of what a reasonable person would have thought or believed. This ingredient of the offence requires that you look at what was going on in the mind of [*the accused*]. And in deciding this issue you can have regard to all the surrounding circumstances.

   [*Note: It is unnecessary and unhelpful to direct the jury about elements of knowledge not relevant to the issues in the case: R v Mueller (2005) 62 NSWLR 476 at [3]–[4] and [42].*]

   [*If recklessness as to consent is an issue omit 4 above and substitute with*

   Now that brings us to the fourth ingredient which focuses on what was in [*the accused's*] mind at the time of the act amounting to the assault. Remember that you have not been given an impossible task when you are required to consider what was going on in [*the accused's*] mind.

   You must examine what [*the accused's*] state of mind was. Now, the Crown succeeds in proving the fourth ingredient if it proves that [*the accused*] knew that

[*the complainant*] was not consenting. The fourth ingredient is also satisfied if the Crown proves to you that [*the accused*] realised that there was a possibility that [*the complainant*] was not consenting to the act amounting to the assault, but [*he/she*] went ahead anyway. The Crown can also prove this fourth ingredient if it proves beyond reasonable doubt that [*the accused*] didn't even think about whether [*he/she*] was consenting to the act amounting to the assault or not, treating the question of whether [*he/she*] was not consenting as irrelevant. It is enough that the Crown proves beyond reasonable doubt any one of those three aspects of the fourth ingredient.

In deciding this issue you are concerned with the actual state of mind of [*the accused*] at the time of the act amounting to the assault. It is [*the accused's*] mind you should consider. It's not a question of what you would have realised, or thought, or believed. It's not a question of what a reasonable person would have thought or believed. This ingredient of the offence requires that you look at what was going on in the mind of [*the accused*]. And in deciding this issue you can have regard to all the surrounding circumstances.

I want to make it clear to you that if [*the accused*] honestly, though wrongly, believed [*the complainant*] was consenting to the act amounting to the assault, then [*he/she*] is not guilty. Let me repeat that because it is important, if [*the accused*] honestly, though wrongly believed that [*the complainant*] was consenting to the act amounting to the assault [*he/she*] would not be guilty, because if that was the position, the Crown could not prove the fourth ingredient. And as I have told you, all ingredients have to be satisfied beyond reasonable doubt before you can find [*the accused*] guilty. The failure to prove the fourth ingredient would mean that [*the accused*] is not guilty of that offence.

[*Deal with evidence relied upon by the Crown and by [the accused] on this issue, and with opposing submissions*.]]

[*If applicable — relevance of accused's intoxication*

There was evidence that [*the accused*] was intoxicated. For this offence, the law requires that you have to ignore any effects of intoxication. If you think that [*his/her*] ability to think or understand what was going on was affected by alcohol, then you have to put that to one side. You have to look at [*the accused*] and ask what would have been going on in [*his/her*] mind if [*he/she*] had not ingested alcohol and/or drugs.**]**

Short summary

If the Crown has failed to prove beyond reasonable doubt any one of these essential ingredients of the charge, namely:

– that [*the accused*] assaulted [*the complainant*]; that the assault was indecent,

  [*if applicable* or that immediately before or immediately after that assault [*the accused*] committed an act of indecency on/in the presence of [*the complainant*]]

– that the assault was without the consent of [*the complainant*]; and

– that [*the accused*] knew that [*the complainant*] was not consenting,

  [*if recklessness as to consent is an issue omit last line above and substitute with*:

  that [*the accused*] knew that [*the complainant*] was not consenting, or [*he/she*] realised that there was a possibility that [*the complainant*] was not consenting but

> [*he/she*] went ahead anyway, or [*he/she*] did not even think about whether [*the complainant*] was consenting or not — in other words, [*he/she*] did not care whether [*the complainant*] was consenting].
>
> then the Crown will have failed to prove its case and it will be your duty to acquit [*the accused*].
>
> If, on the other hand, at the end of your deliberations, after having taken into consideration all the relevant evidence and the submissions of both Counsel, you are of the view that the Crown has established beyond reasonable doubt each one of those essential ingredients of the charge, then it will be open to you, and you should, convict [*the accused*] of the charge of indecent assault.

[5-620] Notes — basic offence of indecent assault — essential ingredients

1. To prove the offence of indecent assault the Crown must first prove that there was an assault. The "assault" element may be satisfied by proof of either physical contact (battery), however minimal, or a threat to the victim involving a reasonable apprehension of immediate and unlawful physical violence: *Fitzgerald v Kennard* (1995) 38 NSWLR 184 at 200. Only in the latter case is it necessary to prove that the conduct was "angry, revengeful, rude, insolent or hostile": *Fitzgerald* at 201. In either case, the act relied upon by the Crown must be deliberate, that is, a non-accidental voluntary act of the accused. The conduct constituting the assault must be unlawful. This excludes touching, whether deliberate or otherwise, in the course of the ordinary exigencies of everyday life: *Fitzgerald* at 201. As to assault where the Crown relies upon recklessness: see [5-5010]ff.
2. Consent is not a defence when the complainant is a child under 16 years: s 77 *Crimes Act*. When consent is an issue, the common law definition of consent applies. The statutory definition of consent in s 61HA did not extend to ss 61L or 61M offences: see s 61HA(1), as in force before 1 December 2018. The Crown must prove that the complainant did not consent to the act alleged: *NWL v R* [2006] NSWCCA 67 at [93]. The Crown must also prove that the accused knew that the complainant was not consenting or was reckless in that regard: *R v Bonora* (1994) 35 NSWLR 74 at 75, 80; *Fitzgerald v Kennard* (1995) 38 NSWLR 184; *R v Burt* (2003) 140 A Crim R 555 at [76], [80]; *R v Kukailis* [2001] NSWCCA 333 at [18]. The same principles relating to recklessness in cases of sexual intercourse without consent apply to offences of indecent assault and failure to advert to the issue of consent can amount to recklessness: *Fitzgerald v Kennard* (1995) 38 NSWLR 184 at 204–206. Similarly, directions for recklessness should only be given if the issue arises on the evidence. It is erroneous to direct the jury about elements of knowledge not relevant to the issues in the case: *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4] and [42].
3. For an assault to be "indecent" it must have a sexual connotation. It will have that connotation where the touching or threat is of a portion of the complainant's body, or by use of part of the assailant's body, which gives rise to that connotation: *R v Harkin* (1989) 38 A Crim R 296 at 301. However, if the assault does not unequivocally offer a sexual connotation, the Crown must show that the accused's conduct was accompanied by an intention to obtain sexual gratification: *Harkin* at 301; *R v Stevens* (unrep, 26/9/94, NSWCCA).

4. The Crown must establish that the accused "at the time of, or immediately before or after the assault" committed an act of indecency "on or in the presence of" the complainant. The same act may (and frequently will) constitute both the assault and the act of indecency: *R v O'Donoghue* (2005) 151 A Crim R 597 at [21]; *Fitzgerald v Kennard* (1995) 38 NSWLR 184 at 187, 202. The words "immediately before or after" add something to the words "at the time of", but if there are two distinct acts involved, they need not occur within seconds or minutes of each other: *R v Hitchins* [1983] 3 NSWLR 318 at 324; *R v Attard* (unrep, 20/4/93, NSWCCA). In *Attard*, (a constructive murder case) it was held that the shooting and the foundational offence "were so closely linked in point of time, place and circumstance that it could scarcely be doubted that the one occurred immediately after the other". The whole of the circumstances must be looked at in order to determine whether this aspect of the charge has been made out: *Hitchins* at 324.
5. The act of indecency must be committed either "on" or "in the presence of" the complainant. In the context of the offence of committing an act of gross indecency in the presence of a child (without the need to prove an accompanying assault), the South Australian Court of Criminal Appeal interpreted the phrase "in the presence of" to include cases where the complainant was asleep, did not see the act and was unaware of it: *R v AWL* [2003] SASC 416 at [11]–[12]. It was sufficient that the child was present when the act occurred. The accused in *AWL* took a photograph of his erect penis on a pillow, close to the head of the child whilst the latter was sleeping.
6. Evidence that the accused was intoxicated at the time of the relevant conduct cannot be taken into account if the intoxication was self-induced. This is because indecent assault is not an offence of specific intent for the purposes of s 428D of the *Crimes Act*: *Attorney General v Curran* [2004] NSWCCA 234 at [15]; and *R v Petersen* [2008] NSWDC 9. See further Note 3 at [5-810].

[5-630] Suggested direction — s 61M (aggravating circumstances alleged)

In addition to these essential ingredients for indecent assault, the Crown also alleges the following additional circumstance(s) of aggravation namely … [*specify circumstance(s) of aggravation*] which it must also establish beyond reasonable doubt before you would be entitled to convict [*the accused*] of the charge in the indictment. You need only consider [*this/these*] additional circumstance(s) of aggravation, if you are first satisfied beyond reasonable doubt that the Crown has established each of the essential ingredients of indecent assault.

If, in your view, the Crown has not established each of those essential ingredients, then it is your duty to bring in a verdict of "not guilty". If you are satisfied that the Crown has established the essential ingredients then you would need to turn to consider the further circumstance(s) of aggravation alleged.

[If "in company", add

The Crown must prove beyond reasonable doubt that the offence was committed in the company of another person. If two or more persons are present, and share the same purpose to indecently assault the alleged victim they will be "in company", even if the alleged victim is unaware of the other person[s].

[*If it is in dispute as to whether [the accused] was in company, add*:

The Crown must prove that the coercive effect of the group operated, either to embolden or reassure [*the accused*] in committing the crime alleged, or to intimidate [*the alleged victim*] into submission. The perspective of [*the alleged victim*] (being confronted by the combined force or strength of two or more persons) is relevant, but does not solely decide the issue.

Participation in the common purpose without being physically present (for example, as being a look-out or previously encouraging [*the accused*] to commit the offence) is not enough.]

[*Describe the evidence relied upon by the Crown to prove the offence committed in the company of another person.*]**]**

[Where the Crown alleges "under the authority", add

The Crown alleges the aggravating circumstance that the offence was committed when [*the complainant*] was under the authority of [*the accused*]. To establish this circumstance, the Crown must prove beyond reasonable doubt that [*the complainant*] was under [*his/her*] care, supervision or authority [*generally/at the time of the commission of the offence*]. It is a matter for you to determine whether [*the complainant*] was under the care, supervision or authority of [*the accused*] having regard to the relevant evidence and taking into consideration the submission of counsel … [*deal with evidence for the Crown and for [the accused] and the opposing submissions*].**]**

[Where the Crown relies on "serious intellectual disability", add

The Crown alleges the aggravating circumstance that at the time of the indecent assault [*the complainant*] suffered a serious intellectual disability. To establish this circumstance, the Crown must prove beyond reasonable doubt that [*the complainant*] at the time of the alleged indecent assault suffered a serious intellectual disability, that is to say, that [*he/she*] then had an appreciably below average general intellectual function such that [*he/she*] required supervision in connection with daily life activities or required assistance in a social context. The Crown must prove that [*the complainant*] had such a disability to a serious degree … [*if in issue, deal with the evidence for the Crown and [the accused] and the opposing submissions*].**]**

[5-640] Notes — aggravated indecent assault under s 61M

1. The "circumstances of aggravation" for the purpose of a charge under s 61M are exclusively defined in s 61M(3) as meaning circumstances in which:
   (a) the offence was committed in company
   (b) the victim is under the age of 16 years
   (c) the victim is under the offender's authority
   (d) the victim has a serious physical disability, or
   (e) the victim has a serious intellectual disability.
2. To establish that the offence was committed in company, the Crown must show that another person was physically present and shared a common purpose with

the accused: *R v Button* (2002) 54 NSWLR 455 at [120]. Physical presence is an elastic concept: *Button* at [123]. Whether or not another person is physically present depends on what the court described in *Button* at [125] as:

> … the coercive effect of the group. There must be such proximity as would enable the inference that the coercive effect of the group operated, either to embolden or reassure the offender in committing the crime, or to intimidate the victim into submission.

See also *R v ITA* (2003) 139 A Crim R 340 at [137]–[140].

Mere presence of another person is not sufficient: *R v Crozier* (unrep, 8/3/96, NSWCCA); *Kelly vThe Queen* (1989) 90 ALR 481 at 483. The complainant's perspective (of being confronted with more than one person) is relevant but not determinative. "If two or more persons are present, and share the same purpose, they will be 'in company', even if the victim was unaware of the other person": *Button* at [120]. It is sufficient if the complainant is confronted by the "combined force of two or more persons", even if the other person(s) did not intend to physically participate if required: *R v Leoni* [1999] NSWCCA 14 at [20] (referring to the judgment of King CJ in *R v Broughman* (1986) 43 SASR 187 at 191); applied in *R v Villar* [2004] NSWCCA 302 at [68]. Proof of this aggravating circumstance does not depend upon the other person being convicted of the same offence: *Villar* at [69].

3. A further circumstance of aggravation is where the complainant is, whether generally or at the time of the commission of the offence, under the authority of the alleged offender: s 61M(3)(c). Section 61H(2) provides that for the purposes of Div 10 of the *Crimes Act* "a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person". The Victorian Court of Appeal has interpreted the words "care, supervision or authority" to apply to those exercising temporary care, such as baby-sitters and child-carers, as well as "those who, by virtue of an established and on-going relationship involving care, supervision or authority, are in a position to exploit or take advantage of the influence which grows out of that relationship": *R v Howes* (2000) 116 A Crim R 249 at [4]; see also *R v MacFie* [2000] VSCA 173 at [18], [21]. It is not confined to relationships based on a legal right or power: *Howes* at [50]; *MacFie* at [20]–[21]. In *R v DH* (unrep, 14/7/97, NSWCCA) (a case involving sexual intercourse with a child under authority) it was held that an employer-employee relationship could be sufficient to establish the aggravating factor of the complainant being under the accused's authority and that there need not be a causal relationship between the authority and the sexual act performed.

4. "Serious physical disability" (s 61M(3)(d)) is not defined for the purposes of s 61M. The following definitions from s 3(1) of the *Community Welfare Act* 1987 may be of assistance:

> "***physical impairment***", in relation to a person, means any defect or disturbance in the normal structure and functioning of the person's body, whether arising from a condition subsisting at birth or from illness or injury, but does not include intellectual impairment".
>
> "***physically disabled person***" includes a person who, as a result of having a physical impairment to his or her body, and having regard to any community attitudes

> relating to persons having the same physical impairment as that person and to the physical environment, is limited in his or her opportunities to enjoy a full and active life.

5. "Serious intellectual disability" in the now repealed (s 61M(3)(e)) was not defined for the purpose of s 61M. There was, however, in the previous form of s 66F a definition of "intellectual disability" for the purposes of that section as "an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with daily life activities". The definition in s 66F may be appropriate for the purposes of instructing a jury pursuant to the previous form of s 61M(3)(e), subject to appropriate emphasis being placed on the word "serious", which appeared in s 61M(3)(e), but not s 66F.

6. The *Crimes Amendment (Cognitive Impairment — Sexual Offences) Act* 2008 commenced on 1 December 2008. It replaced the term "serious intellectual disability" with "cognitive impairment". The following new definition found in s 61H(1A) applies to an offence under s 61M(3)(e) allegedly committed on and after 1 December 2008:

> For the purposes of this Division, a person has a cognitive impairment if the person has:
>
> (a) an intellectual disability, or
>
> (b) a developmental disorder (including an autistic spectrum disorder), or
>
> (c) a neurological disorder, or
>
> (d) dementia, or
>
> (e) a severe mental illness, or
>
> (f) a brain injury,
>
> that results in the person requiring supervision or social habilitation in connection with daily life activities.

[5-650] Proceedings in respect of prescribed sexual offences

Offences against ss 61L and 61M are "prescribed sexual offences" as defined in s 3 of the *Criminal Procedure Act* 1986. Particular provisions of the *Criminal Procedure Act* and the *Crimes Act* apply to proceedings for such offences: see further **Evidence given by alternative means** at [1-360]ff, and **Closed court, suppression and non-publication orders** at [1-349].

[5-660] Suggested direction — where the jury is not satisfied that the accused is guilty of the s 61M offence charged, but is satisfied on the evidence that the accused is guilty of an offence under s 61L

An alternative verdict under s 61L is available on a charge under s 61M: s 80AB.

As I have said, whether the Crown has established beyond reasonable doubt the additional aggravating circumstance(s) only becomes a question if you are first satisfied beyond reasonable doubt that the Crown has proved all of the essential ingredients of indecent assault.

The question then arises — what is the position if, at the end of your deliberations, the Crown has proved each of the essential ingredients of indecent assault but you have a reasonable doubt as to whether it has proved the additional circumstance(s) of aggravation? In that event, you may find [*the accused*] "not guilty" of the offence charged in the indictment but "guilty" of the indecent assault, that is to say, not including the additional circumstance(s) of aggravation.

Therefore there are three available verdicts which you may bring in this case. Firstly, a verdict of "not guilty"; secondly, a verdict of "guilty"; or thirdly, a verdict of "not guilty" but "guilty" of indecent assault.

[The next page is 805]

Maintain unlawful sexual relationship with a child

***Crimes Act* 1900 (NSW), s 66EA**

[5-700] Introduction

Last reviewed: September 2023

Under s 66EA(1) of the *Crimes Act* 1900, it is an offence for an adult to maintain an unlawful sexual relationship with a child. Section 66EA, in its current form, commenced on 1 December 2018. It is in the form recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse and is largely modelled on the Queensland offence found in s 229B of the *Criminal Code* (Qld).

The new s 66EA extends to relationships existing wholly or partly before 1 December 2018, provided the accused's acts were unlawful sexual acts during the period of the relationship: s 66EA(7). "Unlawful sexual act" is defined as any act that constitutes, or would constitute, one of the numerous sexual offences listed in s 66EA(15).

[5-710] Suggested procedure before empanelling jury and formally arraigning accused

Last reviewed: September 2023

Given the nature of this offence, it is expected the Crown would adopt the preferable, and more straightforward, course of including any alternative counts on the indictment as it is anticipated the question of alternative verdicts will arise in every case. It is also anticipated that the unlawful sexual acts making up the s 66EA offence would be particularised in the indictment.

However, if the indictment only contains a substantive s 66EA count, parties must be asked, preferably before arraignment, whether, and what, alternative verdicts will be relied on because the directions at the end of the trial must address the elements of those offences comprising the unlawful sexual acts the subject of the charge.

It is also good practice to identify with the parties precisely what is in issue in the trial, as the content of the summing-up may vary significantly.

Whether or not separate tendency directions may be required in an individual case should also be discussed with the parties as such a direction may be necessary when addressing alternative verdicts.

[5-720] Suggested direction — maintain unlawful sexual relationship with child

Last reviewed: September 2023

The following direction is suggested largely on the basis of the text of s 66EA and the five-judge bench decision of *MK v R* [2023] NSWCCA 180. The suggested direction should be modified as considered appropriate.

The accused is charged with maintaining an unlawful sexual relationship with the complainant between the dates identified on the indictment.

Before you can find the accused guilty of the offence, the Crown must prove beyond reasonable doubt each of the following elements:

1. that the accused, being an adult
2. maintained an unlawful sexual relationship with the complainant
3. who was a child.

If you are not satisfied the Crown has proved each of these elements beyond reasonable doubt then you must find the accused not guilty.

The law says an adult is a person of or above the age of 18 years and that a child is a person who is under the age of 16 years. In this case, there is no dispute that the accused was an adult and the complainant was a child under 16 during the period specified on the indictment. [*This will require adaptation if the complainant's age is in dispute*].

A relationship is a way of describing the nature of the connection between two or more people such as parent and child, teacher and student or coach and player. [*Where applicable*: In the present case there is no dispute the relationship that existed between the complainant and the accused was one of eg, father and daughter.]

An unlawful sexual relationship is a relationship that involves two or more unlawful sexual acts over any period. An "unlawful sexual act" means an act that constitutes an offence of a sexual nature.

The critical issue is whether the relationship of [*for example, father and daughter which the Crown submits existed*], included an unlawful sexual relationship. To answer that question, you must be satisfied beyond reasonable doubt that the accused committed two or more unlawful sexual acts with or towards the complainant during the period identified in the indictment.

The Crown case is that the unlawful sexual acts in this case are [*summarise the evidence the Crown relies on to prove the alleged unlawful sexual acts and summarise the elements of each of those offences*]. **See s 66EA(2)**.

[*If the circumstances of the particular case require it*: Some sexual offences require the Crown to prove that the complainant was not consenting. But where the alleged offence involves a child, consent is irrelevant. The law says that children cannot consent to sexual activity.]

You do not need to be satisfied that the Crown has proved that every unlawful sexual act alleged against the accused occurred. All you need to be satisfied of beyond reasonable doubt is that the accused committed two or more of the unlawful sexual acts with

or towards the complainant. Further, you do not all need to agree about which two unlawful sexual acts constitute the unlawful sexual relationship. This means **[***give examples from Crown case such as*: some of you might be satisfied beyond reasonable doubt that the acts described in 1 and 3 took place, while some of you might be satisfied beyond reasonable doubt that the events described in 4 and 5 took place**]**. In other words, provided you are all satisfied that at least two unlawful sexual acts took place, even if you do not agree on which two (or more) acts have been proved beyond reasonable doubt, that is sufficient to prove the element of unlawful sexual relationship. If you have to consider whether the Crown has established one of the alternative counts on the indictment then the situation is different and I will talk to you about the approach you must take then. **See s 66EA(5).**

[*Where applicable if certain of the unlawful sexual acts were committed outside of NSW*]: In this case, the Crown case is that some of the unlawful sexual acts did not occur in New South Wales but in [*identify the different location/s of unlawful sexual acts*]. Before you can find the accused guilty, you must be satisfied beyond reasonable doubt that *at least* one unlawful sexual act occurred in New South Wales. You cannot find the accused guilty if all the unlawful sexual acts you are satisfied occurred took place outside New South Wales. **See s 66EA(3)**]

[*Summarise the defence case on the unlawful sexual acts. For example, none of these acts happened at all. There was no unlawful sexual relationship at all. At no time did the accused sexually assault the complainant in any way*].

Alternative verdicts – s 66EA(13)

See note 11 below which addresses issues for consideration when determining the appropriate direction with respect to alternative verdicts

If the Crown has failed to prove one of the essential elements of the offence, then you must find the accused not guilty and will be required to return verdicts in respect of the alternative charges. I will now explain what the Crown must prove before you can return a verdict of guilty in relation to those charges.

[5-730] Notes

Last reviewed: September 2023

1. An offence against s 66EA is a "prescribed sexual offence": see s 3, *Criminal Procedure Act* 1986. Accordingly, those provisions of the *Criminal Procedure Act* and the *Crimes Act* concerning how complainants may give evidence apply: see further **Evidence given by alternative means** at **[1-360]**ff, and **Closed court, suppression and non-publication orders** at **[1-349]**.

2. An "unlawful sexual relationship" is defined as a relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over any period: s 66EA(2). See *DPP (NSW) v Presnell* (2022) 108 NSWLR 407 for a discussion of the phrase "with or towards" in the context of sexual act offences under *Crimes Act*, s 66DC(a). As the suggested direction indicates, the summing-up must also address the elements of the offences which comprise the alleged unlawful sexual acts: *JJP v R* [2021] SASCA 53 at [157].

3. An "unlawful sexual act" is comprehensively defined in s 66EA(15) as an act that constitutes, or would constitute, one of the many offences listed and includes former sexual offences which are identified in Column 1 of Sch 1A of the Act.
4. Section 66EA requires proof of the existence of a relationship "in which" two or more unlawful sexual acts were committed: *MK v R* [2023] NSWCCA 180 at [6], [99]–[100]; *R v Mann* (2020) 135 SASR 457 at [21]. The offence may involve an established relationship such as parent and child, teacher and student or coach and player which is corrupted by the commission of two or more unlawful sexual acts within that relationship. In some cases, the "relationship" might be something that arises from the facts and circumstances of the commission of the unlawful sexual acts themselves so that the provision excludes from the scope of the offence a person who commits unlawful sexual acts with a child with whom they have no relationship: *MK v R* at [18], [95].
5. The word "maintains" in s 66EA(1) does not add anything to the actus reus of the offence beyond satisfaction of s 66EA(2): *MK v R* at [18], [79], [95]. Previous authorities requiring the existence of a sexual relationship over and above the unlawful sexual act (see *RW v R* [2023] NSWCCA 2 at [166]–[169], [173]–[174]; [180], *R v RB* [2022] NSWCCA 142 at [62]) are plainly wrong: *MK v R* at [6].
6. An adult is defined as someone 18 years or older and a child is a person under 16 years old: s 66EA(15).
7. Consent is not a defence: s 80AE. Notwithstanding the operation of s 80AE, in certain circumstances it may be prudent to direct a jury that a child cannot consent to an unlawful sexual act. In *R v Nelson* [2016] NSWCCA 130 at [23], Basten JA explained why consent was not an element of an offence against s 66C of the *Crimes Act* : see also *R v McClymont* (unrep, 17/12/92, NSWCCA); *R v Woods* [2009] NSWCCA 55 at [53]. Although those are sentencing cases, the way the issue has been articulated is uncontroversial as they explain the legislative policy underpinning offences of this type.
8. The jury must be satisfied beyond reasonable doubt that there was an unlawful sexual relationship but are *not* required to be satisfied of the particulars of any unlawful sexual act that they would have to be satisfied of if the act, or acts, were charged as separate offences: s 66EA(5). Particulars in this sense refers to particulars as to time and place: *JJP v R* at [145], [154]. However, it is still necessary to prove the general nature or character of those acts by reference to the elements of the relevant sexual offences; merely establishing the relevant acts were of a sexual or indecent nature is not sufficient: *JJP v R* at [154]
9. The jury is not required to agree about which two unlawful sexual acts constitute the unlawful sexual relationship: s 66EA(5)(c).
10. A separate tendency direction may be necessary when giving a jury an alternative verdict direction: see **Tendency, coincidence and background evidence** at **[4-200]**ff.
11. The direction to be given with respect to alternative verdicts depends on the issues in the particular trial. The importance of identifying the issues with the parties before the trial commences has been dealt with above at **[5-710]**.
12. Generalised offences such as this create the potential for unfairness to an accused. It is therefore necessary to ensure the summing up includes whatever directions

are necessary to ensure the accused's trial is fair: *KRM v The Queen* (2001) 206 CLR 221 at [97]–[101] (dealing with a similar Victorian provision); see also *ARS v R* [2011] NSWCCA 266 at [35]–[37] per Bathurst CJ (James and Johnson JJ agreeing) with respect to the previous form of s 66EA.

[The next page is 811]

Sexual intercourse without consent — until 31 May 2022

***Crimes Act* 1900 (NSW), ss 61I–61J**

Important note: The directions in ss 292–292E *Criminal Procedure Act* 1986 apply to proceedings for these offences which commence from 1 June 2022, regardless of when the offence was committed: Sch 2, Pt 42. See further [5-200] **Directions — misconceptions about consent**. The procedure for filing a Crown or Defence Readiness Hearing Case Management Form requires the parties to identify, amongst other matters, which directions under ss 292A–292E may be required at trial. It would be prudent to commence a discussion early in the trial concerning which of these directions, if any, might be required.

1. It is good practice to provide the elements of the offence to the jury in written form. The list of elements in the suggested directions could form the basis of this document.
2. It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.
3. It is unnecessary and unhelpful to direct the jury about elements of consent not relevant to issues in the case: *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4], [42].
4. The suggested directions are framed in terms of what the Crown is required to prove. It is a matter of discretion as to how often it is appropriate to remind the jury that the accused is not obliged to prove anything.

[5-800] Suggested direction — sexual intercourse without consent (s 61I) for offences committed before 1 January 2008

The following suggested direction must be adapted to the issues in the case.

The accused is charged with sexual intercourse without consent knowing the complainant was not consenting to the sexual intercourse.

The Crown case is [*briefly outline the incident/s to which the charge/s relate*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the three elements which make up the offence:

1. that, at the time and place alleged, the accused had sexual intercourse with the complainant,
2. without the complainant's consent,
3. knowing the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of these elements, you must find the accused not guilty.

1. The accused had sexual intercourse with the complainant

This element concerns the nature of the act alleged in the indictment. The Crown must prove beyond reasonable doubt that, at the time and place alleged, the accused had sexual intercourse with the complainant … [*here make some reference to the allegations of time and place, to the extent relevant*].

Sexual intercourse means … [*describe the relevant part of the definition of sexual intercourse, as defined in s 61H(1) Crimes Act 1900 and summarise the evidence relied upon by the Crown*].

[If applicable

The Crown does not have to prove that full penetration occurred or that the accused ejaculated or that the sexual intercourse was for the accused's sexual gratification.]

[*Summarise the evidence and arguments of the parties*.]

2. Without the complainant's consent

This element concerns the complainant's state of mind. The accused does not have to prove the complainant consented. The Crown must prove beyond reasonable doubt that [*she/he*] did not.

Consent involves a conscious and voluntary agreement on the part of the complainant to engage in sexual intercourse with the accused. It can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways such as the offering of resistance although this is not necessary as the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse … [*see repealed s 61R(2)(d) Crimes Act 1900*]. Consent which is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.

[If applicable — circumstances where consent is vitiated — repealed s 61R(2)

A person who consents to sexual intercourse with another person under a mistaken belief —

[*refer to applicable mistaken belief in repealed s 61R(2), for example: a mistaken belief about the identity of the other person (s 61R(2)(a)(i)), or that the other person is married (s 61R(2)(a)(ii)); or that the sexual intercourse is for medical or hygienic purposes (s 61R(2)(a1))*]

— is taken not to consent to the sexual intercourse …]

[*refer to the evidence*].**]**

[If applicable — threats of terror — repealed s 61R(2)(c)

A person who submits to sexual intercourse with another person as a result of threats or terror is, by law, not to be regarded as consenting to the sexual intercourse

[*refer to the relevant arguments by the parties*].]

3. The accused knew the complainant did not consent

This element concerns the accused's state of mind. The Crown must prove beyond reasonable doubt that the accused knew the complainant did not consent.

You might ask how the Crown can prove that the accused knew the complainant did not consent without an admission from [*him/her*]. The Crown asks you to infer or conclude from other facts which it has set out to prove, that the accused must have known and in fact did know … [*summarise the relevant evidence and arguments of the parties*].

[*Give direction as to inferences* [*see [3-150]*] *or remind jury if already given.*]

In a situation where the complainant does not in fact consent, the accused's state of mind at the time of the act of intercourse might be that [*he/she*] actually knew that the complainant was not consenting. That is a guilty state of mind. If the Crown satisfies you beyond reasonable doubt that that was the accused's state of mind at the time of the act of intercourse, then the third element of the charge has been made out.

On the other hand, you may decide on the basis of the evidence led in the trial [*or if applicable* and relied upon by the accused] that the accused's state of mind might be that [*he/she*] genuinely, though wrongly, believed the complainant was consenting to intercourse. That is not a guilty state of mind. It is for the Crown to prove that the accused had a guilty mind, and so if the Crown has failed to prove that, at the time of intercourse, the accused did not genuinely believe that the complainant was consenting, then you would have to say that this third element of the offence is not made out, and return a verdict of "not guilty" of this charge … [*refer to relevant arguments by the parties*].

[If applicable — where recklessness is relied upon to prove the accused knew the complainant did not consent — repealed s 61R

If the Crown proves beyond reasonable doubt that the accused was reckless as to whether the complainant consented to the sexual intercourse, then the accused will be taken to know that the complainant did not consent to the sexual intercourse … [*see repealed s 61R(1) Crimes Act 1900*].

To establish that the accused had a reckless state of mind, the Crown must prove, beyond reasonable doubt, that either:

(a) the accused simply failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of sexual intercourse, even though the risk the complainant was not consenting would have been obvious to someone with the accused's mental capacity if [*he/she*] had turned [*his/her*] mind to it, or

[*The above direction should only be given when the evidence calls for it.*]

(b) the accused realised the possibility the complainant was not consenting but went ahead regardless of whether [*she/he*] was consenting or not.

[*This is a wholly subjective test. This has been referred to as advertent recklessness.*]**]**

[If applicable — accused's knowledge of mistaken belief scenarios

The law says that a person who knows that another person consents to sexual intercourse under a mistaken belief [*refer to relevant mistaken belief in ss 61R(2)(a) or 61R(2)(a1) listed above*] is taken to know that the other person does not consent to the sexual intercourse.]

[If applicable — relevance of accused's intoxication

When considering proof of the accused's state of mind (that is, whether the Crown has proved beyond reasonable doubt element 3), you must ignore any effects of intoxication. If you think that [*his/her*] ability to think or understand what was going on was affected by alcohol, then you must put that to one side. You have to look at the accused and ask what would have been going on in [*his/her*] mind if [*he/she*] had not ingested alcohol and/or drugs.

But apart from that qualification, it is the accused's mind you should consider. It's not a question of what you would have realised, or thought, or believed. It's not a question of what a reasonable person would have thought or believed. You look at what was going on in the mind of the accused, or to be more precise, what would have been going on in the mind of the accused if [*he/she*] was unaffected by alcohol and/or drugs.]

[*If the accused is charged with aggravated sexual assault under s 61J refer to the additional direction for circumstances of aggravation* [*at [5-840]*] *after dealing with the s 61I elements.*]

[5-810] Notes

1. For alleged ss 61I, 61J and 61JA offences committed before 1 January 2008, the Crown must establish that the accused knew that the complainant was not consenting, and that, if the issue is raised in evidence, the Crown must negate any belief by the accused that the complainant was consenting; the Crown does not succeed in doing so on the basis that the accused's belief was not based on reasonable grounds: *South v R* [2007] NSWCCA 117 at [30]. The joint Justices in *Banditt v The Queen* (2005) 224 CLR 262 said at [37]:

   > … [i]t was not the reaction of some notional reasonable man but the state of mind of the appellant which the jury was obliged to consider and that this was to be undertaken with regard to the surrounding circumstances, including the past relationship of the parties.

2. For an offence under s 61J, the Crown must prove the absence of consent and knowledge of that absence of consent beyond reasonable doubt "irrespective of the victim's age": *McGrath v R* [2010] NSWCCA 48 at [11]. It is a misdirection to simply say the complainant is incapable of consenting to sexual intercourse by reason of her or his age: *McGrath v R* at [11]. The reasoning in *McGrath v R* would also apply to an offence against s 61I.

3. Evidence that the accused was intoxicated where it is self-induced cannot be taken into account for offences under s 61I: *R v Gulliford* [2004] NSWCCA 338 at [127] and s 61J: *R v DJB* [2007] NSWCCA 209 at [68] on the basis that neither are offences of specific intent: see s 428D *Crimes Act* 1900. See also *R v Petersen* [2008] NSWDC 9.

4. In *Banditt v The Queen* the High Court considered the meaning of "reckless as to whether the other person consents" in the repealed s 61R(1) *Crimes Act* 1900. The court held that it was proper for the trial judge to have directed the jury: "If he is aware that there is a possibility that she is not consenting but he goes ahead anyway, that is recklessness". The court accepted at [38] that in a particular case one or more of the expressions used in *R v Morgan* [1976] AC 182 (outlined

at [27]) and by Professor Smith (outlined at [35]), as well as those recorded in the respondent's submission (outlined at [16]), may properly be used in explaining what is required by the repealed s 61R(1). The trial judge properly emphasised that it was the state of mind of the appellant that the jury had to consider. A discussion of the concept of recklessness can be found in *Gillard v The Queen* (2014) 88 ALJR 606 at [26].

5. The issue whether a direction on recklessness will be required is discussed in *Bochkov v R* [2009] NSWCCA 166 at [93]–[106]; *R v Murray* (1987) 11 NSWLR 12 at 15 and *R v Kitchener* (1993) 29 NSWLR 696 at 700. A direction may be appropriate if the circumstances of the case are such that, despite rejecting the accused's version, a question of recklessness is still open to be considered on the Crown case: see *CTM v The Queen* (2008) 236 CLR 440 at [38], [84], [191] and the High Court's approach to directions for honest and reasonable mistake of fact. A direction may be appropriate where the accused's version is that the complainant in fact consented, and to his or her knowledge he or she honestly but wrongly believed that the complainant was consenting: *Bochkov v R* at [93]. Where the jury accepts the accused had an honest though wrong belief and that the accused was not reckless as to consent, the Crown will have failed to prove the accused knew the complainant did not consent. It is incorrect to refer to such a wrong belief as a "defence" or as exculpation on the basis of an honest and reasonable mistake of fact: *Bochkov v R* at [102]–[105]. Knowledge (of the accused) is an element the Crown must prove beyond reasonable doubt.
6. Section s 61R(2)(b) (rep) *Crimes Act* 1900 set out grounds on which it may be established that consent to sexual intercourse for offences under ss 61I, 61J and 61JA is vitiated. For the purposes of proving "a person knows that another person consents to sexual intercourse under a mistaken belief" under the repealed s 61R(2)(b), it is not enough for the Crown to prove the accused was reckless: *Gillard v The Queen* (2014) 88 ALJR 606 at [28]–[29]. The Crown must prove the accused knew the other person consented to sexual intercourse on the various grounds (of vitiation) set out in s 61R(2)(b): *Gillard v The Queen* at [29]. In *Gillard v The Queen*, the High Court was dealing with ACT legislation expressed in similar terms to s 61R(2)(b).

[5-820] Suggested direction — sexual intercourse without consent (s 61I) where alleged offence committed on or after 1 January 2008 and before 1 June 2022

The accused is charged with sexual intercourse without consent knowing the complainant was not consenting.

The Crown case is that [*briefly outline the incident/s to which the charge relates*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following three elements of the offence:

1. that, at the time and place alleged, the accused had sexual intercourse with the complainant
2. without the complainant's consent
3. knowing the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them, you must find the accused not guilty.

1. **The accused had sexual intercourse with the complainant**

   [This element element concerns the act of sexual intercourse. The Crown must prove beyond reasonable doubt that an act of sexual intercourse occurred. The meaning of sexual intercourse includes [*describe the relevant act of intercourse from the definition in s 61HA, as in force before 1 June 2022*]:

   (a) penetration to any extent of the complainant's genitalia (where complainant is female) or anus by any part of the accused's body or by an object manipulated by the accused.

   (b) the introduction of the accused's penis into the complainant's mouth.

   (c) cunnilingus.

   (d) the continuation of any of the above acts.

   [*Summarise the evidence and relevant arguments of the parties.*]

   [*Where appropriate: penetration of a person's genitalia or anus for genuine medical or hygienic purposes is not sexual intercourse. As that is what the accused says was the reason for the penetration in this case, the Crown must prove beyond reasonable doubt that it was not done for such a purpose.*]

2. **The sexual intercourse occurred without the complainant's consent**

   The second element concerns the complainant's state of mind. The Crown must prove that the sexual intercourse occurred without the complainant's consent.

   Consent means that a person freely and voluntarily agrees to something. So, the Crown must prove the complainant did not freely and voluntarily agree to the sexual intercourse.

   You are concerned with whether the complainant did not consent to the sexual intercourse when it occurred. What the complainant's state of mind was before or after the sexual intercourse might prove a guide, but the question is whether the Crown has proved that [*she/he*] was not consenting at the time the sexual intercourse occurred.

   [*Where appropriate*: The complainant said in evidence that [*she/he*] did not consent to sexual intercourse. If you accept that evidence, then you could be satisfied the Crown has proved this element.]

   In deciding whether you accept that the complainant was not consenting, you may also take into account any of the following:

   (a) consent obtained after persuasion is still consent, provided that ultimately it is given freely and voluntarily.

   (b) consent, or lack of consent, may be indicated by what the complainant said or did. In other words, the complainant's words or actions, or both, may indicate whether or not there was consent.

(c) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to that intercourse. There is no legal requirement for a person to physically resist before a jury can find that the person did not consent.

[*If applicable, add one or more of the following* (*s 61HE(5)–(6)*):

The law provides that a person does not consent to sexual intercourse:

- if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
- if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or
- if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
- if the person consents to the sexual intercourse because the person is unlawfully detained, or
- if the person consented under a mistaken belief:

  – as to the other person's identity, or

  – that the other person is married to the person, or

  – that the sexual activity is for health or hygienic purposes, or

  – about the nature of the activity that has been induced by fraudulent means.]

[*If applicable, add one or more of the following* (*s 61HE(8)*):

It may be established that the complainant did not consent to sexual intercourse if:

- [*she/he*] consented while substantially intoxicated by alcohol or any drug, or
- [*she/he*] consented because of intimidatory or coercive conduct, or other threat, even though that conduct does not involve a threat of force, or
- [*she/he*] consented because of the abuse of a position of authority or trust.

If you are satisfied the complainant consented in that circumstance, it does not necessarily follow that you should be satisfied beyond reasonable doubt [*she/he*] did not consent. The essential matter the Crown must prove is that the complainant did not consent in the sense that [*she/he*] did not freely and voluntarily agree to the sexual intercourse.]

3. **The accused knew the complainant did not consent**

The third element concerns the accused's state of mind. The Crown is required to prove the accused knew the complainant did not consent to the sexual intercourse.

This is a question about what the accused's state of mind actually was. It is not a question about what you or anyone else would have known, thought or believed in the circumstances. It is what [*he/she*] knew, thought or believed.

You must consider all of the circumstances, including any steps taken by the accused to make sure the complainant consented to the sexual intercourse.

[*Add, if appropriate*: The law is that any intoxication of the accused that was self-induced must be ignored. If you consider that [*he/she*] was intoxicated by voluntarily drinking alcohol [or taking drugs], you must ignore that and decide this element by considering what [*his/her*] state of mind would have been if [*he/she*] had not been intoxicated.]

The law says the Crown will have proved the accused knew the complainant did not consent to sexual intercourse if: [*refer only to those of the following matters that arise from the evidence*]

(a) the accused knew the complainant did not consent; or

(b) the accused was reckless as to whether the complainant consented because [*he/she*] realised there was a possibility [*she/he*] did not consent; or

(c) the accused was reckless as to whether the complainant consented because [*he/she*] did not even think about whether [*she/he*] consented but went ahead not caring, or considering it was irrelevant whether [*she/he*] consented; or

(d) the accused may have actually believed the complainant consented, but [*he/she*] had no reasonable grounds for that belief; or

(e) the accused knew the complainant consented under a mistaken belief about [*refer to those parts of s 61HE(6) that may apply*].

To repeat what I said at the beginning of these directions, you can only find the accused guilty if the Crown proves each of the three elements beyond reasonable doubt. If the Crown fails to prove any of them you must find the accused not guilty.

[*If the accused is charged with aggravated sexual assault under s 61J refer to the additional direction for circumstances of aggravation at [5-840] after dealing with the s 61I elements.*]

[5-830] Notes

1. The *Crimes Amendment (Consent — Sexual Assault Offences) Act* 2007 commenced on 1 January 2008 and applies to offences under ss 61I, 61J and 61JA committed on or after 1 January 2008. Under that Act, s 61R (consent) was repealed and replaced with a definition of consent, whereby a person consents to sexual intercourse "if the person freely and voluntarily agrees to the sexual intercourse": s 61HA(2) (now repealed and replaced with s 61HE(2)). A person who does not offer physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting: s 61HA(7) (now repealed and replaced with s 61HE(9)), previously found in repealed s 61R(2)(d).

2. Further amendments were made to Div 10 of the *Crimes Act* 1900 through the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 which commenced on 1 December 2018. The consent provisions contained in the former s 61HA were renumbered under new s 61HE. There are some differences between the repealed s 61HA and the replacement s 61HE, such as the expansion of offences to which s 61HE applies (eg, sexual touching offences: s 61K), and expansion of the term "sexual intercourse" to also include sexual touching and a sexual act.

However, although care must be taken to ensure the applicable provisions are referred to, depending on the date of the allegations, the substance of the provisions remains the same and can be addressed with the same directions. See *Beattie v R* [2020] NSWCCA 334 at [48]–[53].

3. The *Crimes Legislation Amendment Act* 2014 extended the statutory definition of consent to attempts to commit the offences under ss 61I, 61J and 61JA *Crimes Act*. It had been held that the objective test for consent in s 61HE did not apply to offences of attempting to commit those offences: *WO v DPP (NSW)* [2009] NSWCCA 275 at [80], [83]; *O'Sullivan v R* [2012] NSWCCA 45 at [112]. As there was no transitional provision for the amendment, it may be taken to apply to attempt offences alleged to have occurred on or after the date of commencement on 23 October 2014.
4. For the purpose of determining knowledge of lack of consent, the jury is to have regard to all the circumstances of the case, including any steps taken by the accused to ascertain whether the complainant consents, but excluding any self-induced intoxication on the part of the accused. The Crown does not have to show the complainant communicated her/his lack of consent to prove the accused knew that the complainant did not consent: *R v XHR* [2012] NSWCCA 247 at [47]. Section 61HE(3)(c) requires the Crown to prove beyond reasonable doubt that there were "no reasonable grounds" for the accused to believe the other person consented. It is a significant departure from the subjective test found in the common law and in repealed s 61R(1), as it imports an objective test requiring a jury to apply current community standards. Although a sentencing case, *Saffin v R* [2020] NSWCCA 246 at [50] discusses the three levels of "knowledge" (actual, reckless, belief on unreasonable grounds) and the extent to which there may be a difference between knowledge and recklessness.
5. A judge must take special care in directing the jury in relation to s 61HE(3)(c). The jury is to proceed on the assumption that if the accused honestly believed the complainant consented, the law requires it to test that belief by asking whether there were reasonable grounds for it in the circumstances of the case: *Lazarus v R* [2016] NSWCCA 52 at [155]. It is erroneous to instruct the jury or imply that the jury should ask what a reasonable person might have concluded about consent, rather than what the accused might have believed in all the circumstances and then test that belief by asking whether there might have been reasonable grounds for it: *Lazarus v R* [2016] NSWCCA 52 at [155]. The belief is that of the accused and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable: *O'Sullivan v R* [2012] NSWCCA 45 at [124]–[126].
6. If the accused knows the complainant is labouring under a mistaken belief as set out in s 61HE(6), he or she is taken to have known that the complainant was not consenting. As with consideration of the repealed s 61R(2), the Crown must prove the accused actually knew the other person consented due to a mistaken belief; mere recklessness about that fact will be insufficient: *Gillard v The Queen* (2014) 88 ALJR 606 at [28]–[29]; *Beattie v R* [2020] NSWCCA 334 at [90].
7. Substantial intoxication of a complainant under s 61HE(8)(a) is not determinative of consent being vitiated; it is a factor for a jury to consider in assessing whether the Crown has established lack of consent: *Tabbah v R* [2017] NSWCCA 55 at [142]; *Beattie v R* [2020] NSWCCA 334 at [71].

8. For further commentary on recklessness and intoxication: see **Notes** at **[5-810]**.
9. Where a person is charged with being an accessory to sexual intercourse without consent, the relevant state of mind as to the complainant's lack of consent is knowledge; recklessness is insufficient: *Carlyle-Watson v R* [2019] NSWCCA 226 at [59].
10. Cunnilingus need not involve penetration and refers to oral stimulation of the female genitals with the mouth or tongue: *BA v R* [2015] NSWCCA 189 at [9].
11. Sexual intercourse includes sexual connection occasioned by the penetration of the genitalia except where the "penetration is carried out for proper medical purposes": s 61HA(a). The need for the judge to give a direction in relation to "proper medical purposes" only arises if the issue was raised by the evidence and the parties: *Zhu v R* [2013] NSWCCA 163 at [78]–[79]. The exception may be excluded when the relevant acts giving rise to the offence occurred during a medical examination: *Decision Restricted* [2020] NSWCCA 138 at [51]–[65]. There is no requirement that the sole purpose of penetration in such a context be for sexual gratification. The exception is only engaged when the relevant act is carried out for proper medical purposes: at [51]. The exception will be excluded if a proper medical purpose is accompanied by a sexual purpose either from the outset of the conduct or after commencement: [99].

[5-840] Suggested direction — s 61J circumstance(s) of aggravation

The final element the Crown must prove beyond reasonable doubt is that the offence was aggravated because [*specify circumstance of aggravation*]. You only need to consider this element if you are satisfied the Crown has proved the first three elements of the offence beyond reasonable doubt.

In company — s 61J(2)(c)

[*This direction is based upon the sexual intercourse being carried out by the accused in the presence of an alleged co-offender in his/her company. Modification will be required if the roles are different.*]

It is an aggravating circumstance if the offence was committed in the company of another person or persons. The Crown alleges the accused committed the offence when [*he/she*] was in the company of [*alleged co-offender*]. The Crown case is that when the accused had sexual intercourse with the complainant, [*alleged co-offender*] was [*specify nature of presence*].

The Crown will prove the offence was committed "in company" if it proves beyond reasonable doubt:

(a) the accused and [*alleged co-offender*] shared a common purpose that the accused would have sexual intercourse with the complainant;

and

(b) [*alleged co-offender*] was physically present when the sexual intercourse occurred.

For [*alleged co-offender*] to be "physically present", the Crown must prove [*he/she*] was sufficiently close [*refer only to those of the following the Crown relies on*]:

(a) to intimidate or coerce the complainant in relation to the sexual intercourse;

or,

(b) to encourage or support the accused in having sexual intercourse with the complainant.

It is not enough for the Crown to prove either the accused shared a common purpose with [*alleged co-offender*] that the accused would have sexual intercourse with the complainant, or that [*alleged co-offender*] was physically present. The Crown must prove both of these beyond reasonable doubt before you can conclude the offence was committed in company.

[*If appropriate, add*: It is not enough [*alleged co-offender*] shared a common purpose with the accused that the accused would have sexual intercourse with the complainant, but was not physically present in the way in which I have defined that concept. For example, it would not be enough if [*alleged co-offender*] was somewhere else acting as a look-out, or had provided encouragement to the accused at some time before the sexual intercourse occurred.]

[*Summarise the evidence relied on by the Crown and the defence case.*]

Under authority — s 61J(2)(e)

The Crown alleges the aggravating circumstance that the offence was committed when the complainant was under the authority of the accused. To establish this, the Crown must prove the complainant was under [*his/her*] care, supervision or authority [*whether generally or at the time of the offence*]. It is a matter for you to determine whether the evidence establishes the complainant was under the care, supervision or authority of the accused.

[*Summarise the evidence relied on by the Crown and the defence case*].]

Complainant has serious physical disability or cognitive impairment — 61J(2)(f), (g)

It is an aggravating circumstance if the offence was committed while the complainant had a [*serious physical disability* OR *cognitive impairment*].

The law recognises a variety of forms of "cognitive impairment", including where a person has a [*nominate the form of cognitive impairment according to the list in s 61HD and in accordance with the evidence relied on in the particular case*].

OR

The law does not define what a "serious physical disability" is. That is a matter for you to decide. However, it is an ordinary English phrase, and you should give it its ordinary English meaning. It obviously focuses on disability of the body, as opposed to the mind and requires you to evaluate whether there was a disability that was a serious one.

To prove this element, the Crown relies upon the evidence of [*summarise relevant evidence*].

That evidence [*has/has not*] been disputed. [*Summarise defence case as necessary.*]

Conclusion

If you are satisfied the Crown has proved all four elements of the aggravated offence of sexual intercourse without consent in the indictment beyond reasonable doubt you must find the accused guilty. When asked for the verdict [*for this count*], your foreperson would simply announce, "guilty".

If you are satisfied the Crown has only proved the first three elements of the basic offence of sexual intercourse without consent, but has not proved the element of aggravation, then you would acquit the accused of the aggravated offence and return a verdict of guilty for the basic offence. When asked for the verdict [*for this count*], your foreperson would announce, "not guilty of aggravated sexual touching but guilty of sexual touching".

If you are not satisfied the Crown has proved any one of the three elements of the basic offence of sexual intercourse without consent, then you would acquit the accused completely. When asked for the verdict [*for this count*], your foreperson would simply announce, "not guilty".

[*see s 80AB Crimes Act 1900 regarding alternative verdicts*].

[5-850] Notes

1. In *R v Button* (2002) 54 NSWLR 455 at [120] the court outlined a number of propositions about the aggravating circumstance of being in company under s 61J(2)(c), including that there must be a shared common purpose to commit the offence and both accused must be physically present. The perspective of the victim (being confronted by the combined force or strength of two or more persons) is relevant, although not determinative. If two or more persons are present, and share the same purpose, they will be "in company", even if the victim was unaware of the other person.
2. In *KSC v R* [2012] NSWCCA 179 at [124]–[126], the court held that it was not necessary for the judge to provide the jury with dictionary definitions of "care", "supervision" and "authority" for the purposes of determining if a complainant was under the accused's authority under s 61J(2)(e). They are ordinary English words which a jury would understand. The judge provided the jury with assistance as to the evidentiary matters relevant to the issue.
3. "Serious physical disability" under s 61J(2)(f) is not defined but is capable of encompassing a vast array of different conditions: *JH v R* [2021] NSWCCA 324 at [38]. In *JH v R*, it was held this term did not require explication as the words mean what they say and are capable of being applied by a jury: [24]–[25].

[The next page is 831]

Sexual intercourse without consent — from 1 June 2022

[5-900] Introduction

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 (the amending Act) commenced on 1 June 2022 and replaces the definition of consent in the former *Crimes Act* 1900, s 61HE with Pt 3, Div 10, Sub-div 1A (ss 61HF–61HK).

These provisions apply to basic and aggravated offences of sexual assault (*Crimes Act*, ss 61I, 61J, 61JA), sexual touching (ss 61KC, 61KD) and carrying out a sexual act (ss 61KE, 61KF) committed on and from 1 June 2022: s 61HG.

The amending Act is largely based on recommendations made by the New South Wales Law Reform Commission in *Report 148: Consent in relation to sexual offences*, September 2020.

The Act also inserted new jury directions on misconceptions about consent in sexual assault trials, for trials commencing on and from 1 June 2022, into the *Criminal Procedure Act* 1986 in ss 292–292E: see further **[5-200] Directions — misconceptions about consent in sexual assault trials**.

Section 61HF provides that a purpose of Sub-div 1A is to recognise that:

(a) every person has a right to choose whether or not to participate in a sexual activity

(b) consent to a sexual activity is not to be presumed

(c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

"Sexual activity" in Sub-div 1A means sexual intercourse, sexual touching or a sexual act: s 61HH.

Of the concepts addressed in s 61HF, the Attorney General said that while these were not new, expressly stating them in the legislation "enhances the communicative model of consent that is embodied in the criminal law, guiding the application of the law and aiding the understanding of consent in the general community": Second Reading Speech, Legislative Assembly, *Debates*, 20 October 2021, p 7508.

[5-910] Suggested direction — basic offence — sexual intercourse without consent (s 61I) — offences from 1 June 2022

Notes:

1. It is good practice to provide the elements of the offence to the jury in written form. The list of elements below could form the basis of this document.
2. It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.

3. It is unnecessary and unhelpful to direct the jury about elements of consent not relevant to the issues in the case: *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4] and [42].
4. The suggested direction is framed in terms of what the Crown is required to prove. It is a matter of discretion as to how often it is appropriate to remind the jury that the accused is not obliged to prove anything.

The accused is charged with sexual intercourse without consent knowing the complainant was not consenting. The Crown case is [*briefly outline the incident/s to which the charge/s relate*].

Elements

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following three elements which make up the offence:

1. at the time and place specified in the indictment, the accused had sexual intercourse with the complainant;
2. without the complainant's consent to that act of intercourse; and
3. the accused knew the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of these elements, you must find the accused not guilty.

1. The accused had sexual intercourse with the complainant

This element concerns the nature of the act alleged in the indictment. The Crown must prove beyond reasonable doubt that an act of sexual intercourse occurred.

Sexual intercourse includes [*describe the relevant act of intercourse from the definition in s 61HA(1) and summarise the evidence relied upon by the Crown*

(a) the penetration to any extent of the genitalia or anus of a person by—

(i) any part of the body of another person, or

(ii) any object manipulated by another person, or

(b) the introduction of any part of the genitalia of a person into the mouth of another person (often referred to as an act of fellatio), or

(c) the application of the mouth or tongue to the female genitalia (often referred to as an act of cunnilingus), or

(d) the continuation of sexual intercourse [as I have outlined]].

[*If applicable — where part of body involved in act of intercourse is surgically constructed (s 61H(4))*

It is not relevant that a part of the body involved in the act of intercourse was surgically constructed or not.**]**

[*If applicable — lack of full penetration (s 61HA(1)(a)), ejaculation or sexual gratification*

The Crown does not have to prove that full penetration occurred and/or that the accused ejaculated and/or that the act of intercourse was for the accused's sexual gratification.**]**

**[*If applicable — penetration solely for proper medical or hygienic purposes (s 61HA(2))*

Penetration carried out solely for a proper [*medical and/or hygienic*] purpose is not sexual intercourse. The Crown must prove beyond reasonable doubt that the penetration was not solely for a proper [*medical and/or hygienic*] purpose and may do so by proving either that there was no proper [*medical and/or hygienic*] purpose or that, in addition to any proper [*medical and/or hygienic*] purpose, the penetration was also for another purpose. Examples of where penetration would *not* be solely for a [*medical and/or hygienic*] purpose would be if it was also for sexual gratification, and/or to inflict humiliation upon the complainant. *Summarise the evidence and relevant arguments of the parties*.**]**

2. Without the complainant's consent

This element concerns the complainant's state of mind. The Crown must prove beyond reasonable doubt that the complainant did not consent [*to the act of intercourse*].

Everyone has a right to choose whether or not to participate in sexual intercourse. A person cannot presume that another person is consenting. Consensual sexual intercourse involves ongoing and mutual communication and decision-making and free and voluntary agreement between the persons participating in the sexual intercourse. [s 61HF].

[*If required — (s 292A Criminal Procedure Act 1986 — circumstances in which non-consensual activity occurs):* *However, you should bear in mind that non-consensual activity can occur in many different circumstances and between different kinds of people including people who know one another, or are married to one another, or who are in an established relationship with one another.*] [*See [5-200]*]

A person consents to sexual intercourse if, at the time of the act of intercourse, [*she/he*] freely and voluntarily agrees to that act of intercourse. [s 61HI(1)] Consent can be given verbally or it can be expressed by actions. However, a person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity. [s 61HI(4)]

[*If applicable — Circumstances in which there is no consent – s 61HJ*]

The law provides that circumstances in which a person does not consent to sexual intercourse include if you are satisfied beyond reasonable doubt that the person [*refer only to those that apply*]:

(a) does not say or do anything to communicate consent,

(b) does not have the capacity to consent to the act of intercourse,

(c) is so affected by alcohol or another drug as to be incapable of consenting to the act of intercourse,

(d) is unconscious or asleep,

(e) participates in the act of intercourse because of force, fear of force or fear of serious harm of any kind to [*her/him*], another person, an animal or property (regardless of when the force or the conduct giving rise to the fear occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(f) participates in the act of intercourse because of coercion, blackmail or intimidation (regardless of when the coercion, blackmail or intimidation occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(g) participates in the act of intercourse because [*she/he*] or another person is unlawfully detained,

(h) participates in the act of intercourse because [*she/he*] is overborne by the abuse of a relationship of authority, trust or dependence,

(i) participates in the act of intercourse because [*she/he*] is mistaken about the nature of the act of intercourse,

(j) participates in the act of intercourse because [*she/he*] is mistaken about the purpose of the act of intercourse (including about whether the act of intercourse is for health, hygienic or cosmetic purposes),

(k) participates in the act of intercourse with another person because [*she/he*] is mistaken about the identity of the other person or because [*she/he*] is mistaken that [*she/he*] is married to the other person, or

(l) participates in the act of intercourse because of a fraudulent inducement. [*If appropriate:* A misrepresentation about a person's income, wealth or feelings [*refer only to that or those which apply*] is not a "fraudulent inducement"].

Summarise the evidence and relevant arguments of the parties.**]**

[*If applicable — persuasion:* Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.**]**

[*If applicable — withdrawal of consent:* A person may withdraw consent to an act of intercourse at any time: [s 61HI(2)]. If the act of intercourse occurs, or continues, after consent has been withdrawn then it occurs without consent: [s 61HI(3)]. If the Crown has proved beyond reasonable doubt that the complainant withdrew consent and that the act of intercourse occurred or continued after that point in time, then you would find the occurrence or continuation of the act of intercourse was without the complainant's consent.

Summarise the evidence and relevant arguments of the parties.**]**

[*If applicable — Consent to a different act of intercourse* (s 61HI(5)): A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. There is evidence the complainant may have consented to [*describe relevant sexual activity*]. If you decide [*she/he*] may have consented to that activity, it does not follow that for that reason only [*she/he*] consented to the act of intercourse alleged by the Crown. [*Summarise the evidence and relevant arguments of the parties.*]**]**

[*If applicable — Consent to sexual activity with accused on a different occasion* (s 61HI(6)(a)): A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with that person on another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with the accused. If you decide the complainant may have consented to that activity, it does not follow that for that reason only [*she/he*] consented to the act of intercourse alleged by the Crown. *Summarise the evidence and relevant arguments of the parties*.**]**

[*If applicable — Consent to sexual activity with another person on same or another occasion* (s 61HI(6)(b)):

A person who consents to a sexual activity with a person is not, by reason only of that fact, taken to consent to a sexual activity with another person on that or another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with [*name of person*]. If you decide [*she/he*] may have consented to that activity, it does not follow that for that reason only [*she/he*] consented to the act of intercourse with the accused alleged by the Crown. *Summarise the evidence and relevant arguments of the parties*.**]**

3. The accused knew the complainant did not consent

This element concerns the accused's state of mind. The Crown must prove beyond reasonable doubt that the accused knew the complainant did not consent to the act of intercourse alleged.

The Crown has no direct evidence about what the accused's state of mind was at that time. The Crown asks you to infer or conclude that the accused knew the complainant was not consenting on the basis of the facts and circumstances which it has sought to prove occurred.

[*Give direction as to Inferences [see [3-150] or remind jury if already given.*]

For the purpose of deciding whether the Crown has proved this element, you must consider all the circumstances of the case, including what, if anything, the accused said or did: [s 61HK(5)(a)]. [*Add, if appropriate — self-induced intoxication*: However, intoxication of the accused that was self-induced must be ignored. If you consider [*he/she*] was intoxicated by voluntarily drinking alcohol [or taking drugs], you must decide if the Crown has proved this element by considering what [*his/her*] state of mind would have been if [*he/she*] had not been intoxicated: [s 61HK(5)(b)]].

The Crown will have proved the accused knew the complainant did not consent if it proves that [*refer only to those of the following that arise from the evidence*]:

1. the accused actually knew the complainant did not consent to the act of intercourse; or
2. the accused was reckless as to whether the complainant consented to the act of intercourse; or
3. any belief the accused had, or may have had, that the complainant consented to the act of intercourse was not reasonable in the circumstances.

It is important to bear in mind that it is for the Crown to prove this. As you are well aware, there is no obligation upon the accused to prove anything.

[*Actual knowledge — s 61HK(1)(a):* *Summarise the evidence and relevant arguments of the parties*.]

[*Recklessness — s 61HK(1)(b)*]

To establish that the accused was reckless as to whether the complainant consented to the act of intercourse, the Crown must prove, beyond reasonable doubt, either:

(a) that the accused failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of intercourse, even though the risk [*she/he*] was not consenting would have been obvious to someone with the accused's mental capacity had [*he/she*] turned [*his/her*] mind to it, or

(b) the accused realised the possibility that the complainant was not consenting but went ahead with the act of intercourse regardless of whether [*she/he*] was consenting or not.

[*Summarise the evidence and relevant arguments of the parties*.]

[*Belief in consent that was not reasonable in the circumstances — s 61HK(1)(c)*]

If, on the basis of the evidence led in the trial, you decide there is a possibility the accused had, or may have had, a belief that the complainant consented, the Crown must prove beyond reasonable doubt that the belief was not reasonable in the circumstances. The Crown case is that you would find that any such belief was not reasonable in the circumstances because [*state Crown's contention*].

[*If appropriate* (s 61HK(2)): A belief that the complainant consented to the act of intercourse is not reasonable if the Crown satisfies you beyond reasonable doubt the accused did not, within a reasonable time before, or at the time of, the act of intercourse, say or do anything to find out if the complainant consented.

Whether it was reasonable in the circumstances for the accused to believe the complainant was consenting to the act of intercourse is judged according to community standards. You ask yourself what would an ordinary person in the accused's position have believed at the relevant time having regard to all the circumstances of the case [*If appropriate: other than the accused's self-induced intoxication*]

[*Summarise the evidence and relevant arguments of the parties.*]

[*If applicable — cognitive or mental health impairment as a substantial cause of the accused not saying or doing anything (s 61HK(3)–(4))*:

If the Crown has proved beyond reasonable doubt that the accused did not say or do anything to ascertain whether the complainant consented to the act of intercourse, then that would establish that the belief of the accused that the complainant was not consenting was not reasonable. However, this would not be the case if the accused was suffering from a [*cognitive/mental health*] impairment at the time of the act of intercourse and that impairment was a substantial cause of [*him/her*] not saying or doing anything to ascertain whether the complainant consented to that act of intercourse.

[*Adopt so much of the definitions of mental health impairment and cognitive impairment from ss 4C and 23A(8) and (9) Crimes Act as appropriate — see further [4-304]*.]

This is a matter where the accused must prove on the balance of probabilities both that:

1. [*he/she*] was suffering from a [*cognitive/mental health*] impairment at the time of the act of intercourse; AND
2. [*his/her*] [*cognitive/mental health*] impairment was a substantial cause of [*him/her*] not saying or doing anything to ascertain whether the complainant consented to the act of intercourse.

[*Summarise the evidence and relevant arguments of the parties*.]

If the accused has not proved both these matters on the balance of probabilities, then the Crown will have established beyond reasonable doubt that [*his/her*] failure to say or do anything to ascertain whether the complainant consented to the act of intercourse was such that [*his/her*] belief the complainant was not consenting was not reasonable in the circumstances.

If the accused has proved both these matters on the balance of probabilities, then you cannot use the fact [*he/she*] did not do or say anything to ascertain whether the complainant consented to the act of intercourse in considering whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable. You must put that fact to one side and consider whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable because of other facts and circumstances.

[*For aggravated forms of the offence add from [5-840] as appropriate.*]

[5-920] Notes related to consent

1. Although in the following notes reference is made to the NSWLRC's Report and to the Second Reading Speech for the amending Act, it is not suggested these can necessarily be relied on to resolve issues that may arise when interpreting these provisions: *Interpretation Act* 1987, s 34(1)(b). Additionally, where the language used for particular provisions in Pt 3, Div 10, Sub-div 1A of the *Crimes Act* 1900 is somewhat similar to the previous legislation, it should not be assumed the meaning ascribed will automatically conform with previous case law. See *GS v R* [2022] NSWCCA 65 at [38]–[41] and *Totaan v R* [2022] NSWCCA 75 at [78]–[83] for discussion of approaches to construction of criminal statutes.
2. Section 61HI, provides for the meaning of consent generally, and states:
   (1) A person ***"consents"*** to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.
   (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.
   (3) Sexual activity that occurs after consent has been withdrawn occurs without consent.
   (4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.
   (5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

Example— A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.

(6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—

(a) the person on another occasion, or

(b) another person on that or another occasion.

3. The phrase "at the time of the relevant sexual activity" was added to s 61HI(1) at the recommendation of the NSWLRC (*Report 148: Consent in relation to sexual offences*, September 2020 at p xiii). It did not appear in s 61HE(2) (rep).

4. When describing how free and voluntary consent might be communicated (s 61HI(1)), the Attorney General said this may include "reciprocating body language or affirming remarks throughout a sexual encounter": Second Reading Speech, Legislative Assembly, *Debates*, 20 October 2021, at p 7507.

5. Section 61HJ(1) provides that a person *does not* consent to a sexual activity in the circumstances listed in s 61HJ(1)(a)–(k). This differs from, for example, s 61HE(8)(rep) which provided for grounds where it "may be" established that a person does not consent to a sexual activity. The list of circumstances in s 61HJ(1) is not exhaustive: s 61HJ(2).

6. There is a distinction between the circumstances listed in ss 61HJ(1)(a)–(d) and the balance. Section 61HJ(1)(a)–61HJ(1)(d) does not contain a causal component. For example, s 61HJ(1)(d) provides that a person does not consent to a sexual activity if "the person is unconscious or asleep". Accordingly, if the Crown proves beyond reasonable doubt, for example, that the complainant was unconscious, then there is no consent. By comparison, there is a causal component for each of the circumstances listed in s 61HJ(1)(e)–61HJ(1)(k).

7. A number of the circumstances listed in s 61HJ(1) were previously in s 61HE(5)–(8) (rep) but not all are replicated in identical terms. The following new circumstances provide that a person does not consent to sexual activity if they:

- do not say or do anything to communicate consent: s 61HJ(1)(a). This is intended to address what is referred to as the "freeze" response, where a person may not physically or verbally resist an assault: Second Reading Speech, above, p 7507; NSWLRC Report, above, at 6.25–6.57; see also s 61HI(4). How this relates to s 61HK(2), which states that an accused's belief in consent to sexual activity is not reasonable if they did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consented, may require consideration in the particular circumstances of a given case.

- are unconscious or asleep: s 61HJ(1)(d). This is intended to clarify that consent is only present if the person is awake and conscious at the time of the sexual act, regardless of anything they may have said or done in the past: Second Reading Speech, above, p 7509.

- participate in the sexual activity because of force, fear or force or fear of serious harm of any kind to the person, another person, an animal or property regardless of when the force or conduct giving rise to the force occurred, or whether it occurs as a single instance or as part of an ongoing pattern: s 61HJ(1)(e). While similar to s 61HE(5)(c) (rep), s 61HJ(1)(d) is broader in scope.
- participate in the sexual activity because of coercion, blackmail or intimidation whether it occurs as a single instance or as part of an ongoing pattern: s 61HJ(1)(f). This, and s 61HJ(1)(e), are intended to capture conduct which may amount to coercive control, not "mere begging and nagging": Second Reading Speech, above, p 7509. It is not limited to domestic and family violence.
- participate in the sexual activity because of a fraudulent inducement: s 61HJ(1)(k). See further below.

Fraudulent inducement

8. Section 61HJ(1)(k) is in different terms to its predecessor, s 61HE(6)(d) (rep), which stated that a person did not consent to a sexual activity if they had "any other mistaken belief about the nature of the activity induced by fraudulent means".

9. A "fraudulent inducement" is not defined. While s 61HJ(3) provides that a "fraudulent inducement" does not include a misrepresentation about a person's income, wealth or feelings, the conduct that might amount to a fraudulent inducement is otherwise unlimited. However, the Attorney-General said the relevant conduct must amount to a "very serious deceit". The example given was those cases where sex workers are fraudulently promised payment for sexual services. The Attorney said that it was unlikely that s 61HI(1)(k) would extend to "pick-up lines or white lies": Second Reading Speech, above, p 7510.

10. The use of "because of" in s 61HJ(1)(k) makes clear that there is a causal connection between the fraudulent inducement and the complainant's *participation* in the relevant sexual activity. This differs from the common law which provided that consent to an act of sexual intercourse was vitiated by fraud when the fraud concerned the nature and character of the act: see *R v Clarence* (1888) 22 QBD 23 at 43; *Papadimitropoulos v The Queen* (1957) 98 CLR 249 at 260–261; see also *Michael v Western Australia* [2007] WASCA 66 at [314]–[333] for a discussion of the common law and its application.

11. Some guidance about conduct that might constitute a "fraudulent inducement", may be found in existing Australian case law in those jurisdictions where the relevant legislation is similar to that of New South Wales: see for example s 319(2)(a) *Criminal Code* (WA) and s 67(1) *Crimes Act* 1900 (ACT); cf s 348 *Criminal Code* 1899 (Qld) and the discussion of some of the differences by Refshauge ACJ in *R v Tamawiwy (No 2)* (2015) ACTLR 82 at [37]–[52].

12. In *Higgins v Western Australia* [2016] WASCA 142, Mazza J described a fraudulent or deceitful representation as one "which is false in fact and which the maker knows at the time of making it to be false.": at [142]. By making the representation, the accused must intend to obtain the complainant's consent to the relevant sexual activity when they would not otherwise have consented: *Higgins v Western Australia* at [142].

13. In *Michael v Western Australia*, the majority concluded that the actions of the accused, who pretended he was a police officer, to induce the complainants, who were both prostitutes, to engage in sexual intercourse for a reduced, or no, fee was sufficient to negate consent: at [88] (Steytler, P); [164]–[166] (Miller JA); cf Heenan AJA at [376]. In *R v Tamawiwy (No 2)*, the accused represented to the complainant that he was a woman with two young female friends, all three of whom were willing to have sexual intercourse with the complainant provided he first engaged in sexual activity with the accused (introduced by a false name). Refshauge ACJ, who was determining a no case submission, described the representations as "a serious deception" and "elaborate hoax" and concluded that a jury might properly find they amounted to fraudulent misrepresentations: [58], [64]–[66]. *Onnis v R* [2013] VSCA 271, which concerned multiple case of procuring sexual penetration by fraud (*Crimes Act* 1958 (Vic), s 57(2)), involved conduct similar to that in *R v Tamawiwy (No 2)*: see [7]–[16]. In *DPP v Macfie* [2012] VSCA 314, where the offender was charged with procuring sexual penetration by fraudulent means, he induced young girls to have sex with him by telling them he was a member of the Mafia, promising them things such as money and iPhones, also saying that a condition of them joining the Mafia was that they had sex with him.

14. The Crown should precisely identify the fraudulent inducement from the outset of the trial: *R v Tamawiwy (No 2)* at [15].

Knowledge about consent

15. Section 61HK(1) provides that the accused is taken to know that another person does not consent to a sexual activity if—

    (a) the accused actually knows the other person does not consent to the sexual activity, or

    (b) the accused is reckless as to whether the other person consents to the sexual activity, or

    (c) any belief that the accused has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

16. With the exception of the addition of the word "actually" in s 61HK(1)(a), s 61HK(1)(a) and 61HK(1)(b) are in relevantly identical terms to s 61HE(3)(a) and 61HE(3)(b) (rep).

17. Whether an accused's belief as to consent was "not reasonable in the circumstances" involves a hybrid subjective/objective test. As to the subjective aspect, the relevant belief is that of the accused: see *O'Sullivan v R* [2012] NSWCCA 45 at [124]–[126]. The onus is on the Crown to prove beyond reasonable doubt that the accused's belief was not reasonable in the circumstances. If there is something in the evidence that may give rise to a possibility the accused had a belief the complainant was consenting, a direction will be required as to the need for the Crown to prove beyond reasonable doubt that such a belief was not a reasonable one. There is no onus on the accused. Assistance with the concept of "reasonableness" might be derived from *Aubertin v Western Australia* (2006) WAR 87 at [25]–[44]; see also *Doran v Director of Public Prosecutions* [2019] NSWSC 1191 at [36]–[47].

18. In determining whether the accused's belief was "not reasonable in the circumstances", s 61HK(2) states that a belief is not reasonable if the accused:

> … did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.

19. A "reasonable time" is not defined.

20. Section 61HK(3) provides that s 61HK(2) does not apply if, at the time of the relevant sexual activity, the accused had a cognitive impairment or a mental health impairment, and the impairment was a substantial cause of the accused not saying or doing anything. "Mental health impairment" is defined in s 4C *Crimes Act*. "Cognitive impairment" is defined by reference to s 23A(8) of the *Crimes Act*: s 61HK(3)(a)(i). Both definitions are identical to those found in ss 4 and 5 *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020. See **[4-304]** "Statutory definitions of mental health and cognitive impairments" in **Procedures for fitness to be tried (including special hearings)**. The onus of establishing one of the matters referred to in s 61HK(3) is on the accused on the balance of probabilities: s 61HK(4).

[The next page is 851]

Sexual intercourse — cognitive impairment

Section 66F *Crimes Act* 1900 (NSW)

NOTE: This chapter includes references to ss 61L, 61M, 61N, 61O and 61P, which were repealed with effect from 1 December 2018 by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (s 2, LW 30.11.2018). Those provisions continue to apply to offences committed or alleged to have been committed before 1 December 2018: *Crimes Act* 1900, Sch 11, Pt 35.

[5-1000] Introduction

The following section applies to offences committed after the commencement of the *Crimes Amendment (Cognitive Impairment—Sexual Offences) Act* 2008, that is, 1 December 2008.

Section 66F *Crimes Act* 1900 creates two offences. One of having sexual intercourse with a person who has a cognitive impairment where the accused was responsible for the care of that person (either generally or at the time of the sexual intercourse): s 66F(2). The care of a person with a cognitive impairment includes voluntary care, health professional care, education, home care and supervision and includes care provided "in the course of a program" at a facility or at home: s 66F(1).

The other offence is having sexual intercourse with a person who has a cognitive impairment with the intention of taking advantage of that person's cognitive impairment: s 66F(3).

The amendments made to s 66F by the *Crimes Amendment (Cognitive Impairment —Sexual Offences) Act* 2008 replace the term "intellectual disability" with the term "cognitive impairment". "Cognitive impairment" is defined by s 61H(1A), which provides that a person is cognitively impaired if he or she has:

- an intellectual disability
- developmental disorder (including autism spectrum disorder)
- a neurological disorder
- dementia
- severe mental illness, or
- a brain injury,

that results in the person requiring supervision or social habilitation in connection with daily life activities.

Somewhat unhelpfully, expressions "supervision" and "social habilitation" are not defined.

It is suggested that the "supervision" of a person, in this context, may be taken to mean the power to give directions as to that person's activities or the obligation to keep watch over those activities for that person's protection.

It is suggested that "social habilitation" may be taken to mean the need to gain the social capacity or skills necessary to function in the community as a self-reliant citizen.

These are suggestions only and judges should consider carefully whether these meanings, which are incorporated in the draft directions below, should be put to the jury.

The consent of a person who has a cognitive impairment is not a defence to a charge under s 66F(2)–(4): s 66F(5).

The consent of a cognitively impaired person is also not a defence to a charge of indecent assault (s 61L), aggravated indecent assault (s 61M(1)), act of indecency (s 61N(2)), aggravated act of indecency (s 61O(1A)) or attempts to commit these offences (s 61P), if the accused:

- was responsible for the care of a cognitively impaired person: s 66F(6)(a), or
- engaged in the conduct with a cognitively impaired person intending to take advantage of that person's cognitive impairment: s 66F(6)(b).

Section 66F(7) sets out three defences to a charge arising from s 66F(2)–(4) or (6):

- if the accused did not know the person to whom the charge relates had a cognitive impairment: s 66F(7)(a)(i)
- the accused was married to the person to whom the charge relates or was their de facto partner: s 66F(7)(a)(ii), or
- where the act was carried out for a proper medical purpose: s 66F(7)(b).

As the defence of lack of knowledge is likely to be the most common, the draft directions below deal with that defence only. They will, of course, require modification if another defence is relied on.

[5-1010] Prescribed sexual offences

An offence pursuant to s 66F is a "prescribed sexual offence" as defined in s 3 *Criminal Procedure Act* 1986. Proceedings for all prescribed sexual offences are subject to the operation of particular provisions of the *Criminal Procedure Act* and the *Crimes Act*. For further details of these provisions and their application see **Evidence given by alternative means** at **[1-360]** and **Closed court, suppression and non-publication orders** at **[1-349]**.

[5-1020] Suggested direction — s 66F(2)

[*The accused*] has been charged with having sexual intercourse with a person who has a cognitive impairment at the time when [*he/she*] was responsible for the care of that person.

The Crown must establish, beyond reasonable doubt, each of the four ingredients or elements of that offence:

1. that [*the accused*] had sexual intercourse with [*the complainant*], and
2. that, at the time of that sexual intercourse, [*the complainant*] was a person who had a cognitive impairment, and

3. that, at the time of that sexual intercourse, [*the accused*] knew that [*the complainant*] had a cognitive impairment, and

4. that, at the time of that sexual intercourse, [*the accused*] was responsible for the care of [*the complainant*].

[Where appropriate

The Crown does not have to establish that [*the complainant*] did not consent to the sexual intercourse which took place. Consent is not an issue in this case.**]**

In relation to the various ingredients of the offence, that:

1. [*The accused*] had sexual intercourse with [*the complainant*]. Sexual intercourse means, so far as is here relevant … [*insert only those parts of the s 61H definition as are relevant to the particular case. See [5-800]*].

2. At the time of the sexual intercourse, [*the complainant*] was a person who had a cognitive impairment [*refer to the evidence the Crown relies on as it relates to s 61H(1A) quoted above and the accused's response to it*].

   The Crown must establish that [*the complainant*] had a cognitive impairment which meant that the person required supervision or social habilitation in connection with daily life activities.

   The supervision of a person in this context means the power to give directions as to that person's activities or the obligation to keep watch over those activities for that person's protection. The social habilitation of a person in this context means the training of that person to gain the social capacity or skills necessary to function in the community as a self-reliant citizen.

   The Crown must establish that [*the complainant's*] need for supervision or social habilitation resulted from (or was caused by) the cognitive impairment … [*refer here to the evidence*].

3. The Crown must prove beyond reasonable doubt that [*the accused*] knew that [*the complainant*] had a cognitive impairment. It is not enough if the Crown proves that [*the accused*] should have known that [*the complainant*] had a cognitive impairment. The Crown must establish that [*the accused*] actually knew. It is not a question of what you would have known if you were in the accused's position, or what a reasonable person would have known. It is a question of what this accused actually knew. Has the Crown proved beyond reasonable doubt that he knew that the complainant had a cognitive impairment which meant that he/she required supervision or social habilitation in connection with daily life activities? In deciding this issue, you may take into account all of the circumstances, including those in which the sexual intercourse took place, in deciding what [*the accused's*] state of mind was … [*refer to the relevant circumstances*].

4. At the time when [*the accused*] had sexual intercourse with [*the complainant*], [*the complainant*] was under the care of [*the accused*] in connection with a facility or program providing services for persons who have cognitive impairments. The care of a person includes voluntary care, health professional care, education, home care and supervision. [*The accused*] may be responsible for the care of the complainant either generally or at the time of the sexual intercourse.

[*Refer to the evidence relied upon by the Crown and the accused's response to it.*]

[5-1030] Suggested direction — s 66F(3)

[*The accused*] has been charged with the offence of having sexual intercourse with a person known by [*him/her*] to have a cognitive impairment, with the intention of taking advantage of that person's cognitive impairment.

The Crown must establish beyond reasonable doubt each of the four ingredients or elements of that offence:

1. that [*the accused*] had sexual intercourse with [*the complainant*], and
2. that, at the time of that sexual intercourse, [*the complainant*] was a person who had an a cognitive impairment, and
3. that, at the time of that sexual intercourse, [*the accused*] knew that [*the complainant*] had a cognitive impairment, and
4. that [*the accused*] had sexual intercourse with [*the complainant*] with the intention of taking advantage of [*her/his*] cognitive impairment.

[Where appropriate

The Crown does not have to establish that [*the complainant*] did not consent to the sexual intercourse which took place. Consent is not an issue in this case, and the accused can be found guilty even if the complainant consented to everything which happened between him/her and the accused.**]**

In relation to the various ingredients of the offence, that:

1. [*The accused*] had sexual intercourse with [*the complainant*]. Sexual intercourse means, so far as is here relevant … [*insert only those parts of the s 61H definition as are relevant to the particular case. See [5-800]*].
2. At the time of the sexual intercourse, [*the complainant*] was a person who had a cognitive impairment [*refer to the evidence the Crown relies on as it relates to s 61H(1A)*].

   The Crown must establish that [*the complainant*] had a cognitive impairment which meant that [*she/he*] required supervision or social habilitation in connection with daily life activities.

   The supervision of a person in this context means the power to give directions as to that person's activities or the obligation to keep watch over those activities for that person's protection. The social habilitation of a person in this context means the training of that person to gain the social capacity or skills necessary to function in the community as a self-reliant citizen.

   The Crown must establish that [*the complainant's*] need for supervision or social habilitation resulted from (or was caused by) the cognitive impairment … [*refer here to the evidence*].
3. The Crown must prove beyond reasonable doubt that [*the accused*] knew that [*the complainant*] had a cognitive impairment. It is not enough if the Crown proves that [*the accused*] should have known that [*the complainant*] had a cognitive impairment. The Crown must establish that [*the accused*] actually knew. It is not a question of what you would have known if you were in the accused's position, or

what a reasonable person would have known. It is a question of what this accused actually knew. Has the Crown proved beyond reasonable doubt that he knew that the complainant had a cognitive impairment which meant that he/she required supervision or social habilitation in connection with daily life activities? In deciding this issue, you may take into account all of the circumstances, including those in which the sexual intercourse took place, in deciding what [*the accused's*] state of mind was … [*refer to the relevant circumstances*].

4. [*The accused*] had sexual intercourse with [*the complainant*] with the intention of taking advantage of [*her/his*] cognitive impairment. Intention is a state of mind, and you may take into account all of the circumstances in which the sexual intercourse took place in determining what [*the accused's*] state of mind was … [*refer to the circumstances*].

You should consider such things as what [*the accused*] did or did not do and by what [*he/she*] said or did not say. You should look at [*his/her*] actions before, at the time of, and after the alleged offence. All these things may shed light on [*his/her*] intention at the relevant time.

[5-1040] Sexual intercourse — intellectual disability (offences under s 66F committed prior to 1 December 2008)

The following section deals with the law as it stood prior to the enactment of the *Crimes Amendment (Cognitive Impairment—Sexual Offences) Act* 2008, that is, 1 December 2008. The amendments made by that Act do not apply in respect of an offence committed before the commencement of the amendment: *Crimes Act*, Sch 11, Pt 26.

Section 66F *Crimes Act* created two offences. One of having sexual intercourse with a person known by the accused to have an intellectual disability and who was (at that time) under that person's authority: s 66F(2). This has been described as "the carer's offence".

The other offence was having sexual intercourse with a person known by the accused to have an intellectual disability with the intention of taking advantage of that person's vulnerability to sexual exploitation: s 66F(3). This has been described as "the exploitation offence", and it applies to anyone with knowledge of the complainant's disability. See NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Discussion Paper 35, 1994 at [9.18].

For the purposes of s 66F prior to 1 December 2008:

1. "Intellectual disability" meant "an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with daily life activities": s 66F(1).
2. The phrase "general intellectual function" was not defined. Nor were the expressions "supervision" and "social habilitation" defined.
3. It is suggested that the "supervision" of a person, in this context, may be taken to mean the power to give directions as to that person's activities or the obligation to keep watch over those activities for that person's protection.
4. It is suggested that social habilitation may be taken to mean the need to gain the social capacity or skills necessary to function in the community as a self-reliant citizen.

With regard to the phrase "under the authority of" in s 66F(2), reference is to be made to s 61H(2) which provides that, for the purposes of inter alia, s 66F, a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person. This definition was considered in *R v DH* (unrep, 14/07/97, NSWCCA).

Section 66F(5) provided that:

> A person does not commit an offence under this section unless the person knows that the person concerned has an intellectual disability.

In the case of a prosecution under s 66F(2), this element should not create difficulty if the Crown establishes, in accordance with s 66F(2)(b), that the intellectually disabled person was under the authority of the accused in connection with any facility or program providing services to persons who have intellectual disabilities.

[5-1050] Suggested direction — s 66F(2) (offence committed prior to 1 December 2008)

[*The accused*] has been charged with the offence of having sexual intercourse with a person known by [*him/her*] to have an intellectual disability and who was at the time under [*his/her*] authority.

The Crown must establish, beyond reasonable doubt, each of the four ingredients or elements of that offence:

1. that [*the accused*] had sexual intercourse with [*the complainant*], and
2. that, at the time of that sexual intercourse, [*the complainant*] was a person who had an intellectual disability, and
3. that, at the time of that sexual intercourse, [*the accused*] knew that [*the complainant*] was such a person, and
4. that, at the time of that sexual intercourse, [*the complainant*] was under the authority of [*the accused*] in connection with a facility or program providing services for persons who have intellectual disabilities.

[Where appropriate

Because the offence has been created in order to protect persons who are vulnerable to sexual exploitation, if necessary from themselves, the Crown does not have to establish that [*the complainant*] did not consent to the sexual intercourse which took place. Consent is not an issue in this case.**]**

In relation to the various ingredients of the offence, that:

1. [*The accused*] had sexual intercourse with [*the complainant*]. Sexual intercourse means, so far as is here relevant … [*insert only those parts of the s 61H definition as are relevant to the particular case. See [5-800]*].
2. At the time of the sexual intercourse, [*the complainant*] was a person who had an intellectual disability. A person with an intellectual disability is one whose general intellectual functioning is appreciably below the intellectual functioning

of the average member of the community, and who, as a result of that disability, requires supervision or social habilitation in connection with that person's daily life activities.

A person's general intellectual functioning is the process by which that person knows or understands or reasons what or how to do something, or why to do or not to do something. Members of the community vary greatly in their intellectual functioning, and the Crown must establish that [*the complainant's*] intellectual functioning is appreciably below the intellectual functioning of an average member of the community. The Crown must also show that as a result of the disability, [*the complainant*] requires supervision or social habilitation.

The supervision of a person in this context means the power to give directions as to that person's activities or the obligation to keep watch over those activities for that person's protection. The social habilitation of a person in this context means the training of that person to gain the social capacity or skills necessary to function in the community as a self-reliant citizen.

The Crown must establish that [*the complainant's*] need for supervision or social habilitation resulted from (or was caused by) the intellectual disability … [*refer here to the relevant lay and expert evidence*].

3. The Crown must prove beyond reasonable doubt that [*the accused*] knew that [*the complainant*] had an intellectual disability. It is not enough if the Crown proves that [*the accused*] should have known that [*the complainant*] had an intellectual disability. The Crown must establish that [*the accused*] actually knew. It is not a question of what you would have known if you were in the accused's position, or what a reasonable person would have known. It is a question of what this accused actually knew. Has the Crown proved beyond reasonable doubt that [*the accused*] knew that [*the complainant*] had an intellectual disability which meant that he/she required supervision or social habilitation in connection with daily life activities? In deciding this issue, you may take into account all of the circumstances, including those in which the sexual intercourse took place, in deciding what [*the accused's*] state of mind was … [*refer to relevant circumstances*].
4. At the time when [*the accused*] had sexual intercourse with [*the complainant*], [*the complainant*] was under the authority of [*the accused*] in connection with a facility or program providing services for persons who have intellectual disabilities. One person is under the authority of another person if that person is in the care of, or under the supervision or authority, of that other person … [*see: s 61H(2)*].

[*Refer to evidence relied upon by the Crown and the accused's response to it.*]

[5-1060] Suggested direction — s 66F(3) (offence committed prior to 1 December 2008)

[*The accused*] has been charged with the offence of having sexual intercourse with a person known by [*him/her*] to have an intellectual disability, with the intention of taking advantage of that person's vulnerability to sexual exploitation.

The Crown must establish beyond reasonable doubt each of the four ingredients or elements of that offence:

1. that [*the accused*] had sexual intercourse with [*the complainant*], and
2. that, at the time of that sexual intercourse, [*the complainant*] was a person who had an intellectual disability, and
3. that, at the time of that sexual intercourse, [*the accused*] knew that [*the complainant*] as such a person, and
4. that [*the accused*] had sexual intercourse with [*the complainant*] with the intention of taking advantage of [*her/his*] vulnerability to sexual exploitation.

[Where appropriate

The Crown does not have to establish that [*the complainant*] did not consent to the sexual intercourse which took place. Consent is not an issue in this case, and the accused can be found guilty even if [*the complainant*] consented to everything which happened between him/her and the accused.**]**

In relation to the various ingredients of the offence, that:

1. [*The accused*] had sexual intercourse with [*the complainant*]. Sexual intercourse means, so far as is here relevant … [*insert only those parts of the s 61H definition as are relevant to the particular case. See [5-800]*].
2. At the time of the sexual intercourse, [*the complainant*] was a person who had an intellectual disability. A person with an intellectual disability is one whose general intellectual functioning is appreciably below the intellectual functioning of the average member of the community, and who, as a result of that disability, requires supervision or social habilitation in connection with that person's daily life activities. A person's general intellectual functioning is the process by which that person knows or understands or reasons what or how to do something or why to do or not to do something. Members of the community vary greatly in their intellectual functioning, and the Crown must establish that [*the complainant's*] intellectual functioning is appreciably below the intellectual functioning of an average member of the community. The Crown must also show that as a result of the disability [*the complainant*] requires supervision or social habilitation.

   The supervision of a person in this context means the power to give directions as to that person's activities or the obligation to keep watch over those activities for that person's protection. The social habilitation of a person in this context means the training of that person to gain the social capacity or skills necessary to function in the community as a self reliant citizen. The Crown must establish that [*the complainant's*] need for supervision or social habilitation resulted from (or was caused by) the intellectual disability.
3. The Crown must prove beyond reasonable doubt that [*the accused*] knew that [*the complainant*] had an intellectual disability. It is not enough if the Crown proves that [*the accused*] should have known that [*the complainant*] had an intellectual disability. The Crown must establish that [*the accused*] actually knew. It is not a question of what you would have known if you were in the accused's position, or what a reasonable person would have known. It is a question of what this accused actually knew. Has the Crown proved beyond reasonable

doubt that [*the accused*] knew that the complainant had an intellectual disability which meant that he/she required supervision or social habilitation in connection with daily life activities? In deciding this issue, you may take into account all of the circumstances, including those in which the sexual intercourse took place, in deciding what [*the accused's*] state of mind was … [*refer to relevant circumstances*].

4. [*The accused*] had sexual intercourse with [*the complainant*] with the intention of taking advantage of [*her/his*] vulnerability to sexual exploitation. Again, an intention is a state of mind, and you may take into account all of the circumstances in which the sexual intercourse took place in determining what that state of mind was … [*relevant circumstances must be identified*].

You decide intention by considering what [*the accused*] did or did not do and by what [*he/she*] said or did not say. You should look at [*his/her*] actions before, at the time of, and after the alleged offence. All these things may shed light on [*his/her*] intention at the critical time. [*The accused's*] intention to take such advantage of [*the complainant*] may be established by the Crown only if the circumstances have been shown to be such that [*he/she*] must have had such an intention. The Crown must eliminate any reasonable doubt as to whether [*the accused*] did have such an intention.

[5-1070] Notes

1. For a discussion of s 66F prior to the amendments by the *Crimes Amendment (Cognitive Impairment—Sexual Offences) Act* 2008: see *R v Grech* [1999] NSWCCA 268; *R v Parsons* (unrep,17/12/90, NSWCCA) and *DPP v WJW* (2000) 115 A Crim R 217.

[The next page is 861]

Sexual touching

***Crimes Act* 1900 (NSW), ss 61KC, 61KD, 66DA and 66DB**

Important note: The directions in ss 292–292E *Criminal Procedure Act* 1986 apply to proceedings for these offences which commence from 1 June 2022, regardless of when the offence was committed: Sch 2, Pt 42. See further **[5-200] Directions — misconceptions about consent in sexual assault trials**. The procedure for filing a Crown or Defence Readiness Hearing Case Management Form requires the parties to identify, amongst other matters, which directions under ss 292A–292E may be required at trial. It would be prudent to commence a discussion early in the trial concerning which of these directions, if any, might be required in a particular trial.

[5-1100] Introduction

Last reviewed: September 2023

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (the amending Act) implemented recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse and the Child Sexual Offences Review team to reform the law with respect to sexual offences. These included repealing the basic and aggravated offences of indecent assault (former ss 61L and 61M *Crimes Act* 1900, respectively) and replacing them with separate offences of sexual touching in ss 61KC and 61KD for adults, and in ss 66DA and 66DB for children.

The new provisions apply to offences committed on or after 1 December 2018: *Crimes Act* 1900, Sch 11, Pt 35.

For offences committed before 1 December 2018 see **[5-600] Indecent assault**.

"Sexual touching" is defined in s 61HB(1) as a person touching another person in circumstances a reasonable person would consider to be sexual:

(a) with any part of the body or with anything else, or

(b) through anything, including anything worn by the person doing the touching or by the person being touched.

The following matters in s 61HB(2) must be considered when deciding whether a reasonable person would consider touching to be sexual:

(a) whether the area of the body touched or doing the touching is the person's genital area or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person's breasts, whether or not the breasts are sexually developed, or

(b) whether the person doing the touching does so for the purpose of obtaining sexual arousal or sexual gratification, or

(c) whether any other aspect of the touching (including the circumstances in which it is done) makes it sexual.

Offences against ss 61KC, 61KD, 66DA and 66DB are "prescribed sexual offences": s 3 *Criminal Procedure Act* 1986. Particular provisions of the *Criminal Procedure Act* and the *Crimes Act* apply to proceedings for such offences: see **Evidence given by alternative means** at **[1-360]**ff, and **Closed court, suppression and non-publication orders** at **[1-349]**.

See also: *Criminal Practice and Procedure NSW* at [8-s 61KC], [8-s 61KD], [8-s 66DA] and [8-s 66DB].

[5-1110] Suggested direction — basic offence (s 61KC) — until 31 May 2022

Last reviewed: September 2023

The suggested direction is based on the offence in s 61KC(a). For incitement offences see the commentary at **[5-1170] Notes — Incitement offences**.

It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.

For the suggested direction for offences involving a child, see **[5-1150] Suggested direction — sexually touching a child under 10 (s 66DA)**.

The accused is charged with sexual touching. The Crown case is that [*briefly outline the incident/s to which the charge relates*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following four elements which make up the offence.

1. the accused intentionally touched the complainant;
2. the touching was sexual;
3. the complainant did not consent to being touched in that way; and
4. the accused knew the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them you must find the accused not guilty.

1. **The accused intentionally touched the complainant**

   The slightest contact with the complainant is enough to amount to touching.

   The touching does not have to be a hostile or aggressive act or one that caused the complainant fear or pain, but it must be an intentional touching; not an accidental touching.

2. **The touching was sexual**

   Sexual touching means touching another person with any part of the body **[***add where relevant*: "or with anything else, or through anything, including through anything worn by the person doing the touching or by the person being touched"**]**, in circumstances where a reasonable person would consider the touching to be sexual.

   In determining whether a reasonable person would consider the touching was sexual, you should consider everything that you regard as relevant, but there are some particular matters you are required to take into account. They are:

   - the part of the body touched, **[***or if appropriate*: "or doing the touching"]. Was it the genital or anal area or the breasts **[***and add where relevant*: whether or not the breasts are sexually developed, and regardless of the person's gender or sex**]**?

- whether the person doing the touching did so for the purpose of obtaining sexual arousal or sexual gratification.
- was there any other aspect of the touching (including the circumstances in which it was done) which made it sexual?

The Crown is not required to prove any particular one of these matters. They are matters you are required to take into account, along with anything else you consider to be relevant when you are deciding whether the Crown has proved that the touching was "sexual".

[*Where appropriate*: A touching done for genuine medical or hygienic purposes is not a sexual touching. As that is what the accused says was the reason for the touching in this case, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

3. **The sexual touching was done without the complainant's consent**

The third element concerns the complainant's state of mind. The Crown must prove that the sexual touching was done without their consent.

Consent means that a person freely and voluntarily agrees to something. So, the Crown is required to prove the complainant did not freely and voluntarily agree to the sexual touching.

You are concerned with whether the complainant did not consent to the touching at the time the touching occurred. What the complainant's state of mind was before or after the touching might provide a guide, but the question is whether the Crown has proved that they were not consenting at the time the touching occurred.

[*Where appropriate***:** The complainant said in evidence that they did not consent to being sexually touched. If you accept that evidence, then you could be satisfied the Crown has proved this element.**]**

In deciding whether you accept that the complainant was not consenting you may also take into account any of the following:

(a) Consent obtained after persuasion is still consent, provided that ultimately it is given freely and voluntarily.

(b) Consent, or lack of consent, may be indicated by what the complainant said or did. In other words, the complainant's words or actions, or both, may indicate whether or not there was consent.

(c) A person who does not offer actual physical resistance to sexual touching is not, by reason only of that fact, to be regarded as consenting to that touching. There is no legal requirement for a person to physically resist before a jury can find that the person did not consent.

[*If applicable, add one or more of the following* **[s 61HE(5)–(6)]:**

The law provides that a person does not consent to sexual touching:

- if they do not have the capacity to consent, including because of their age or cognitive incapacity, or
- if they did not have the opportunity to consent because they were unconscious or asleep, or

- if they consent because of threats of force or terror (whether the threats are against, or the terror is instilled in, them or another person), or
- if they consent because they were unlawfully detained, or
- if the person consented under a mistaken belief:
  - as to the other person's identity, or
  - that the other person is married to the person, or
  - that the sexual activity is for health or hygienic purposes, or
  - about the nature of the activity that has been induced by fraudulent means.**]**

[*If applicable, add one or more of the following* **[s 61HE(8)]:**

It may be established that the complainant did not consent to the sexual touching if:

- they consented while substantially intoxicated by alcohol or any drug, or
- they consented because of intimidatory or coercive conduct, or other threat, even though that conduct does not involve a threat of force, or
- they consented because of the abuse of a position of authority or trust.

If you are satisfied the complainant consented in that circumstance, it does not necessarily follow that you should be satisfied beyond reasonable doubt they did not consent. The essential matter the Crown must prove is that the complainant did not consent in the sense that they did not freely and voluntarily agree to the sexual touching.**]**

To repeat what I have said, the third element the Crown must prove concerns the complainant's state of mind. The Crown must prove the complainant did not consent to the sexual touching at the time it occurred.

4. **The accused knew the complainant did not consent**

The fourth element concerns the accused's state of mind. The Crown is required to prove the accused knew the complainant did not consent to the sexual touching.

This is a question about what the accused's state of mind actually was. It is not a question about what you or anyone else would have known, thought or believed in the circumstances. It is what they knew, thought or believed.

You must consider all of the circumstances, including any steps taken by the accused to make sure the complainant consented to the sexual touching.

[*Add, if appropriate:* The law is that any intoxication of the accused that was self-induced must be ignored. If you consider that they were intoxicated by voluntarily drinking alcohol [or taking drugs], you must ignore that and decide this element by considering what their state of mind would have been if they had not been intoxicated.**]**

The law says the Crown will have proved the accused knew the complainant did not consent to sexual touching if: [*refer only to those of the following matters that arise from the evidence* — **see further [5-1120] Notes below**]

(a) the accused knew the complainant did not consent; or

(b) the accused was reckless as to whether the complainant consented because the accused realised there was a possibility the complainant did not consent; or

(c) the accused was reckless as to whether the complainant consented because the accused did not even think about whether the complainant consented but went ahead not caring, or considering it was irrelevant whether they consented; or

(d) the accused may have actually believed the complainant consented, but the accused had no reasonable grounds for that belief; or

(e) the accused knew the complainant consented under a mistaken belief about **[refer to those parts of s 61HE(6) that may apply]**.

To repeat what I said at the beginning of these directions, you can only find the accused guilty if the Crown proves each of the four elements beyond reasonable doubt. If the Crown fails to prove any one of them you must find the accused not guilty.

[5-1115] Suggested direction — basic offence (s 61KC) — from 1 June 2022

Last reviewed: September 2023

Notes:

1. Sections 61HF–61HK *Crimes Act* 1900 which relate to consent and proof of consent apply to offences committed from 1 June 2022. See **[5-900] Sexual intercourse without consent — from 1 June 2022** and **[5-920] Notes related to consent** for the commentary related to these provisions. See also the notes preceding the suggested direction at **[5-1110]** above.
2. The suggested direction is framed in terms of what the Crown is required to prove. It is a matter of discretion as to how often it is appropriate to remind the jury that the accused is not obliged to prove anything.

The accused is charged with sexual touching. The Crown case is that [*briefly outline the incident/s to which the charge relates*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following four elements which make up the offence.

1. the accused intentionally touched the complainant;
2. the touching was sexual;
3. without the complainant's consent to being touched in that way; and
4. the accused knew the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of these elements you must find the accused not guilty.

1. The accused intentionally touched the complainant

The slightest contact with the complainant is enough to amount to touching.

The touching does not have to be a hostile or aggressive act or one that caused the complainant fear or pain, but it must be an intentional touching; not an accidental touching.

2. The touching was sexual

Sexual touching means touching another person with any part of the body [*add where relevant*: "or with anything else, or through anything, including through anything worn by the person doing the touching or by the person being touched"], in circumstances where a reasonable person would consider the touching to be sexual.

In determining whether a reasonable person would consider the touching was sexual, you should consider everything that you regard as relevant, but there are some particular matters you are required to take into account. They are:

- the part of the body touched, [*or if appropriate*: "or doing the touching"]. Was it the genital or anal area or the breasts **[***and add where relevant*: whether or not the breasts are sexually developed, and regardless of the person's gender or sex**]**?
- whether the person doing the touching did so for the purpose of obtaining sexual arousal or sexual gratification.
- was there any other aspect of the touching (including the circumstances in which it was done) which made it sexual?

The Crown is not required to prove any particular one of these matters. They are matters you are required to take into account, along with anything else you consider to be relevant when you are deciding whether the Crown has proved that the touching was "sexual".

[*Where appropriate*: A touching done for genuine medical or hygienic purposes is not a sexual touching. As that is what the accused says was the reason for the touching in this case, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

3. Without the complainant's consent

This element concerns the complainant's state of mind. The Crown must prove beyond reasonable doubt that the complainant did not consent to the sexual touching.

Everyone has a right to choose whether or not to participate in sexual touching. A person cannot presume that another person is consenting. Consensual sexual touching involves ongoing and mutual communication and decision-making and free and voluntary agreement between the persons participating in the sexual touching. **[s 61HF]**

[***If required (s 292A Criminal Procedure Act 1986 — circumstances in which non-consensual activity occurs)***: *However, you should bear in mind that non-consensual sexual activity can occur in many different circumstances and between different kinds of people including people who know one another, or are married to one another, or who are in an established relationship with one another*.] [*See* ***[5-200]***]

A person consents to sexual touching if, at the time of the touching, they freely and voluntarily agree to the touching: [**s 61HI(1)**]. Consent can be given verbally or it

can be expressed by actions. However, a person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity: [**s 61HI(4)**].

[*If applicable — circumstances in which there is no consent — s 61HJ*:

The law provides that circumstances in which a person does not consent to sexual touching include if you are satisfied beyond reasonable doubt that the person [*refer only to those that apply*]:

(a) does not say or do anything to communicate consent,

(b) does not have the capacity to consent to the sexual touching,

(c) is so affected by alcohol or another drug as to be incapable of consenting to the sexual touching,

(d) is unconscious or asleep,

(e) participates in the sexual touching because of force, fear of force or fear of serious harm of any kind to them, another person, an animal or property (regardless of when the force or the conduct giving rise to the fear occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(f) participates in the sexual touching because of coercion, blackmail or intimidation (regardless of when the coercion, blackmail or intimidation occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(g) participates in the sexual touching because they or another person is unlawfully detained,

(h) participates in the sexual touching because they are overborne by the abuse of a relationship of authority, trust or dependence,

(i) participates in the sexual touching because they are mistaken about the nature of the touching,

(j) participates in the sexual touching because they are mistaken about the purpose of the touching (including about whether the touching is for health, hygienic or cosmetic purposes),

(k) participates in the sexual touching with another person because they are mistaken about the identity of the other person or because they are mistaken that they are married to the other person, or

(l) participates in the sexual touching because of a fraudulent inducement. [*If appropriate*: A misrepresentation about a person's income, wealth or feelings [*refer only to that or those which apply*] is not a "fraudulent inducement".

Summarise the evidence and relevant arguments of the parties.]

[If applicable — persuasion: Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.**]**

[If applicable — withdrawal of consent: A person may withdraw consent to sexual touching at any time: [**s 61HI(2)**]. If the touching occurs, or continues, after consent has been withdrawn then it occurs without consent: [**s 61HI(3)**]. If the Crown has proved

beyond reasonable doubt that the complainant withdrew consent and that the touching occurred or continued after that point in time, then you would find the occurrence or continuation of the sexual touching was without the complainant's consent. *Summarise the evidence and relevant arguments of the parties*.]

[If applicable — consent to a different act of sexual touching [**s 61HI(5)**]: A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. There is evidence the complainant may have consented to [*describe relevant sexual activity*]. If you decide they may have consented to that activity, it does not follow that for that reason only they may have consented to the sexual touching alleged by the Crown. [*Summarise the evidence and relevant arguments of the parties*.**]**

[If applicable — consent to sexual activity with accused on a different occasion (s 61HI(6)(a)): A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with that person on another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with the accused. If you decide the complainant may have consented to that activity, it does not follow that for that reason only they consented to the sexual activity alleged by the Crown.

Summarise the evidence and relevant arguments of the parties.**]**

[*If applicable — consent to sexual activity with another person on same or another occasion* (s 61HI(6)(b)):

A person who consents to a sexual activity with a person is not, by reason only of that fact, taken to consent to a sexual activity with another person on that or another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with [*name of person*]. If you decide they may have consented to that activity, it does not follow that for that reason only they consented to the sexual touching with the accused alleged by the Crown. Summarise the evidence and relevant arguments of the parties.**]**

4. The accused knew the complainant did not consent

This element concerns the accused's state of mind. The Crown must prove beyond reasonable doubt that the accused knew the complainant did not consent to the sexual touching alleged.

The Crown has no direct evidence about what the accused's state of mind was at that time. The Crown asks you to infer or conclude that the accused knew the complainant was not consenting on the basis of the facts and circumstances which it has sought to prove occurred.

[*Give direction as to Inferences [see **[3-150]**] or remind jury if already given.*]

For the purpose of deciding whether the Crown has proved this element, you must consider all the circumstances of the case, including what, if anything, the accused said or did: [**s 61HK(5)(a)**]. **[***Add, if appropriate — self-induced intoxication*: However, intoxication of the accused that was self-induced must be ignored. If you consider they were intoxicated by voluntarily drinking alcohol [*or taking drugs*], you must decide if the Crown has proved this element by considering what their state of mind would have been if they had not been intoxicated: [**s 61HK(5)(b)**]].

The Crown will have proved the accused knew the complainant did not consent if it proves that [*refer only to those of the following that arise from the evidence*]:

1. the accused actually knew the complainant did not consent to the sexual touching; or
2. the accused was reckless as to whether the complainant consented to the sexual touching;
3. any belief the accused had, or may have had, that the complainant consented to the sexual touching was not reasonable in the circumstances.

It is important to bear in mind that it is for the Crown to prove this. As you are well aware, there is no obligation upon the accused to prove anything.

[*Actual knowledge — s 61HK(1)(a)*: *Summarise the evidence and relevant arguments of the parties*.**]**

[Recklessness — s 61HK(1)(b)]

To establish that the accused was reckless as to whether the complainant consented to the sexual touching, the Crown must prove, beyond reasonable doubt, either:

(a) that the accused failed to consider whether or not the complainant was consenting at all, and just went ahead with the sexual touching, even though the risk they were not consenting would have been obvious to someone with the accused's mental capacity had they turned their mind to it, or

(b) the accused realised the possibility that the complainant was not consenting but went ahead with the sexual touching regardless of whether they were consenting or not.

[*Summarise the evidence and relevant arguments of the parties*.]

[Belief in consent that was not reasonable in the circumstances — s 61HK(1)(c):

If, on the basis of the evidence led in the trial, you decide there is a possibility the accused had, or may have had, a belief that the complainant consented, the Crown must prove beyond reasonable doubt that the belief was not reasonable in the circumstances. The Crown case is that you would find that any such belief was not reasonable in the circumstances because [*state Crown's contention*].

[*If appropriate* — **s 61HK(2):** A belief that the complainant consented to the sexual touching is not reasonable if the Crown satisfies you beyond reasonable doubt the accused did not, within a reasonable time before, or at the time of, the sexual touching, say or do anything to find out if the complainant consented.

Whether it was reasonable in the circumstances for the accused to believe the complainant was consenting to the sexual touching is judged according to community standards. You ask yourself what would an ordinary person in the accused's position have believed at the relevant time having regard to all the circumstances of the case [*If appropriate: other than the accused's self-induced intoxication*]?

[*Summarise the evidence and relevant arguments of the parties.*]

[If applicable — cognitive or mental health impairment as a substantial cause of the accused not saying or doing anything (s 61HK(3)–(4)):

If the Crown has proved beyond reasonable doubt that the accused did not say or do anything to ascertain whether the complainant consented to the sexual touching,

then that would establish that the belief of the accused that the complainant was not consenting was not reasonable. However, this would not be the case if the accused was suffering from a [*cognitive/mental health*] impairment at the time of the sexual touching and that the impairment was a substantial cause of them not saying or doing anything to ascertain whether the complainant consented to that sexual touching.

[*Adopt so much of the definitions of mental health impairment and cognitive impairment from ss 4C and 23A(8) and (9) Crimes Act as appropriate — see further* ***[4-304]***.]

This is a matter where the accused must prove on the balance of probabilities both that:

1. they were suffering from a [*cognitive/mental health*] impairment at the time of the sexual touching; AND
2. their [*cognitive/mental health*] impairment was a substantial cause of them not saying or doing anything to ascertain whether the complainant consented to the sexual touching.

[*Summarise the evidence and relevant arguments of the parties*.]

If the accused has not proved both these matters on the balance of probabilities, then the Crown will have established beyond reasonable doubt that their failure to say or do anything to ascertain whether the complainant consented to the sexual touching was such that their belief the complainant was not consenting was not reasonable in the circumstances.

If the accused has proved both these matters on the balance of probabilities, then you cannot use the fact they did not do or say anything to ascertain whether the complainant consented to the sexual touching in considering whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable. You must put that fact to one side and consider whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable because of other facts and circumstances.

[*For aggravated forms of the offence add from* ***[5-1130]*** *as appropriate*.]

[5-1120] Notes

Last reviewed: September 2023

1. It is important to tailor the directions to the circumstances and issues in the particular trial. Where the only issue is whether the alleged act occurred, or whether the accused was the offender and there is no issue about the complainant not consenting, it may be confusing to direct the jury about aspects of the definition of consent in s 61HE(6) (for offences up to 31 May 2022) and s 61HJ(1)(i) and (j) (for offences from 1 June 2022) that do not apply. See *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4] and [42].
2. The Crown must prove the alleged complainant did not consent. What amounts to knowledge of consent and how consent may be negated is addressed in detail in s 61HE (for offences up to 31 May 2022) and ss 61HJ and 61HK (for offences from 1 June 2022).

3. Consent is not an element of a sexual touching offence if the alleged victim is a child: s 61HE(1) (for offences up to 31 May 2022) and s 61HG(1) (for offences from 1 June 2022) lists the offences to which the definition of consent applies.
4. The exception for genuine or proper medical or hygienic purposes in s 61HB(3) may be excluded when the relevant acts giving rise to the offence occurred during a medical examination: *Decision Restricted* [2020] NSWCCA 138 at [51]–[65]. There is no requirement that the sole purpose of touching in such a context be for sexual gratification. The exception is only engaged when the relevant act is carried out for proper medical purposes: at [51]; see also [99].
5. Evidence that, at the relevant time, the accused was intoxicated cannot be taken into account if it was self-induced: s 61HE(4)(b) (for offences up to 31 May 2022) and s 61HK(5)(b) (for offences from 1 June 2022).
6. Where a trial involves an offence of sexual touching and an offence of indecent assault (*Crimes Act*, s 61M, now repealed) separate consent directions are required: *Holt v R* [2019] NSWCCA 50 at [64].

[5-1130] Suggested direction — aggravated offence (s 61KD)

Last reviewed: September 2023

If the Crown has charged the accused with an aggravated offence, adapt so much of the suggested direction for the basic offence as is appropriate and continue with whichever of the following aggravated circumstances have been relied upon.

Because it is possible for the jury to reach different verdicts, it may avoid confusion if they are provided with a written list of possible verdicts (a "verdict sheet"), particularly if the trial involves multiple counts.

The final element the Crown must prove beyond reasonable doubt is that the offence was aggravated because [*specify circumstance of aggravation*]. You only need to consider this element if you are satisfied the Crown has proved the first four elements of the offence beyond reasonable doubt.

In company — s 61KD(2)(a)

[*This direction is based upon the sexual touching being carried out by the accused in the presence of an alleged co-offender in their company. Modification will be required if the roles are different.*]

It is an aggravating circumstance if the offence was committed in the company of another person or persons. The Crown alleges the accused committed the offence when they were in the company of [*alleged co-offender*]. The Crown case is that when the accused sexually touched the complainant, [*alleged co-offender*] was [*specify nature of presence*].

The Crown will prove the offence was committed "in company" if it proves beyond reasonable doubt:

(a) the accused and [*alleged co-offender*] shared a common purpose that the complainant would be sexually touched;

and

(b) [*alleged co-offender*] was physically present when the sexual touching occurred.

For [*alleged co-offender*] to be "physically present", the Crown must prove they were sufficiently close **[***refer only to those of the following the Crown relies on***]**:

(a) to intimidate or coerce the complainant in relation to the sexual touching;

or

(b) to encourage or support the accused in sexually touching the complainant.

It is not enough for the Crown to prove either the accused shared a common purpose with [*alleged co-offender*] that the complainant would be sexually touched, or that [*alleged co-offender*] was physically present. The Crown must prove both of these beyond reasonable doubt before you can conclude the offence was committed in company.

[*If appropriate, add*: It is not enough [*alleged co-offender*] shared a common purpose with the accused that the complainant would be sexually touched, but was not physically present in the way in which I have defined that concept. For example, it would not be enough if [*alleged co-offender*] was somewhere else acting as a look-out, or had provided encouragement to the accused at some time before the sexual touching occurred.**]**

[*Summarise the evidence relied on by the Crown and the defence case.*]

Under authority — s 61KD(2)(b)

The Crown alleges the aggravating circumstance that the offence was committed when the complainant was under the authority of the accused. To establish this, the Crown must prove the complainant was under their care, supervision or authority [*whether generally or at the time of the offence*]. It is a matter for you to determine whether the evidence establishes the complainant was under the care, supervision or authority of the accused.

[*Summarise the evidence relied on by the Crown and the defence case*].**]**

Complainant has serious physical disability or cognitive impairment — s 61KD(2)(c), (d)

It is an aggravating circumstance if the offence was committed while the complainant had a [*serious physical disability* OR *cognitive impairment*].

The law recognises a variety of forms of "cognitive impairment", including where a person has a [*nominate the form of cognitive impairment according to the list in s 61HD and in accordance with the evidence relied on in the particular case*].

OR

The law does not define what a "serious physical disability" is. That is a matter for you to decide. However, it is an ordinary English phrase, and you should give it its ordinary English meaning. It obviously focuses on disability of the body, as opposed to the mind and requires you to evaluate whether there was a disability that was a serious one.

To prove this element, the Crown relies upon the evidence of [*summarise relevant evidence*].

That evidence [*has/has not*] been disputed. [*Summarise defence case as necessary*.]

Conclusion

If you are satisfied the Crown has proved all five elements of the aggravated offence of sexual touching in the indictment beyond reasonable doubt you would find the accused guilty. When asked for the verdict [*for this count*], your foreperson would simply announce, "guilty".

If you are satisfied the Crown has only proved the first four elements of the basic offence of sexual touching, but has not proved the element of aggravation, then you would acquit the accused of the aggravated offence and return a verdict of guilty for the basic offence. When asked for the verdict [*for this count*], your foreperson would announce, "not guilty of aggravated sexual touching but guilty of sexual touching".

If you are not satisfied the Crown has proved any one of the four elements of the basic offence of sexual touching, then you would acquit the accused completely. When asked for the verdict [*for this count*], your foreperson would simply announce, "not guilty".

[5-1140] Notes — aggravated sexual touching — under s 61KD

Last reviewed: September 2023

1. As indicated in the suggested direction, the "circumstances of aggravation" for a charge against s 61KD are listed in s 61KD(2).
2. An alternative verdict for the basic offence in s 61KC is available for a charge under s 61KD: s 80AB(1).
3. To establish that the offence was committed in company, the Crown must show another person was physically present and shared a common purpose with the accused: *R v Button* (2002) 54 NSWLR 455 at [120]. Whether or not another person is physically present depends on what was described in *Button* at [125] as:

   > … the coercive effect of the group. There must be such proximity as would enable the inference that the coercive effect of the group operated, either to embolden or reassure the offender in committing the crime, or to intimidate the victim into submission.

   See also *R v ITA* [2003] NSWCCA 174 at [137]–[140].

   Mere presence of another person is not sufficient: *R v Crozier* (unrep, 8/3/96, NSWCCA); *Kelly v The Queen* (1989) 23 FCR 463 at 466. The complainant's perspective (of being confronted with more than one person) is relevant but not determinative. "If two or more persons are present, and share the same purpose, they will be 'in company', even if the victim was unaware of the other person": *Button* at [120]. It is sufficient if the complainant is confronted by the "combined force of two or more persons", even if the other person(s) did not intend to physically participate if required: *R v Leoni* [1999] NSWCCA 14 at [20] (referring to the judgment of King CJ in *R v Broughman* (1986) 43 SASR 187 at 191); applied in *R v Villar* [2004] NSWCCA 302 at [68]. Proof of this aggravating circumstance does not depend upon the other person being convicted of the same offence: *Villar* at [69].

4. As to whether the alleged victim is under the authority of the accused (s 61KD(2)(b)), s 61H(2) provides that "a person is under the authority of another person if [they are] in the care, or under the supervision or authority, of the other person". In *KSC v R* [2012] NSWCCA 179 at [125], McClellan CJ at CL (Davies and Fullerton JJ agreeing) concluded that the components in the definition of care and supervision made plain the nature of the relationship to which section was directed and that each of the words "care", "supervision" and "authority" were ordinary English words a jury would have no difficulty understanding. See also *R v Howes* [2000] VSCA 159 at [4]; *R v MacFie* [2000] VSCA 173 at [18], [21]. It is not confined to relationships based on a legal right or power: *Howes* at [50]; *MacFie* at [20]–[21].
5. "Serious physical disability" (s 61KD(3)(d)) is not defined but is capable of encompassing a vast array of different conditions: *JH v R* [2021] NSWCCA 324 at [38]. In *JH v R*, it was held that this term did not require explication as the words mean what they say and are capable of being applied by a jury: at [24]–[25].
6. "Cognitive impairment" is defined in s 61HD and provides that a person has such an impairment if they have:

   (a) an intellectual disability, or

   (b) a developmental disorder (including an autistic spectrum disorder), or

   (c) a neurological disorder, or

   (d) dementia, or

   (e) a severe mental illness, or

   (f) a brain injury,

   that results in the person requiring supervision or social habilitation in connection with daily life activities.

[5-1150] Suggested direction — sexually touching a child under 10 (s 66DA)

Last reviewed: September 2023

This direction can be adapted for an offence involving a child against s 66DB. For incitement offences see the commentary at **[5-1170] Notes — Incitement offences**.

It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.

The accused is charged with sexually touching the complainant. The Crown case is that [*briefly outline the incident/s to which the charge relates*].

Before you can find the accused is guilty, the Crown must prove beyond reasonable doubt each of the following elements of the offence.

1. the complainant was a child under 10 years old;
2. the accused intentionally touched the complainant; and
3. the touching was sexual.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them then you must find the accused not guilty.

1. **The complainant was a child under 10**

   The law says a child is a person who is under the age of 10 years. In this case there is no dispute the complainant was a child of [*age*] at the time specified on the indictment. [*This will require adaptation if the complainant's age is disputed*].

2. **The accused intentionally touched the complainant**

   The slightest contact with the complainant is enough to amount to touching. The touching does not have to be a hostile or aggressive act or one that caused the complainant fear or pain, but it must be an intentional touching; not an accidental touching.

3. **The touching was sexual**

   Sexual touching means touching another person with any part of the body **[***add where relevant*: "or with anything else, or through anything, including through anything worn by the person doing the touching or by the person being touched"**]**, in circumstances where a reasonable person would consider the touching to be sexual.

   In determining whether a reasonable person would consider the touching was sexual, you should consider everything you regard as relevant, but there are some particular matters you are required to take into account. They are:

   - the part of the body touched, **[***or if appropriate*: "or doing the touching"**]**. Was it the genital or anal area or the breasts **[***and add where relevant*: whether or not the breasts are sexually developed, and regardless of the person's gender or sex**]**?
   - whether the person doing the touching did so for sexual arousal or sexual gratification.
   - was there any other aspect of the touching (including the circumstances in which it was done) which made it sexual?

   The Crown is not required to prove any particular one of these matters. They are matters you are required to take into account, along with anything else you consider to be relevant when you are deciding whether the Crown has proved the touching was "sexual".

   [*Where appropriate*: Touching done for genuine medical or hygienic purposes is not sexual touching. As that is what the accused says was the reason for the touching in this case, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

[*If the circumstances of the particular case require it*: Some sexual offences require the Crown to prove the complainant did not consent. But where the alleged offence involves a child, consent is irrelevant. The law says that children cannot consent to sexual activity.**]**

If you find that the Crown has proved all three elements of the offence beyond reasonable doubt, then your verdict should be "guilty". However, if you are not satisfied the Crown has proved any one element of the offence, then your verdict should be "not guilty".

[5-1160] Notes — sexual touching of a child

Last reviewed: September 2023

1. Section 80AF *Crimes Act* 1900, which addresses the situation where there is some uncertainty about the timing of a particular offence or offences against a child, may require consideration. The section may only be invoked at the commencement of a trial; it cannot be invoked to address uncertainties that arise during the trial: *Stephens v The Queen* (2022) 273 CLR 635 at [45]–[46].
2. The suggested direction at **[5-1150]** could be adapted for an offence of sexually touching a young person between 16 and 18 years old under special care in s 73A. "Special care" is broadly defined in s 73A(3).

[5-1170] Notes — incitement offences

Last reviewed: September 2023

1. The offences of sexual touching include inciting an alleged victim to sexually touch the alleged offender or a third person, or inciting a third person to sexually touch the alleged victim (ss 61KC(b)–(d), 61KD(b)–(d), 66DA(b)–(d) and 66DB(b)–(d)).
2. It is not an offence to incite an offence where the offence is constituted by inciting another person to sexual touching: s 80G(5)(a).
3. "Incite" is not defined in the Act. Its meaning was discussed in *R v Eade* [2002] NSWCCA 257, where Smart AJ observed at [59]–[60]:

> In *Young v Cassells* (1914) 33 NZLR 852 Stout CJ … said: "The word 'incite' means to rouse; to stimulate; to urge or spur on; to stir up; to animate." In *R v Massie* [1999] VR 542 at 564, Brooking JA, with whom Winneke P and Batt JA agreed, said of 'incite', "common forms of behaviour covered by the word are 'command', 'request', 'propose', 'advise', 'encourage', or 'authorise'".
>
> It was pointed out in *Regina v Asst Recorder of Kingston* [1969] 2 QB 58 at 62 that with the offence of incitement it is merely the incitement which constitutes the offence and that it matters not that no steps have been taken towards the commission of the substantive offence nor whether the incitement had any effect at all: *Young v Cassells* …"

4. The incitement must be to commit the specific offence at hand: *Walsh v Sainsbury* (1925) 36 CLR 464 at 476; *Clyne v Bowman* (1987) 11 NSWLR 341 at 347–348. It is not necessary to prove the person incited acted upon the incitement or whether the incitement had any effect. However, it is necessary to prove that the course of conduct urged would, if it had been acted upon as the inciter intended it to be,

amount to the commission of the offence: *R v Dimozantis* (unrep, 7/10/1991, Vic CCA); *R v Assistant Recorder of Kingston-Upon-Hull; Ex parte Morgan* [1969] 2 QB 58 at 62.

[The next page is 879/1]

Sexual act

***Crimes Act* 1900 (NSW), ss 61KE, 61KF, 66DC, 66DD, 66DE and 66DF**

Important note: The directions in ss 292–292E *Criminal Procedure Act* 1986 apply to proceedings for the above offences which commence on or after 1 June 2022, regardless of when the offence was committed: Sch 2, Pt 42. See further **[5-200] Directions — misconceptions about consent in sexual assault trials**. The procedure for filing a Crown or Defence Readiness Hearing Case Management Form requires the parties to identify, amongst other matters, which directions under ss 292A–292E may be required at trial. It would be prudent to commence a discussion early in the trial concerning which of these directions, if any, might be required in a particular trial.

[5-1200] Introduction

Last reviewed: September 2023

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (the amending Act) implemented recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse and the Child Sexual Offences Review team to reform the law with respect to sexual offences. These included repealing the basic and aggravated offences of act of indecency (former ss 61N and 61O *Crimes Act* 1900, respectively) and replacing them with separate offences of sexual act in ss 61KE and 61KF for adults, and in ss 66DC, 66DD, 66DE and 66DF for children.

The new provisions apply to offences committed on or after 1 December 2018: *Crimes Act* 1900, Sch 11, Pt 35.

"Sexual act" is defined in s 61HC as an act (other than sexual touching) carried out in circumstances a reasonable person would consider to be sexual.

The following matters in s 61HC must be considered when deciding whether a reasonable person would consider an act to be sexual:

(a) whether the area of the body involved in the act is the person's genital area or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person's breasts, whether or not the breasts are sexually developed, or

(b) whether the person carrying out the act does so for the purpose of obtaining sexual arousal or sexual gratification, or

(c) whether any other aspect of the act (including the circumstances in which it is carried out) makes it sexual.

Offences against ss 61KE, 61KF, 66DC, 66DD, 66DE and 66DF are "prescribed sexual offences": s 3 *Criminal Procedure Act* 1986. Particular provisions of the *Criminal Procedure Act* and the *Crimes Act* apply to proceedings for such offences: see **Evidence given by alternative means** at **[1-360]**ff, and **Closed court, suppression and non-publication orders** at **[1-349]**.

See also: *Criminal Practice and Procedure NSW* at [8-s 61KE], [8-s 61KF], [8-s 66DC], [8-s 66DD], [8-s 66DE] and [8-s 66DF].

For offences committed before 1 December 2018, ss 61N and 61O provide the basic and aggravated offences, respectively. Section 61N(1) makes it an offence to commit an

act of indecency "with or towards" a person (or incite a person to an act of indecency) where the person is under the age of 16 years. Section 61N(2) applies where the person is aged above 16 years.

The common law definition of "indecency" applies, meaning contrary to currently accepted standards of decency: *R v Manson* (unrep, 17/2/93, NSWCCA,); *R v Harkin* (1989) 38 A Crim R 296. Where an act does not have an unequivocal sexual connotation, it may still constitute an indecent act if it is proved it was carried out for sexual gratification: *R v Court* [1989] 1 AC 28; *R v Harkin*. The purpose of the act, such as for artistic or political reasons, is a relevant but not decisive condition for determining if the act was indecent: *R v Manson*.

[5-1210] Suggested direction — basic offence (s 61KE) — until 31 May 2022

Last reviewed: September 2023

The suggested direction is based on the offence in s 61KE(a). For incitement offences see the commentary at **[5-1290] Notes — Incitement offences**.

It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.

For the suggested direction for offences involving a child, see **[5-1260] Suggested direction — sexual act involving a child under 10 (s 66DC)**.

The accused is charged with carrying out a sexual act. The Crown case is that [*briefly outline the incident/s to which the charge relates*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following four elements which make up the offence.

1. the accused intentionally carried out an act with, or towards, the complainant;
2. the act was sexual;
3. without the complainant's consent to the sexual act;
4. the accused knew the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them you must find the accused not guilty.

1. **The accused intentionally carried out an act with, or towards, the complainant**

   The act itself must be voluntary and intentional, not an accident or carried out by mistake.

   In determining whether the act was intentionally carried out with, or towards, the complainant, you are to consider the act and all of its surrounding circumstances. [*refer to specific Crown allegation regarding the act*]. This may include: .

   - the nature of the act;
   - the proximity between the accused and the complainant when the act was carried out (the complainant does not have to be in the immediate physical presence of the accused);

- the visibility of the act and whether the accused wanted their actions to be seen or was deliberately hiding them;
- what interaction, if any, occurred between the complainant and the accused at the time the act was being carried out, including inviting or encouraging the complainant to watch or participate.

[*Add the following where the offence is particularised as 'with'*]:

The act must involve some participation by the complainant (although the Crown case is that the participation was involuntary).

[*Add the following where the offence is particularised as 'towards'*]:

In performing the act, there must be some engagement with the complainant, from which it can be inferred the act is directed at the complainant.

[*For either particularisation*]: It is not enough if the complainant was simply present (physically or electronically), but nothing more, when the act was carried out.

2. **The act was sexual**

Sexual act means an act (other than touching another person) carried out in circumstances where a reasonable person would consider the act to be sexual.

In determining whether a reasonable person would consider the act was sexual, you should consider everything that you regard as relevant, but there are some particular matters you are required to take into account. They are:

- the part of the body involved in the act. Was it the genital or anal area or [*only in the case of a female person, or a transgender/intersex person identifying as female:* the breasts] [*and add where relevant:* whether or not the breasts are sexually developed]?
- whether the person doing the carrying out the act did so for the purpose of obtaining sexual arousal or sexual gratification;
- whether there was any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?

The Crown is not required to prove any particular one of these matters. They are matters you are required to take into account, along with anything else you consider to be relevant when you are deciding whether the Crown has proved that the act was "sexual".

[*Where appropriate*: An act carried out for genuine medical or hygienic purposes is not a sexual act. As that is what the accused says was the reason for carrying out the act, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

3. **Without the complainant's consent**

This element concerns the complainant's state of mind. The Crown must prove that the sexual act was carried out without the complainant's consent.

Consent means that a person freely and voluntarily agrees to something. So, the Crown is required to prove the complainant did not freely and voluntarily agree to the sexual act being carried out.

You are concerned with whether the complainant did not consent to the act at the time the act occurred. What the complainant's state of mind was before or after the act might provide a guide, but the question is whether the Crown has proved that the complainant was not consenting at the time the act occurred.

[*Where appropriate:* The complainant said in evidence that they did not consent to the sexual act being carried out. If you accept that evidence, then you could be satisfied the Crown has proved this element.**]**

In deciding whether you accept that the complainant was not consenting you may also take into account any of the following:

(a) Consent obtained after persuasion is still consent, provided that ultimately it is given freely and voluntarily.

(b) Consent, or lack of consent, may be indicated by what the complainant said or did. In other words, the complainant's words or actions, or both, may indicate whether or not there was consent.

(c) A person who does not offer actual physical resistance to a sexual act being carried out is not, by reason only of that fact, to be regarded as consenting to that act. There is no legal requirement for a person to physically resist before a jury can find that the person did not consent.

[*If applicable, add one or more of the following* **[s 61HE(5)–(6)]:**

The law provides that a person does not consent to a sexual act being carried out:

- if they do not have the capacity to consent, including because of their age or cognitive incapacity, or
- if they did not have the opportunity to consent because they were unconscious or asleep, or
- if they consent because of threats of force or terror (whether the threats are against, or the terror is instilled in, them or another person), or
- if they consent because they were unlawfully detained, or
- if the person consented under a mistaken belief:
  - as to the other person's identity, or
  - that the other person is married to the person, or
  - that the sexual activity is for health or hygienic purposes, or
  - about the nature of the activity that has been induced by fraudulent means.**]**

[*If applicable, add one or more of the following* **[s 61HE(8)]:**

It may be established that the complainant did not consent to the sexual act if:

- the complainant consented while substantially intoxicated by alcohol or any drug, or
- the complainant consented because of intimidatory or coercive conduct, or other threat, even though that conduct does not involve a threat of force, or
- the complainant consented because of the abuse of a position of authority or trust.

If you are satisfied the complainant consented in that circumstance, it does not necessarily follow that you should be satisfied beyond reasonable doubt the complainant did not consent. The essential matter the Crown must prove is that the complainant did not consent in the sense that the complainant did not freely and voluntarily agree to the sexual act.**]**

4. **The accused knew the complainant did not consent**

The fourth element concerns the accused's state of mind. The Crown is required to prove the accused knew the complainant did not consent to the sexual act being carried out.

This is a question about what the accused's state of mind actually was. It is not a question about what you or anyone else would have known, thought or believed in the circumstances. It is what the accused knew, thought or believed.

You must consider all of the circumstances, including any steps taken by the accused to make sure the complainant consented to the sexual act being carried out.

[*Add, if appropriate:* The law is that any intoxication of the accused that was self-induced must be ignored. If you consider that the accused was intoxicated by voluntarily drinking alcohol [or taking drugs], you must ignore that and decide this element by considering what the accused's state of mind would have been if they had not been intoxicated.**]**

The law says the Crown will have proved the accused knew the complainant did not consent to the sexual act if: **[***refer only to those of the following matters that arise from the evidence* **— see further [5-1230] Notes below**]

(a) the accused knew the complainant did not consent; or

(b) the accused was reckless as to whether the complainant consented because the accused realised there was a possibility the complainant did not consent; or

(c) the accused was reckless as to whether the complainant consented because the accused did not even think about whether the complainant consented but went ahead not caring, or considering it was irrelevant whether the complainant consented; or

(d) the accused may have actually believed the complainant consented, but the accused had no reasonable grounds for that belief; or

(e) the accused knew the complainant consented under a mistaken belief about [*refer to those parts of s 61HE(6) that may apply*].

To repeat what I said at the beginning of these directions, you can only find the accused guilty if the Crown proves each of the four elements beyond reasonable doubt. If the Crown fails to prove any one of them you must find the accused not guilty.

[5-1220] Suggested direction — basic offence (s 61KE) — from 1 June 2022

Last reviewed: September 2023

Notes:

1. Sections 61HF–61HK *Crimes Act* 1900 which relate to consent and proof of consent apply to offences committed from 1 June 2022. See **[5-900] Sexual intercourse without consent — from 1 June 2022** and **[5-920] Notes related to consent** for the commentary related to these provisions. See also the notes at **[5-1230]** below.
2. The suggested direction is framed in terms of what the Crown is required to prove. It is a matter of discretion as to how often it is appropriate to remind the jury that the accused is not obliged to prove anything.

The accused is charged with carrying out a sexual act. The Crown case is that [*briefly outline the incident/s to which the charge relates*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following four elements which make up the offence.

1. the accused intentionally carried out an act with, or towards, the complainant;
2. the act was sexual;
3. without the complainant's consent to the sexual act;
4. the accused knew the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of these elements you must find the accused not guilty.

1. The accused intentionally carried out an act with, or towards, the complainant

The act itself must be voluntary and intentional, not an accident or carried out by mistake.

In determining whether the act was intentionally carried out with or towards the complainant, you are to consider the act and all of its surrounding circumstances. [*refer to specific Crown allegation regarding the act*].

This may include:

- The nature of the act;
- The proximity between the accused and the complainant when the act was carried out (the complainant does not have to be in the immediate physical presence of the accused);

- The visibility of the act and whether the accused wanted their actions to be seen or was deliberately hiding them;
- What interaction, if any, occurred between the complainant and the accused at the time the act was being carried out, including inviting or encouraging the complainant to watch or participate.

[*Add the following where the offence is particularised as 'with'*]:

The act must involve some participation by the complainant (although the Crown case is that the participation was involuntary).

[*Add the following where the offence is particularised as 'towards'*]: In performing the act, there must be some engagement with the complainant, from which it can be inferred the act is directed at the complainant.

[*For either particularisation*]:

It is not enough if the complainant was simply present (physically or electronically), but nothing more, when the act was carried out.

2. The act was sexual

Sexual act means an act (other than touching another person) carried out in circumstances where a reasonable person would consider the act to be sexual.

In determining whether a reasonable person would consider the act was sexual, you should consider everything that you regard as relevant, but there are some particular matters you are required to take into account. They are:

- the part of the body involved in the act. Was it the genital or anal area or **[***only in the case of a female person, or a transgender/intersex person identifying as female:* the breasts] [*and add where relevant:* whether or not the breasts are sexually developed**]**?
- whether the person carrying out the act did so for the purpose of obtaining sexual arousal or sexual gratification.
- whether there was any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?

The Crown is not required to prove any particular one of these matters. They are matters you are required to take into account, along with anything else you consider to be relevant when you are deciding whether the Crown has proved that the act was "sexual".

[*Where appropriate*: An act carried out for genuine medical or hygienic purposes is not a sexual act. As that is what the accused says was the reason for carrying out the act, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

3. Without the complainant's consent

This element concerns the complainant's state of mind. The Crown must prove beyond reasonable doubt that the complainant did not consent to the sexual act.

Everyone has a right to choose whether or not to participate in a sexual act. A person cannot presume that another person is consenting. A consensual sexual act involves ongoing and mutual communication and decision-making and free and voluntary agreement between the persons participating in the sexual act. **[s 61HF]**

[***If required (s 292A Criminal Procedure Act 1986 — circumstances in which non-consensual activity occurs)***: *However, you should bear in mind that non-consensual sexual activity can occur in many different circumstances and between different kinds of people including people who know one another, or are married to one another, or who are in an established relationship with one another*.] [*See [5-200]*]

A person consents to a sexual act being carried out if, at the time of the act, the person freely and voluntarily agrees to the act: [**s 61HI(1)**]. Consent can be given verbally or it can be expressed by actions. However, a person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity: [**s 61HI(4)**].

[*If applicable — circumstances in which there is no consent — s 61HJ*:

The law provides that circumstances in which a person does not consent to a sexual act include if you are satisfied beyond reasonable doubt that the person [*refer only to those that apply*]:

(a) does not say or do anything to communicate consent,

(b) does not have the capacity to consent to the sexual act,

(c) is so affected by alcohol or another drug as to be incapable of consenting to the sexual act,

(d) is unconscious or asleep,

(e) participates in the sexual act because of force, fear of force or fear of serious harm of any kind to them, another person, an animal or property (regardless of when the force or the conduct giving rise to the fear occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(f) participates in the sexual act because of coercion, blackmail or intimidation (regardless of when the coercion, blackmail or intimidation occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(g) participates in the sexual act because they or another person is unlawfully detained,

(h) participates in the sexual act because they are overborne by the abuse of a relationship of authority, trust or dependence,

(i) participates in the sexual act because they are mistaken about the nature of the act,

(j) participates in the sexual act because they are mistaken about the purpose of the act (including about whether the act is for health, hygienic or cosmetic purposes),

(k) participates in the sexual act with another person because they are mistaken about the identity of the other person or because they are mistaken that they are married to the other person, or

(l) participates in the sexual act because of a fraudulent inducement. [*If appropriate*: A misrepresentation about a person's income, wealth or feelings [*refer only to that or those which apply*] is not a "fraudulent inducement".

Summarise the evidence and relevant arguments of the parties.]

[If applicable — persuasion: Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.**]**

[If applicable — withdrawal of consent: A person may withdraw consent to a sexual act at any time: [**s 61HI(2)**]. If the act occurs, or continues, after consent has been

withdrawn then it occurs without consent: [**s 61HI(3)**]. If the Crown has proved beyond reasonable doubt that the complainant withdrew consent and that the act occurred or continued after that point in time, then you would find the occurrence or continuation of the sexual act was without the complainant's consent. *Summarise the evidence and relevant arguments of the parties*.]

[If applicable — consent to a different act [**s 61HI(5)**]: A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. There is evidence the complainant may have consented to [*describe relevant sexual activity*]. If you decide the person may have consented to that activity, it does not follow that for that reason only the person may have consented to the sexual act alleged by the Crown. [*Summarise the evidence and relevant arguments of the parties*.**]**

[If applicable — consent to sexual activity with accused on a different occasion (s 61HI(6)(a)): A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with that person on another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with the accused. If you decide the complainant may have consented to that activity, it does not follow that for that reason only the complainant consented to the sexual activity alleged by the Crown.

Summarise the evidence and relevant arguments of the parties.**]**

[*If applicable — consent to sexual activity with another person on same or another occasion* (s 61HI(6)(b)):

A person who consents to a sexual activity with a person is not, by reason only of that fact, taken to consent to a sexual activity with another person on that or another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with [*name of person*]. If you decide that the complainant may have consented to that activity, it does not follow that for that reason only that the complainant consented to the sexual act with the accused alleged by the Crown.

Summarise the evidence and relevant arguments of the parties.**]**

4. The accused knew the complainant did not consent

This element concerns the accused's state of mind. The Crown must prove beyond reasonable doubt that the accused knew the complainant did not consent to the sexual act alleged.

The Crown has no direct evidence about what the accused's state of mind was at that time. The Crown asks you to infer or conclude that the accused knew the complainant was not consenting on the basis of the facts and circumstances which it has sought to prove occurred.

[*Give direction as to Inferences [see [3-150]] or remind jury if already given.*]

For the purpose of deciding whether the Crown has proved this element, you must consider all the circumstances of the case, including what, if anything, the accused said or did: [**s 61HK(5)(a)**]. **[***Add, if appropriate — self-induced intoxication*: However, intoxication of the accused that was self-induced must be ignored. If you consider the accused was intoxicated by voluntarily drinking alcohol [*or taking drugs*], you must decide if the Crown has proved this element by considering what the accused's state of mind would have been if the accused had not been intoxicated: [**s 61HK(5)(b)**]].

The Crown will have proved the accused knew the complainant did not consent if it proves that [*refer only to those of the following that arise from the evidence*]:

1. the accused actually knew the complainant did not consent to the sexual act; or
2. the accused was reckless as to whether the complainant consented to the sexual act;
3. any belief the accused had, or may have had, that the complainant consented to the sexual act was not reasonable in the circumstances.

It is important to bear in mind that it is for the Crown to prove this. As you are well aware, there is no obligation upon the accused to prove anything.

[*Actual knowledge — s 61HK(1)(a)*: *Summarise the evidence and relevant arguments of the parties*.**]**

[Recklessness — s 61HK(1)(b)]

To establish that the accused was reckless as to whether the complainant consented to the sexual act, the Crown must prove, beyond reasonable doubt, either:

(a) that the accused failed to consider whether or not the complainant was consenting at all, and just went ahead with the sexual act, even though the risk the complainant was not consenting would have been obvious to someone with the accused's mental capacity had they turned their mind to it, or

(b) the accused realised the possibility that the complainant was not consenting but went ahead with the sexual act regardless of whether the complainant was consenting or not.

[*Summarise the evidence and relevant arguments of the parties*.]

[Belief in consent that was not reasonable in the circumstances — s 61HK(1)(c):

If, on the basis of the evidence led in the trial, you decide there is a possibility the accused had, or may have had, a belief that the complainant consented, the Crown must prove beyond reasonable doubt that the belief was not reasonable in the circumstances. The Crown case is that you would find that any such belief was not reasonable in the circumstances because [*state Crown's contention*].

[*If appropriate* — **s 61HK(2):** A belief that the complainant consented to the sexual act is not reasonable if the Crown satisfies you beyond reasonable doubt the accused did not, within a reasonable time before, or at the time of, the sexual act, say or do anything to find out if the complainant consented.

Whether it was reasonable in the circumstances for the accused to believe the complainant was consenting to the sexual act is judged according to community standards. You ask yourself what would an ordinary person in the accused's position have believed at the relevant time having regard to all the circumstances of the case [*If appropriate: other than the accused's self-induced intoxication*]?

[*Summarise the evidence and relevant arguments of the parties.*]

[If applicable — cognitive or mental health impairment as a substantial cause of the accused not saying or doing anything (s 61HK(3)–(4)):

If the Crown has proved beyond reasonable doubt that the accused did not say or do anything to ascertain whether the complainant consented to the sexual act, then that would establish that the belief of the accused that the complainant was not consenting

was not reasonable. However, this would not be the case if the accused was suffering from a [*cognitive/mental health*] impairment at the time of the sexual act and that the impairment was a substantial cause of the accused not saying or doing anything to ascertain whether the complainant consented to that sexual act.

[*Adopt so much of the definitions of mental health impairment and cognitive impairment from ss 4C and 23A(8) and (9) Crimes Act as appropriate — see further [4-304]*.]

This is a matter where the accused must prove on the balance of probabilities both that:

1. The accused was suffering from a [*cognitive/mental health*] impairment at the time of the sexual act; AND
2. The accused's [*cognitive/mental health*] impairment was a substantial cause of the accused not saying or doing anything to ascertain whether the complainant consented to the sexual act.

[*Summarise the evidence and relevant arguments of the parties*.]

If the accused has not proved both these matters on the balance of probabilities, then the Crown will have established beyond reasonable doubt that the accused's failure to say or do anything to ascertain whether the complainant consented to the sexual act was such that the accused's belief the complainant was not consenting was not reasonable in the circumstances.

If the accused has proved both these matters on the balance of probabilities, then you cannot use the fact the accused did not do or say anything to ascertain whether the complainant consented to the sexual act in considering whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable. You must put that fact to one side and consider whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable because of other facts and circumstances.

[*For aggravated forms of the offence add from [5-1240] as appropriate*.]

[5-1230] Notes

Last reviewed: September 2023

1. The meaning of "with" or "towards" has been considered in the following cases:
   (a) Sexual or indecent acts "with" another require two participants, while acts "towards" another are committed towards a non-participant: *R v Chonka* [2000] NSWCCA 466 at [46].
   (b) Where an accused performs a sexual or indecent act in front of a person and invites that person to participate, this will be considered a sexual act towards that person: *R v Gillard* [1999] NSWCCA 21 at [63].
   (c) An accused's sexual or indecent act does not have to be committed in the immediate physical presence of another person for it to be considered "towards" that other person. It is sufficient if the conduct was within the view of that person and the accused intended to be seen: *R v Barrass* [2005] NSWCCA 131 at [28]–[30].

(d) If the accused engages in a sexual or indecent act but does not believe the other person is able to see the act, this act will not be "towards" that person. The accused must know they are being watched by that person and derive some sort of stimulus from that person's observation: *R v Francis* (1989) 88 Cr App R 127 at 129.

(e) "Towards" requires an intention by the accused to engage at some level with another person, from which it can be inferred the accused's sexual or indecent act is directed towards the person. A person's mere presence is not enough: *DPP (NSW) v Presnell* [2022] NSWCCA 146 (by majority) at [29], [91]–[92]. A complainant does not have to be aware of the accused's conduct for the offence to be established (for example, if the complainant is asleep they are taken to not be consenting: s HJ(1)(d)): *DPP (NSW) v Presnell* at [59]. If the accused is sufficiently proximate to the person so that it can be inferred the accused intends to gain sexual pleasure from exposure to the person's body, this may be sufficient even if the accused does not intend the person becomes aware of the sexual or indecent act: *DPP (NSW) v Presnell* at [94].

2. *DPP (NSW) v Presnell* involved consideration of a sexual act involving a child (s 66DC), where consent is not an element of the offence. The principle of "intention to engage" was applied by Yehia J at [202] in *SC v R* [2023] NSWCCA 60 regarding an offence of aggravated act of indecency towards a person under 16 years contrary to now repealed s 61O(1).

3. It is important to tailor the directions to the circumstances and issues in the particular trial. Where the only issue is whether the alleged act occurred, or whether the accused was the offender and there is no issue about the complainant not consenting, it may be confusing to direct the jury about aspects of the definition of consent in s 61HE(6) (for offences up to 31 May 2022) and s 61HJ(1)(i) and (j) (for offences from 1 June 2022) that do not apply. See *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4] and [42].

4. The Crown must prove the alleged complainant did not consent. What amounts to knowledge of consent and how consent may be negated is addressed in detail in s 61HE (for offences up to 31 May 2022) and ss 61HJ and 61HK (for offences from 1 June 2022)..

5. Consent is not an element of a sexual act offence if the alleged victim is a child: s 61HE(1) (for offences up to 31 May 2022) and s 61HG(1) (for offences from 1 June 2022) lists the offences to which the definition of consent applies.

6. The exception for genuine or proper medical or hygienic purposes in s 61HC(3) may be excluded when the relevant acts giving rise to the offence occurred during a medical examination: *Decision Restricted* [2020] NSWCCA 138 at [51]–[65]. There is no requirement that the sole purpose of an act in such a context be for sexual gratification. The exception is only engaged when the relevant act is carried out for proper medical purposes: at [51]; see also [99].

7. Evidence that, at the relevant time, the accused was intoxicated cannot be taken into account if it was self-induced: s 61HE(4)(b) (for offences up to 31 May 2022) and s 61HK(5)(b) (for offences from 1 June 2022).

[5-1240] Suggested direction — aggravated offence (s 61KF)

Last reviewed: September 2023

If the Crown has charged the accused with an aggravated offence, adapt so much of the suggested direction for the basic offence as is appropriate and continue with whichever of the following aggravated circumstances have been relied upon.

Because it is possible for the jury to reach different verdicts, it may avoid confusion if they are provided with a written list of possible verdicts (a "verdict sheet"), particularly if the trial involves multiple counts.

The final element the Crown must prove beyond reasonable doubt is that the offence was aggravated because [*specify circumstance of aggravation*]. You only need to consider this element if you are satisfied the Crown has proved the first four elements of the offence beyond reasonable doubt.

In company — s 61KF(2)(a)

[*This direction is based upon the sexual act being carried out by the accused in the presence of an alleged co-offender in the accused's company. Modification will be required if the roles are different.*]

It is an aggravating circumstance if the offence was committed in the company of another person or persons. The Crown alleges the accused committed the offence when the accused was in the company of [*alleged co-offender*]. The Crown case is that when the accused carried out the sexual act, [*alleged co-offender*] was [*specify nature of presence*].

The Crown will prove the offence was committed "in company" if it proves beyond reasonable doubt:

(a) the accused and [*alleged co-offender*] shared a common purpose that a sexual act would be carried out with or towards the complainant;

and

(b) [*alleged co-offender*] was physically present when the sexual act occurred.

For [*alleged co-offender*] to be "physically present", the Crown must prove the co-offender was sufficiently close **[***refer only to those of the following the Crown relies on***]**:

(a) to intimidate or coerce the complainant in relation to the sexual act;

or

(b) to encourage or support the accused in carrying out the sexual act.

It is not enough for the Crown to prove either the accused shared a common purpose with [*alleged co-offender*] that the sexual act would be carried out, with or towards the complainant, or that [*alleged co-offender*] was physically present. The Crown must prove both of these beyond reasonable doubt before you can conclude the offence was committed in company.

[*If appropriate, add*: It is not enough [*alleged co-offender*] shared a common purpose with the accused that a sexual act would be carried out with or towards the complainant, but was not physically present in the way in which I have defined that concept. For

example, it would not be enough if [*alleged co-offender*] was somewhere else acting as a look-out, or had provided encouragement to the accused at some time before the sexual act occurred.**]**

[*Summarise the evidence relied on by the Crown and the defence case.*]

Under authority — s 61KF(2)(b)

The Crown alleges the aggravating circumstance that the offence was committed when the complainant was under the authority of the accused. To establish this, the Crown must prove the complainant was under the accused's care, supervision or authority [*whether generally or at the time of the offence*]. It is a matter for you to determine whether the evidence establishes the complainant was under the care, supervision or authority of the accused.

[*Summarise the evidence relied on by the Crown and the defence case*].**]**

Complainant has serious physical disability or cognitive impairment — s 61KF(2)(c), (d)

It is an aggravating circumstance if the offence was committed while the complainant had a [*serious physical disability* OR *cognitive impairment*].

The law recognises a variety of forms of "cognitive impairment", including where a person has a [*nominate the form of cognitive impairment according to the list in s 61HD and in accordance with the evidence relied on in the particular case*].

OR

The law does not define what a "serious physical disability" is. That is a matter for you to decide. However, it is an ordinary English phrase, and you should give it its ordinary English meaning. It obviously focuses on disability of the body, as opposed to the mind and requires you to evaluate whether there was a disability that was a serious one.

To prove this element, the Crown relies upon the evidence of [*summarise relevant evidence*].

That evidence [*has/has not*] been disputed. [*Summarise defence case as necessary*.]

Conclusion

If you are satisfied the Crown has proved all five elements of the aggravated offence of sexual act in the indictment beyond reasonable doubt you would find the accused guilty. When asked for the verdict [*for this count*], your foreperson would simply announce, "guilty".

If you are satisfied the Crown has only proved the first four elements of the basic offence of sexual act, but has not proved the element of aggravation, then you would acquit the accused of the aggravated offence and return a verdict of guilty for the basic offence. When asked for the verdict [*for this count*], your foreperson would announce, "not guilty of aggravated sexual act but guilty of sexual act".

If you are not satisfied the Crown has proved any one of the four elements of the basic offence of sexual act, then you would acquit the accused completely. When asked for the verdict [*for this count*], your foreperson would simply announce, "not guilty".

[5-1250] Notes — aggravated sexual act — under s 61KF

Last reviewed: September 2023

1. As indicated in the suggested direction, the "circumstances of aggravation" for a charge against s 61KF are listed in s 61KF(2).
2. An alternative verdict for the basic offence in s 61KE is available for a charge under s 61KF: s 80AB(1).
3. To establish that the offence was committed in company, the Crown must show another person was physically present and shared a common purpose with the accused: *R v Button* (2002) 54 NSWLR 455 at [120]. Whether or not another person is physically present depends on what was described in *Button* at [125] as:

   > … the coercive effect of the group. There must be such proximity as would enable the inference that the coercive effect of the group operated, either to embolden or reassure the offender in committing the crime, or to intimidate the victim into submission.

   See also *R v ITA* [2003] NSWCCA 174 at [137]–[140].

   Mere presence of another person is not sufficient: *R v Crozier* (unrep, 8/3/96, NSWCCA); *Kelly v The Queen* (1989) 23 FCR 463 at 466. The complainant's perspective (of being confronted with more than one person) is relevant but not determinative. "If two or more persons are present, and share the same purpose, they will be 'in company', even if the victim was unaware of the other person": *Button* at [120]. It is sufficient if the complainant is confronted by the "combined force of two or more persons", even if the other person(s) did not intend to physically participate if required: *R v Leoni* [1999] NSWCCA 14 at [20] (referring to the judgment of King CJ in *R v Broughman* (1986) 43 SASR 187 at 191); applied in *R v Villar* [2004] NSWCCA 302 at [68]. Proof of this aggravating circumstance does not depend upon the other person being convicted of the same offence: *Villar* at [69].
4. As to whether the alleged victim is under the authority of the accused (s 61KF(2)(b)), s 61H(2) provides that "a person is under the authority of another person if [they are] in the care, or under the supervision or authority, of the other person". In *KSC v R* [2012] NSWCCA 179 at [125], McClellan CJ at CL (Davies and Fullerton JJ agreeing) concluded that the components in the definition of care and supervision made plain the nature of the relationship to which section was directed and that each of the words "care", "supervision" and "authority" were ordinary English words a jury would have no difficulty understanding. See also *R v Howes* [2000] VSCA 159 at [4]; *R v MacFie* [2000] VSCA 173 at [18], [21]. It is not confined to relationships based on a legal right or power: *Howes* at [50]; *MacFie* at [20]–[21].
5. "Serious physical disability" (s 61KF(2)(c)) is not defined but is capable of encompassing a vast array of different conditions: *JH v R* [2021] NSWCCA 324 at [38]. In *JH v R*, it was held that this term did not require explication as the words mean what they say and are capable of being applied by a jury: [24]–[25].
6. "Cognitive impairment" is defined in s 61HD and provides that a person has such an impairment if they have:

   (a) an intellectual disability, or

(b) a developmental disorder (including an autistic spectrum disorder), or

(c) a neurological disorder, or

(d) dementia, or

(e) a severe mental illness, or

(f) a brain injury,

that results in the person requiring supervision or social habilitation in connection with daily life activities.

[5-1260] Suggested direction — sexual act involving a child under 10 (s 66DC)

Last reviewed: September 2023

This direction can be adapted for an offence involving a child against s 66DE. For incitement offences see the commentary at **[5-1290] Notes — Incitement offences**.

It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.

The accused is charged with carrying out a sexual act with or towards the complainant. The Crown case is that [*briefly outline the incident/s to which the charge relates*].

Before you can find the accused is guilty, the Crown must prove beyond reasonable doubt each of the following elements of the offence.

1. the complainant was a child under 10 years old;
2. the accused intentionally carried out an act with, or towards, the complainant; and
3. the act was sexual.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them then you must find the accused not guilty.

1. **The complainant was a child under 10**

   The law says a child is a person who is under the age of 10 years. In this case there is no dispute the complainant was a child of [*age*] at the time specified on the indictment. [*This will require adaptation if the complainant's age is disputed*].

2. **The accused intentionally carried out a sexual act with or towards the complainant**

   The act itself must be voluntary and intentional, not an accident or carried out by mistake.

   In determining whether the act was intentionally carried out with or towards the complainant, you are to consider the act and all of its surrounding circumstances. [*refer to specific Crown allegation regarding the act*].

   This may include:

   - The nature of the act;
   - The proximity between the accused and the complainant when the act was carried out (the complainant does not have to be in the immediate physical presence of the accused);

- The visibility of the act and whether the accused wanted their actions to be seen or was deliberately hiding them;
- What interaction, if any, occurred between the complainant and the accused at the time the act was being carried out, including inviting or encouraging the complainant to watch or participate.

[*Add the following where the offence is particularised as 'with'*]:

The act must involve some participation by the complainant (although the Crown case is that the participation was involuntary).

[*Add the following where the offence is particularised as 'towards'*]:

In performing the act, there must be some engagement with the complainant, from which it can be inferred the act is directed at the complainant.

[*For either particularisation*]:

It is not enough if the complainant was simply present (physically or electronically), but nothing more, when the act was carried out.

3. **The act was sexual**

Sexual act means an act (other than touching another person) carried out in circumstances where a reasonable person would consider the act to be sexual.

In determining whether a reasonable person would consider the act was sexual, you should consider everything you regard as relevant, but there are some particular matters you are required to take into account. They are:

- the part of the body involved in the act. Was it the genital or anal area or [*only in the case of a female person, or a transgender/intersex person identifying as female*: the breasts] **[***and add where relevant*: whether or not the breasts are sexually developed**]**?
- whether the person carrying out the act did so for sexual arousal or sexual gratification.
- was there any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?

The Crown is not required to prove any particular one of these matters. They are matters you are required to take into account, along with anything else you consider to be relevant when you are deciding whether the Crown has proved that the act was "sexual".

[*Where appropriate*: An act carried out for genuine medical or hygienic purposes is not a sexual act. As that is what the accused says was the reason for carrying out the act, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

[*If the circumstances of the particular case require it*: Some sexual offences require the Crown to prove the complainant did not consent. But where the alleged offence involves a child, consent is irrelevant. The law says that children cannot consent to sexual activity.**]**

If you find that the Crown has proved all three elements of the offence beyond reasonable doubt, then your verdict should be "guilty". However, if you are not satisfied the Crown has proved any one element of the offence, then your verdict should be "not guilty".

[5-1270] Notes — sexual act involving a child

Last reviewed: September 2023

1. Section 80AF *Crimes Act* 1900, which addresses the situation where there is some uncertainty about the timing of a particular offence or offences against a child, may require consideration. The section may only be invoked at the commencement of a trial; it cannot be invoked to address uncertainties that arise during the trial: *Stephens v The Queen* [2022] HCA 31 at [45]–[46].

[5-1280] Suggested direction — sexual act involving a child which is filmed (s 66DF)

Last reviewed: September 2023

The suggested direction is based on the offence in s 66DF. For incitement offences see **[5-1290] Notes — Incitement offences**.

The accused is charged with carrying out a sexual act with or towards the complainant, while knowing the act is being filmed for the purposes of producing child abuse material. The Crown case is that [*briefly outline the incident/s to which the charge/s relates*].

Before you can find the accused is guilty, the Crown must prove beyond reasonable doubt each of the following elements of the offence:

1. the complainant was a child under 16 years old at the time of the offence;
2. the accused intentionally carried out an act with, or towards, the complainant;
3. the act was sexual; and
4. the accused knew the act was being filmed to produce child abuse material.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them then you must find the accused not guilty.

1. **The complainant was a child under 16.**

   The law says a child is a person who is under the age of 16 years. In this case there is no dispute the complainant was a child of [age] at the time specified on the indictment. [This will require adaptation if the complainant's age is disputed].

2. **The accused intentionally carried out a sexual act with or towards the complainant**

   The act itself must be voluntary and intentional, not an accident or carried out by mistake.

   In determining whether the act was intentionally carried out with or towards the complainant, you are to consider the act and all of its surrounding circumstances. [*Refer to specific Crown allegation regarding the act*].

This may include:

- the nature of the act;
- the proximity between the accused and the complainant when the act was carried out (the complainant does not have to be in the immediate physical presence of the accused);
- the visibility of the act and whether the accused wanted their actions to be seen or was deliberately hiding them;
- what interaction, if any, occurred between the complainant and the accused at the time the act was being carried out, including inviting or encouraging the complainant to watch or participate.

[*Add the following where the offence is particularised as 'with'*]:

The act must involve some participation by the complainant (even though the Crown case is that the participation was involuntary).

[*Add the following where the offence is particularised as 'towards'*]:

In performing the act, there must be some engagement with the complainant, from which it can be inferred the act is directed at the complainant.

[*For either particularisation*]:

It is not enough if the complainant was simply present (physically or electronically), but nothing more, when the act was carried out.

3. **The act was sexual**

Sexual act means an act (other than touching another person) carried out in circumstances where a reasonable person would consider the act to be sexual.

In determining whether a reasonable person would consider the act was sexual, you should consider everything that you regard as relevant, but there are some particular matters you are required to take into account. They are:

- whether there was any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?
- the part of the body involved in the act. Was it the genital or anal area [*only in the case of a female person, or a transgender/intersex person identifying as female:* or the breasts] [*and add where relevant:* whether or not the breasts are sexually developed]?
- whether the person carrying out the act did so for the purpose of obtaining sexual arousal or sexual gratification;
- whether there was any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?

The Crown is not required to prove any particular one of these matters. They are matters you are required to take into account, along with anything else you consider to be relevant when you are deciding whether the Crown has proved that the act was "sexual".

[*Where appropriate:* An act carried out for genuine medical or hygienic purposes is not a sexual act. As that is what the accused says was the reason for carrying out the act, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.]

4. **The accused knew the act was being filmed to produce child abuse material**

The Crown case is that the alleged sexual act [*briefly state the particulars*] was being filmed for the purposes of producing child abuse material and the accused knew this.

Child abuse material includes material that depicts a child's private parts, or a child engaged in sexual posing or sexual activity, [*or where relevant:* a child in the presence of another person engaged in sexual posing or a sexual activity].

Private parts means a person's genital or anal area (whether bare or covered by underwear) [*only in the case of a female person, or a transgender/intersex person identifying as female:* or the breasts] [*and add where relevant:* whether or not the breasts are sexually developed].

Child abuse material is what reasonable persons would, in all the circumstances, consider to be offensive. In determining whether reasonable persons would regard particular material as being, in all the circumstances, offensive, you should consider everything that you regard as relevant, but there are some particular matters you are required to take into account. They are:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults, and

(b) the literary, artistic or educational merit (if any) of the material, and

(c) the journalistic merit (if any) of the material, being the merit of the material as a record or report of a matter of public interest, and

(d) the general character of the material (including whether it is of a medical, legal or scientific character).

You must also be satisfied the accused knew, at the time of the sexual act, that it was being filmed for the purpose of producing child abuse material.

[*Where appropriate:* Some sexual offences require the Crown to prove the complainant did not consent. But where the alleged offence involves a child, consent is irrelevant. The law says that children cannot consent to sexual activity.]

If you find that the Crown has proved all four elements of the offence beyond reasonable doubt, then your verdict should be "guilty". However, if you are not satisfied the Crown has proved any one element of the offence, then your verdict should be "not guilty".

[5-1290] Notes — incitement offences

Last reviewed: September 2023

1. The offences of committing a sexual act include inciting an alleged victim to carry out a sexual act with or towards the alleged offender or a third person,

or inciting a third person to sexually touch the alleged victim (ss 61KE(b)–(d), 61KF(b)–(d), 66DC(b)–(d) and 66DE(b)–(d)) or doing any of the aforementioned while knowing the sexual act is being filmed for the purposes of the production of child abuse material (s 66DF(b)(d)).

2. It is not an offence to incite an offence where the offence is constituted by inciting another person to carry out a sexual act: s 80G(5)(a).

3. "Incite" is not defined in the Act. Its meaning was discussed in *R v Eade* [2002] NSWCCA 257, where Smart AJ observed at [59]–[60]:

> In *Young v Cassells* (1914) 33 NZLR 852 Stout CJ … said: "The word 'incite' means to rouse; to stimulate; to urge or spur on; to stir up; to animate." In *R v Massie* [1999] VR 542 at 564, Brooking JA, with whom Winneke P and Batt JA agreed, said of 'incite', "common forms of behaviour covered by the word are 'command', 'request', 'propose', 'advise', 'encourage', or 'authorise'".
>
> It was pointed out in *Regina v Asst Recorder of Kingston* [1969] 2 QB 58 at 62 that with the offence of incitement it is merely the incitement which constitutes the offence and that it matters not that no steps have been taken towards the commission of the substantive offence nor whether the incitement had any effect at all: *Young v Cassells* …"

4. The incitement must be to commit the specific offence at hand: *Walsh v Sainsbury* (1925) 36 CLR 464 at 476; *Clyne v Bowman* (1987) 11 NSWLR 341 at 347–348. It is not necessary to prove the person incited acted upon the incitement or whether the incitement had any effect. However, it is necessary to prove that the course of conduct urged would, if it had been acted upon as the inciter intended it to be, amount to the commission of the offence: *R v Dimozantis* (unrep, 7/10/1991, Vic CCA); *R v Assistant Recorder of Kingston-Upon-Hull; Ex parte Morgan* [1969] 2 QB 58 at 62.

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Abusive behaviour towards intimate partners

[5-2000] Introduction

Last reviewed: December 2023

The *Crimes Legislation Amendment (Coercive Control) Act* 2022 ("the Act") relevantly amends the *Crimes Act* 1900 to create a new offence of abusive behaviour towards intimate partners.

The offence involves engaging in a course of conduct consisting of abusive behaviour (violence, threats, intimidation, or coercion or control of a person) against a current or former intimate partner, with the intention of coercing or controlling that person: s 54D(1).

The new offence provisions are expected to commence between 1 February and 1 July 2024 and will only apply to conduct occurring on or after the commencement of the amendments: *Crimes Legislation Amendment (Coercive Control) Act* 2022, s 2; Sch 1[2], 2[6].

[5-2010] Suggested direction

Last reviewed: December 2023

The accused is charged with engaging in a course of conduct against the complainant that consisted of abusive behaviour, intending to coerce or control the complainant who was **[*or:*** had been**]** an intimate partner.

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following elements which make up the offence.

1. The accused was an adult: ss 54D(1), s 54C.
2. The accused and the complainant were **[*or:*** had been**]** intimate partners: ss 54D(1)(b), 54C.
3. The accused engaged in a course of conduct against the complainant: ss 54D(1)(a), 54G.
4. The course of conduct consisted of abusive behaviour: ss 54D(1)(a), 54F.
5. The accused intended the course of conduct to coerce or control the complainant: s 54D(1)(c).
6. A reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause any or all of the following, whether or not the fear or impact was in fact caused:
   (a) fear that violence would be used against the complainant or another person, or
   (b) a serious adverse impact on the capacity of the complainant to engage in some or all of the complainant's ordinary day-to-day activities. **[***Omit any of these matters which are not alleged by the prosecution.***]**: 54D(1)(d).
7. **[*Only where there is evidence capable of raising the defence in s 54E:*** The course of conduct was not reasonable in all the circumstances.**]**: s 54E(2)(b).

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them you must find the accused not guilty.

1. **The accused was an adult.**

   An "adult" is a person who is 18 years of age or older.

2. **The accused and the complainant were [*or:* had been] intimate partners.**

   The complainant will have been an "intimate partner" of the accused if the complainant, at the time the alleged course of conduct occurred or previously: [*specify which of the following is alleged*]:

   (a) was married to the accused; or

   (b) was a de facto partner of the accused; or

   (c) had an intimate personal relationship with the accused, whether or not the intimate relationship involved a relationship of a sexual nature.

3. **The accused engaged in a course of conduct against the complainant.**

   A "course of conduct" means engaging in behaviour either repeatedly or continuously, or both repeatedly and continuously.

   Such behaviour does not have to be engaged in as an unbroken series of incidents or in immediate succession.

   [*Where appropriate:* it must involve behaviour engaged in within this State, but it may also include behaviour engaged in outside the State.**]**

4. **The course of conduct consisted of abusive behaviour.**

   "Abusive behaviour" means behaviour that consists of, or involves:

   - violence or threats against the complainant, or
   - intimidation of the complainant, or
   - coercion or control of the complainant: s 54F(1).

   There are a variety of behaviours that may constitute abusive behaviour.

   In this case the Crown alleges there was abusive behaviour by way of the accused **[***describe the nature and description of the behaviours that are alleged to amount to the course of conduct of abusive behaviour and the particulars of the period of time over which it is alleged to have taken place***]**: s 54H(1)(b).

   [*If there is a dispute about particulars of any specific incident of abusive behaviour alleged*: *s 54H(2)(b):* In relation to the **[***refer to the incident***]** there is an issue about a matter of detail concerning **[***specify the particular that is in issue***]**. As a matter of law this is not a matter that the Crown is required to prove beyond reasonable doubt.

   [*Summarise the competing cases in relation to elements 3 and 4*.]

The law is that the course of conduct may be constituted by any combination of abusive behaviours. Whether the course of conduct consists of or involves abusive behaviour must be assessed by you considering all of the behaviours that the Crown alleges makes up the course of conduct and determining whether you are satisfied beyond reasonable doubt that they consisted of or involved violence or threats of violence against the complainant, intimidation of the complainant or coercion or control of the complainant**]**.

5. **The accused intended the course of conduct to coerce or control the complainant.**

This element is concerned with the accused's state of mind. The Crown must prove that the accused intended the course of conduct of abusive behaviour to coerce or control the complainant.

A person's intention may be inferred or deduced from what the person may have said or done. Even without the person having said anything, their actions and the circumstances in which they were carried out may provide the most convincing evidence of what their intention was. **[*If appropriate*:** Where a specific result is the obvious and inevitable consequence of a person's act, and the person does that act, a jury may readily conclude that the person acted with the intention of achieving that specific result.**]**

[A direction on the care required in relation to drawing inferences should be considered: see **[3-150]]**

To "coerce" someone is to restrain or constrain them by force or to compel them to do or to refrain from doing something. To "control" a person is to exercise restraint or direction over someone; to dominate or have command over them.

[*Summarise the competing cases on this issue*.]

The Crown must prove the accused intended the "course of conduct" to coerce or control the complainant. It is not necessary for the Crown to prove that each of the acts of the accused that you find establishes the course of conduct were by themselves intended to have that effect.

6. **A reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause any or all of the following, whether or not the fear or impact was in fact caused**:

(a) **fear that violence would be used against the complainant or another person, or**

(b) **a serious adverse impact on the capacity of the complainant to engage in some or all of the complainant's ordinary day-to-day activities. [***Omit any of these matters which are not alleged by the prosecution.***]**

In deciding what a "reasonable person" would consider you are asked to make an objective assessment based upon community standards of the likely effect of the accused's course of conduct. You must consider this question in the light of all of the circumstances that you regard as relevant.

The Crown says that the following circumstances are relevant for you to take into account. **[***Summarise those relied upon by the Crown*.**]**

The Crown is not required to prove what the complainant thought, or what was in fact, the effect of the accused's course of conduct. Although there may be evidence from a complainant about this, there does not have to be because this element is concerned with what a reasonable person would consider the course of conduct would be likely to cause, not what may have been, or what was in fact, caused.

[*Refer to any evidence that may have been given and explain its relevance*.**]**

7. **[Where there is evidence capable of raising the defence in s 54E: The course of conduct was not reasonable in all the circumstances.]**

   The defence case is that the course of conduct was reasonable in the circumstances. This is not a matter for the defence to prove. I remind you that the accused is not obliged to prove anything and that the onus remains at all times upon the Crown to prove the accused's guilt beyond reasonable doubt.

   In relation to this issue, it is for the Crown to prove that the course of conduct engaged in by the accused was not reasonable in all the circumstances.

   [*Summarise the evidence and submissions on this issue***]**.

[5-2020] Notes

Last reviewed: December 2023

1. There is no minimum number of incidents required to establish a course of conduct: Second Reading Speech, Crimes Legislation Amendment (Coercive Control) Bill 2022, Legislative Assembly, *Debates*, 19/10/2022, p 9047.
2. If a specific incident of abusive behaviour is alleged to form part of the course of conduct, the prosecution is not required to allege the particulars that would be necessary were the incident charged as a separate offence: s 54H(1)(a). The prosecution is required to allege the nature and description of the behaviours that amount to the course of conduct and the particulars of the period of time over which the course of conduct took place: s 54H(1)(b).
3. The common law in relation to double jeopardy applies to s 54D offences: Note to s 54H. A person cannot be subsequently convicted of a standalone offence if it formed part of a course of conduct for a s 54D(1) charge regarding which the person was either acquitted or convicted. Likewise, there can be no conviction for a s 54D(1) charge if it relies on a standalone offence for which the person was already convicted or acquitted.
4. An offence against s 54D(1) is a "domestic abuse offence": s 11 *Crimes (Domestic and Personal Violence) Act* 2007. Particular procedural provisions of the *Criminal Procedure Act* 1986 apply to proceedings for such offences: **Evidence given by alternative means** at **[1-360]**ff, and **Closed court, suppression and non-publication orders** at **[1-349]**.
5. As the offence is a "domestic abuse offence", s 306ZR of the *Criminal Procedure Act* applies. If evidence is given or a question is asked of a witness that tends to suggest an absence or delay in complaint, the warning and information in s 306ZR(2) must be given.

6. Where evidence of other acts of alleged misconduct by the accused towards the complainant are led, see **Suggested direction — context evidence** at **[4-215]**.
7. Where evidence of complaint is led, see **Complaint evidence** at **[5-000]**.
8. For information and discussion of the dynamics of coercive control, see the *Equality before the Law Bench Book* at 7.5.3, and as to domestic violence offences generally see *Sentencing Bench Book* at **Domestic violence offences** at **[63-500]**. See also *Coercive control resource* on the Judicial Information Research System (for JIRS subscribers and judicial officers only).

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Assault

[5-5000] Common assault prosecuted by indictment

Section 61 of the *Crimes Act* 1900 provides:

> Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

[5-5010] General principles

Definitions

An assault is any act — and not a mere omission to act — by which a person intentionally — or recklessly — causes another to apprehend immediate and unlawful violence: *R v Burstow; R v Ireland* [1998] 1 AC 147. Thus it is the fear which is the gist of assault.

Battery is the actual infliction of unlawful force on another. But the word "assault" has come to describe both offences: see *DPP v JWH* (unrep NSWSC, 17 Oct 1997).

Barwick CJ in *The Queen v Phillips* (1971) 45 ALJR 467 at 472 described an assault in the common law sense of the word as follows: "Such an assault necessarily involves the apprehension of injury or the instillation of fear or fright. It does not necessarily involve physical contact with the person assaulted: nor is such physical contact, if it occurs, an element of the assault."

Apprehension of immediate and unlawful personal violence

A number of cases have considered the element of *immediacy* with regard to the requirement of a threat of immediate violence and the following propositions may be deduced from the cases.

Perhaps the concept was most widely construed in *Barton v Armstrong* [1969] 2 NSWR 451 at 455 where it was held that if the threat produces an immediate fear or apprehension of physical violence, there may be an assault, although the complainant does not know when the physical violence may be effected. *Barton v Armstrong* was considered and distinguished in *R v Knight* (1988) 35 A Crim R 314.

There need be no intention or power to use actual violence or power, for it is enough if the complainant on reasonable grounds believes that he or she is in danger of it. Indeed, if it later appears that no violence was intended, it is sufficient if the complainant or a reasonable person thinks that it is intended. Thus, in *Zanker v Vartzokas* (1988) 34 A Crim R 11 a young woman accepted a lift from the accused. While the van was moving, the accused accelerated the vehicle saying: "I'm going to take you to my mate's house. He will really fix you up." She was put in fear and jumped out of the moving vehicle. This was held to be an assault on the basis that the complainant was put in fear of relatively immediate imminent violence which continued to have effect as the vehicle continued toward the threatened destination while she was unlawfully imprisoned and at the continuing mercy of the accused. Again, *Barton v Armstrong* was distinguished.

A threat to strike a person even at such a distance as to make contact impossible may constitute an assault if it instils a fear of immediate violence in the mind of the victim: *R v Mostyn* [2004] NSWCCA 97 at [71].

Recklessness — recklessly causing another to apprehend immediate and unlawful violence

In the case where no physical force is actually applied, and the Crown relies upon recklessness, it is necessary to prove that the accused realised that the complainant might fear that he or she would then and there be subjected to immediate and unlawful force, but none the less went on and took that risk.

In the case where physical force is actually applied, it is necessary to prove that the accused realised that the complainant might be subjected to unlawful force, however slight, as a result of what the accused was about to do, but yet took the risk that that might happen: see *R v Savage; DPP v Parmenter* [1992] 1 AC 699.

Hostile intent

There is no general proposition that the intentional application of force to the person of an unwilling victim cannot constitute unlawful assault at common law unless it be accompanied or motivated by positive hostility or hostile intent on the part of the assailant towards the complainant. Such hostility or hostile intent may however, convert what might otherwise be unobjectionable as reasonably necessary for the common intercourse of life into assault by precluding an excuse or justification of assistance or rescue: *Boughey v The Queen* (1986) 161 CLR 10 at 27.

[5-5020] Suggested direction — assault where no physical force is actually applied

The accused is charged that the accused did on the [*day*] of [*month*] at [*location*] assault the complainant. *Assault* is a word in common, everyday use. No doubt it immediately conjures up in your minds the image of one person striking another person physically, whether with a hand, a fist or perhaps some hand held implement. In most cases, any such striking would also be regarded by the law as an assault.

However, there are differences between the law and what is perhaps ordinary, everyday speech. For example, if I raise my hand at you in a menacing fashion and thereby cause you to fear that you are about to be struck, then the law says that I have assaulted you. Ordinary use of the word *assault* would probably not have extended that far. It is, therefore, necessary that I should tell you what an assault is in law.

An assault is any act by which a person intentionally, or recklessly, causes another person to apprehend immediate and unlawful violence. There are four elements which constitute an assault. They are:

1. An act by the accused which intentionally, or recklessly, causes another person (the complainant) to apprehend immediate and unlawful violence.
2. That such conduct of the accused was without the consent of the complainant.
3. That such conduct was intentional or reckless in the sense that the accused realised that the complainant might fear that the complainant would then and there be subject to immediate and unlawful violence and none the less went on and took that risk.
4. That such conduct be without lawful excuse.

[*The relevant evidence should be related to the four elements set out above, together with the competing arguments*]

The Crown must be able to satisfy you beyond reasonable doubt of each of the four elements which I have mentioned, before you may convict the accused of assault.

[5-5030] Suggested direction — assault where physical force is actually applied

The accused is charged that the accused did on the [*day*] of [*month*] at [*location*] assault the complainant.

The Crown contends that the accused [*here outline the specific physical force which the Crown contends constituted the assault*]. There are four elements which constitute an assault. They are:

1. A striking, touching or application of force by the accused to another person (the complainant).
2. That such conduct of the accused was without the consent of the complainant.
3. That such conduct was intentional or reckless in the sense that the accused realised that the complainant might be subject to immediate and unlawful violence, however slight as a result of what he or she was about to do, but yet took the risk that that might happen.
4. That such conduct be without lawful excuse.

[*The relevant evidence should be related to the four elements set out above, together with the competing arguments*]

The Crown must be able to satisfy you beyond reasonable doubt of each of the four elements which I have mentioned, before you may convict the accused of assault.

[5-5040] Notes

1. Should any issue of intention or voluntariness arise, it will have to be pointed out to the jury that the Crown must prove that the act was voluntary and intentional, not merely accidental. Should any issue of "lawful excuse" arise, that will also have to be dealt with for example, by pointing out that the Crown must prove beyond reasonable doubt that the assault was not consented to, or that the accused was not acting in lawful self defence.
2. As to mens rea, a person using unnecessary violence to push through a crowd would have the necessary intent: *R v Court* [1988] 2 WLR 1071 at 1073–1074.
3. Mere use of words may in certain circumstances amount to an assault: *R v Tout* (1987) 11 NSWLR 251 at 254–255. Threats made over the phone have been held to amount to more than "mere words" depending on the circumstances: *Barton v Armstrong* [1969] 2 NSWR 451 at 455. Mere silence, as in silent telephone calls, may constitute an assault: *R v Burstow; R v Ireland* [1998] AC 147.
4. The following passage from para 19–175 of *Archbold, Criminal Pleading, Evidence and Practice*, 2004, Sweet and Maxwell, London, is instructive.

> The effect [of the fundamental principle that every person's body is inviolate] is that everybody is protected not only against physical injury but against any

form of physical molestation: *Collins v Wilcock* 79 Cr App R 229, DC. There are exceptions, for example, the correction of children, the lawful exercise of the power of arrest, the use of reasonable force when the necessity to act in self-defence arises. Further, a broader exception exists which caters for the exigencies of everyday life such as jostling in crowded places and touching a person for the purpose of engaging his attention. The approach to the facts of any particular case where there is an element of persistence in the touching should not be unreal. In each case, the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct.

[5-5050] Examples of assault

The following examples of assault, which may be of assistance to trial judges, are set out in para 19–172 of *Archbold*.

- Striking at a person with a stick or a fist is an assault, even though the person striking misses the aim; drawing a weapon such as a knife or throwing a bottle or glass with intent to wound or strike, will constitute an assault; so will any other like act indicating an intention to use violence against the person of another: *Martin v Shoppe* (1837) 3 C & P 373.
- To strike a horse causing the rider to fall, would be an assault. An act may cause grievous harm or other injury, yet not constitute an assault. Causing a deleterious drug to be taken by another is not an assault: *R v Walkden* (1845) 1 Cox 282.
- An unlawful imprisonment is also an assault: *Hunter v Johnson* (1884) 13 QBD 225 (detention of a child after school hours by a master, without lawful authority).
- For a discussion of s 58 of the *Crimes Act* 1900 (assault with intent to commit a serious indictable offence on certain officers) and s 60 (assault and other actions against police officers), see *DPP v Gribble* (2004) 151 A Crim R 256.

[The next page is 901]

Break, enter and commit serious indictable offence

***Crimes Act* 1900 (NSW), s 112**

[5-5100] Suggested direction

Last reviewed: June 2023

The suggested direction has been designed to fit the most commonly found offence of break, enter and steal but can be adapted for other serious indictable offences.

See also **Larceny [5-6100]** and s 4 *Crimes Act* 1900.

The Crown must satisfy you beyond reasonable doubt that —

1. the accused broke and entered the premises described;
2. [*those premises were a dwelling house/building*]; and
3. having entered the premises, the accused stole … [*specify the property*].

"Broke" means "forcibly gained access". It is not a "breaking" to walk through an open door.

"Entered" means what it says, that is, "went inside" … [*or inserted some part of [his/her] body or some implement that [he/she] was holding*].

[*Where applicable:* The accused says [*he/she*] had a right to enter the premises because [*state the reason from the defence case*]. A person who has lawful authority to enter the premises, such as by being a leaseholder, will not be guilty of "breaking and entering", even if they use force to gain entry. The Crown must prove beyond reasonable doubt the accused had no lawful authority to enter the premises.]

A "dwelling house" is a house, flat or apartment where somebody dwells, that is to say, where somebody lives or resides. It may include a place that is designed for that purpose even when nobody is actually living in it at the time.

To "steal" somebody's property means to "take it away, without consent and intending to deprive them of it permanently".

It need not be shown that the accused actually removed the property from the premises but it must be shown that [*he/she*] moved it to some extent, and that when the accused did so [*he/she*] had the intention of stealing it.

Here it is alleged by the Crown that the accused … [*state the offence alleged, for example, opened a locked window, went inside, took an ipod*]. If the Crown proves beyond reasonable doubt that the accused did those things, then you should return a verdict of "guilty".

[5-5110] Notes

Last reviewed: June 2023

1. There is no definition of "breaking" in the *Crimes Act* 1900. In *Stanford v R* (2007) 70 NSWLR 474, the court held that there is no "breaking" involved in further opening an already opened window: at [38]; see also *R v Galea* (1989) 46 A Crim R 158 at 161. However, to open a closed but unlocked door could amount to "breaking" for the purposes of s 112 *Crimes Act* since the definition of

breaking includes pushing open a closed but secured door or opening a closed but unfastened window: *DPP (NSW) v Trudgett* [2013] NSWSC 1607 at [15]. Other acts which have been held to constitute a "breaking" at common law include the raising of a flap door: *R v Russell* (1833) 1 Mood 377; or lifting a latch or loosening any other fastening: *R v Lackey* [1954] Crim L R 57. There may be a constructive breaking where an accused gains entry by trick: *R v Boyle* (1954) 38 Cr App R 111 at 112.

Ghamrawi v R (2017) 95 NSWLR 405 includes an extensive survey of the history of the concept of "breaking" at common law. Leeming JA, applying *Stanford v R*, held at [84]–[85] that the term "break" in s 112 had the same meaning it had at common law and accordingly that there can be an "actual" and a "constructive" breaking. On the facts of the case at hand, his Honour held that there is no actual breaking if the person has express or implied permission to enter through a closed, but unlocked, door, even if they had felonious intent at the time they entered. In *Singh v R* [2019] NSWCCA 110, Payne JA held that knocking on a door of a house with intent to rob its occupants and, upon the door being opened, rushing into the house constituted a "constructive breaking".

2. Break and enter offences under s 112 *Crimes Act* require a trespass to be established, that is, entry to premises of another without lawful authority: *BA v The King* [2023] HCA 14 at [42], [62], [69]. A person who has a right to occupy premises, such as under an existing rental agreement, has lawful authority to enter, including by using force that would otherwise constitute a "break". This will be the case notwithstanding the person no longer physically occupies the premises or the current occupant (even if they are a joint tenant) does not consent to the person's entry. There will be no offence under s 112 in such circumstances, even if the person's intention in entering the premises is for a non-residential purpose: *BA v The King* at [42].

3. From 15 February 2008, s 112 *Crimes Act* refers to "any dwelling-house or other building", whereas previously it referred to a list of specifically nominated buildings. A dwelling-house is defined in s 4(1) to include:

   (a) any building or other structure intended for occupation as a dwelling and capable of being so occupied, although it has never been so occupied,

   (b) a boat or vehicle in or on which any person resides, and

   (c) any building or other structure within the same curtilage as a dwelling-house, and occupied therewith or whose use is ancillary to the occupation of the dwelling-house.

   A building is defined in s 105A(1) to include "any place of Divine worship".

4. The "serious indictable offence" must be committed inside the dwelling house. In *Nassr v R* [2015] NSWCCA 284, a person entered the victim's home intending to steal but was interrupted. He assaulted the victim outside the house as he attempted to flee. The court held at [10]–[11] that "dwelling-house" as defined in s 4(1) does not include the front or side yard of the property on which the relevant house, building or structure is erected.

5. For the purpose of establishing whether the accused knew a person was "in the place where the offence is alleged to have been committed" as a circumstance of

aggravation in s 105A(1), it is sufficient that the accused knew a person was on the patio or in the confined grounds of the dwelling house: *R v Rice* [2004] NSWCCA 384 per Smart J at [62]–[63]; per Hodgson JA at [4]–[6]; cf Hulme J at [13].

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Bribery

[5-5200] Introduction

The common law offence of bribery is constituted by the receiving or offering of an undue reward by or to any person in public office, in order to influence that person's behaviour in that office, and to incline that person to act contrary to accepted rules of honesty and integrity. The offence can be constituted by the mere offer of a corrupt inducement, even if the offer is rejected.

The offence of bribery can be constituted by the making or offering of a payment with an intent to incline a person in public office to disregard his or her duty at some future time — the occasion for the disregard of duty need not have arisen at the time of the offence, and it need never arise: *R v Allen* (1992) 27 NSWLR 398 at 402.

[5-5210] Suggested direction

Upon the assumption that the undue reward was a sum of money.

The allegation is that [*the accused*] [*paid/offered*] money to [*name*], a person in public office, to incline [*him/her*] to act contrary to [*his/her*] [*duty/accepted rules of honesty and integrity*].

The Crown must prove that money was in fact [*paid/offered*] to [*name*] by [*the accused*]. If you have a reasonable doubt as to whether such [*payment/offer*] was made, then [*the accused*] is "not guilty".

If you are satisfied beyond reasonable doubt that there was a [*payment/offer*] made by [*the accused*], then you must consider the purpose for which it was made. Before you can find [*the accused*] "guilty", you must be satisfied beyond reasonable doubt that [*the accused's*] purpose in making the [*payment/offer*] was to incline or dispose [*name*] to act contrary to [*his/her*] duty and accepted rules of honesty and integrity. It is not essential for the Crown to show that [*name*] did so act or even that [*name*] ever intended to do so. The essential feature is the intention of [*the accused*]; the intention with which [*he/she*] made the [*offer/payment*].

This involves an inquiry into the state of mind of [*the accused*]. Obviously, you cannot look inside [*his/her*] head to ascertain this — you must consider the facts that have been established and ask yourselves whether those facts demonstrate what [*the accused's*] state of mind was at the time of the [*payment/offer*]. It is alleged that [*the accused*] made certain statements which would indicate what [*his/her*] state of mind must have been.

Section 72 of the *Evidence Act* 1995 will be relevant if the accused made a contemporaneous representation about his or her intention or state of mind. See also Intention [3-200].

[5-5220] Notes

1. For a discussion of the elements of bribery at common law, see *R v Glynn* (1994) 33 NSWLR 139 at 140 et seq.
2. Where the Crown proves that clandestine payments of money have been made to a police officer, the fact that the Crown cannot prove the nature of any expected

or desired departure from duty is of factual or evidentiary significance, but it does not mean that the prosecution must fail: *R v Webster and Jones* (unrep, 03/08/92, NSWCCA).

3. The essence of the offence of bribery is that there must be an offer which is known to the person sought to be bribed and which is capable of being rejected. What cannot be rejected is not an offer: *R v Glynn* (1994) 33 NSWLR 139 at 147.
4. Provisions relating to the bribery of a Commonwealth public official are contained in the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (Cth).
5. See Pt 4A of the *Crimes Act* 1900 for offences relating to the corrupt receipt of commissions and other corrupt practices.

[The next page is 921]

Conspiracy

[5-5300] Introduction

The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime which constitutes the necessary *mens rea* for the offence: *Yip Chiu-Cheung v R* (1994) 99 Cr App R 406 at 410, per Lord Griffiths; *R v Wilson* (unrep, 12/08/94, NSWCCA).

[5-5310] Suggested direction

A conspiracy is an agreement between two or more persons to do an unlawful act. The nub of the offence is the agreement to engage in a common enterprise to do the unlawful act alleged.

In the present case, the Crown alleges that … [*give details of the alleged conspiracy*].

… [*give the direction requiring the jury to give separate consideration to the case against each accused: see [3-350] and continue*].

The evidence against each of [*the accused*] may include evidence relating to what [*the accused*] did or said. It may also include what was said or done by other alleged conspirators in the presence of [*the accused*]. Generally speaking, an accused is not to be held liable for the acts or statements of others if he or she is not present when those acts were done or those statements were made. However, there is an exception to this rule in the case of a charge of conspiracy. This exception permits, in certain circumstances and for certain limited purposes, evidence of acts done and statements made by other alleged conspirators in the absence of one of their number to be admissible in the case against [*him/her*].

In order for you to find any one of those accused "guilty", the Crown must satisfy you beyond reasonable doubt of the following matters in relation to each accused —

1. That there was in fact an agreement between two or more persons to commit … [*specify the unlawful act in question*]; and
2. That [*the accused*], whose case you are considering, participated in that agreement … [**If applicable, add:** *from its outset or because [he/she] joined the conspiracy at a later date*] in the sense that —
   (a) [*he/she*] agreed with one or more of the other persons referred to in the count that the unlawful objective of the conspiracy should be carried out; and
   (b) at the time of agreeing to this, [*he/she*] intended that objective should be carried into effect.

As to the first of these matters, namely, whether there was an agreement of the kind alleged by the Crown. An agreement does not have to be reached by any formal means. There does not have to be writing or even someone saying "I agree" for there to be an agreement. As you will know from your own experience, many agreements are made informally and people often enter into agreements without there being any express statements to that effect between them.

The form of the agreement does not matter. In this area of the law, all that is necessary for there to be an agreement is for two or more persons to concur either by words or by conduct in a common design, each having the intention to bring about the unlawful object of the agreement. If you are satisfied beyond reasonable doubt that there was an agreement to … [*set out the nature of the agreement alleged by the Crown*], then that is in law an agreement to do an unlawful act.

The Crown may seek to prove an agreement in a variety of ways. In some cases it may seek to prove the agreement by direct evidence, for example, by calling a person who actually heard the agreement being made. In other cases, and this is by far the more usual type of case, the Crown may seek to prove the agreement by asking the jury to infer its existence from the evidence tendered before the court. In the present case, the Crown seeks to prove the agreement and the nature of the agreement by … [*indicate how the Crown seeks to prove the agreement, and, if by inference, an inference direction must be given: see [3-150], and also a circumstantial evidence direction: see [2-500]*].

As to the second of the matters which the Crown has to prove — in order for [*the accused*] to have participated in the agreement, [*he/she*] must have known what was proposed as the objective of the agreement and must have intended to carry that objective into effect. The Crown must satisfy you beyond reasonable doubt of those matters. It is not necessary for the Crown to prove that the agreement was carried into effect, but it is necessary for the Crown to prove that [*the accused*] intended that it be carried into effect. [*The accused*] must have been a party to that common design with at least one other person.

The Crown may seek to prove that [*the accused*] participated in the agreement in a variety of ways. It may do so by leading direct evidence of witnesses that [*the accused*] by [*his/her*] conduct, including any statements [*he/she*] may have made, indicated that [*he/she*] was a participant. The Crown may also seek to prove such an agreement by inferences from acts done or statements made by [*the accused*] in apparent furtherance of the purpose or objective of the alleged agreement.

[If an agreement by inferences from acts done or statements made by the accused in apparent furtherance of the purpose or objective of the alleged agreement, add

I remind you of the directions of law I have given you as to the drawing of inferences and the necessity for the Crown to exclude any explanation other than that of guilt before you would be entitled to come to the conclusion that the Crown has established that [*the accused*] was a participant in the alleged agreement.**]**

I have already explained to you that, in general, an accused is to be regarded as responsible in law only for [*his/her*] own acts or statements and [*he/she*] is not generally to be held responsible for acts done or statements made by others when [*he/she*] is not present. I have also informed you, however, that in cases of conspiracy there is an exception to this rule.

This exception provides that relevant acts done and statements made by other persons alleged also to be conspirators, and done or made whilst the conspiracy is still active, are evidence against all of them, even though not all were present when the act was done or the statement was made … [**if appropriate**: *or was done or made before [he/she] joined the conspiracy*].

Evidence of such acts and statements of co-conspirators is admissible against an accused who was not present when the act was done or the statement was made, on the issue whether there was an agreement as alleged by the Crown and also as to the nature of that agreement. If these acts or statements done in [*his/her*] absence were acts done or statements made in carrying out the purpose of the alleged conspiracy then that evidence may also be regarded as evidence of [*his/her*] participation in the agreement alleged.

In this case, the Crown seeks to prove the participation of [*the accused*] by … [*set out how the Crown seeks to prove the participation of the particular accused and if by inference give (or remind the jury of) the general directions on circumstantial evidence and drawing inferences and then set out the alleged facts from which the inference is sought to be drawn against the particular accused*].

[5-5320] Notes

Because evidentiary difficulties frequently arise in conspiracy trials, judges may find the following notes helpful —

1. Conspiracy is a continuous crime. It extends over the period of agreement until the police intervene or the objective of the agreement is achieved. It remains a single conspiracy no matter who joins or leaves it, as long as there are at least two persons at any one time acting in combination to achieve the same criminal objective: *R v Masters* (1992) 26 NSWLR 450 at 458.
2. In a joint trial for conspiracy, the summing up must deal separately with the case against each accused and the trial judge must separate the evidence properly relevant and admissible against each of the accused: *R v Cosgrove and Hunter* (1988) 34 A Crim R 299 at 303.
3. Before the co-conspirators rule can operate to permit acts and statements of others, in the absence of a particular accused, to be evidence in the case against that accused, the trial judge must have determined (on the basis of evidence admissible in the ordinary way against that accused) that there is *prima facie* reasonable evidence of participation of that accused in the alleged agreement. The jury is not to be told of the trial judge's finding in the summing up, or at all, and there need not be a formal judgment or ruling to that effect, but the trial judge must indicate that he or she is satisfied that there is such reasonable evidence of participation prior to the summing up.

   If there is evidence of reasonable participation, then acts or statements in the absence of the accused will be admissible against him or her to prove the existence of the conspiracy and the nature of it. If those acts or statements were done or made in furtherance of the conspiracy, then they will also be admissible on the issue of the accused's participation in the alleged agreement. If, however, the allegation of the Crown is that the accused joined the conspiracy after it had commenced, then acts done or statements made prior to his or her joining the alleged conspiracy are admissible only to prove the existence of the alleged agreement and the nature of it, but not to prove his or her participation. See generally: *R v Masters* (1992) 26 NSWLR 450; *R v Chai* (1992) 27 NSWLR 153; *R v Houlker* (unrep, 19/03/93, NSWCCA).

4. Section 57(2) of the *Evidence Act* 1995 provides that if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy, or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

   This provision reflects the common law. See, for example, *Ahern v The Queen* (1988) 165 CLR 87 at 93–94 and *Tripodi v The Queen* (1961) 104 CLR 1 at 6–7. The admission of this evidence does not offend the hearsay rule. Where evidence is admitted on a provisional basis under s 57(2) of the *Evidence Act* 1995, even though its admissibility is in issue, and it transpires that there was no other evidence of common purpose involving the relevant accused, it will probably be necessary for the judge to exclude the evidence at a later stage.

5. It is open to the trial judge in the exercise of his or her discretion, even where it is found that there is reasonable evidence of participation against a particular accused, to exclude evidence of the acts and statements of others from consideration in the case against him or her (pursuant to s 135 or s 137 of the *Evidence Act* 1995) and/or to limit the use to which the jury might put such evidence under s 136 of the *Evidence Act* 1995.

6. Although a warning under s 165 of the *Evidence Act* 1995 is not required, the jury should be told that they should scrutinise carefully before acting on evidence of the acts and statements of others in the absence of a particular accused but which implicate that accused: *R v Chai* (1992) 27 NSWLR 153. It should be pointed out to the jury that the particular accused was not present when the relevant things were said and done by his or her alleged co-conspirators, and was therefore unable to confirm or deny the truth of what was said or done.

7. As to the significance of statements made after the arrest of an alleged conspirator, see: *R v Louden* (1995) 37 NSWLR 683.

8. The common law rule that a husband and wife cannot be found guilty of conspiring together has been abolished, see: *Crimes Act* 1900, s 580D.

9. As to indictments for conspiracy, see: *Criminal Procedure Act* 1986, Sch 3, cl 21.

10. As to conspiracy to defraud, the jury should be directed that to defraud is to deliberately use dishonest means to deprive another person of his or her property or to imperil his or her rights or interests. It involves the intentional creation of a situation by one person to use dishonest means to deprive another person of money or property, or to imperil the other person's rights or interests, knowing that he or she has no right to deprive that other person of money or property, or imperil that other person's rights or interests.

    The summing up should also identify the dishonest means relied upon by the Crown: *Peters v The Queen* (1998) 192 CLR 431; *Spies v The Queen* (2000) 113 A Crim R 448. See also **Defraud — Intent to** [5-5500].

11. Having regard to the definition of "supply" in the *Drug Misuse and Trafficking Act* 1985, it is not open to the Crown to charge a conspiracy to supply a prohibited drug where the accused agreed with another to supply a prohibited drug to that other: *R v Challita* (1988) 37 A Crim R 175 at 184 and *R v Trudgeon* (1988) 39 A Crim R 252. It is, however, open to the Crown to charge a conspiracy where

the accused is alleged to have agreed with another or others to supply drugs to the public generally, or to another, or others not being conspirators with them: *Tannous v The Queen* (1989) 64 ALJR 141.

12. An accused may nevertheless be liable for conspiracies to do the factually impossible: *R v El Azzi* (2001) 125 A Crim R 113.

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Dangerous driving

***Crimes Act* 1900 (NSW), s 52A**

[5-5400] Introduction

The offences involving dangerous driving are contained in s 52A *Crimes Act* 1900. There are two basic offences depending upon the consequences of the driving: s 52A(1) where death is occasioned, and s 52A(3), where grievous bodily harm is occasioned. There are aggravated forms of each of the basic offences. The matters of aggravation are set out in s 52A(7).

There is a defence available to any of the offences provided in s 52A(8).

Section 52AA contains various procedural matters, particularly in relation to the proof of intoxication. Section 52AA(4) provides for alternative verdicts.

Section 52AB contains an offence of failing to stop and assist after a collision causing death or grievous bodily harm.

[5-5410] Dangerous driving

1. Generally see *King v The Queen* (2012) 245 CLR 588 and Special Bulletin 28. See also *Criminal Practice and Procedure NSW* at [8-s 52A.1]ff; *Criminal Law (NSW)* at [CA.52A.20]ff.
2. The offences in s 52A are strict liability, as to which see *Jiminez v The Queen* (1992) 173 CLR 572 and the defence of an honest and reasonable mistake of fact that it was safe to drive.
3. To "drive" includes being "in control of the steering, movement or propulsion of a vehicle" under s 4(1) *Road Transport Act* 2013. With regard to a similar definition of "drive" under s 3(1) of the now repealed *Road Transport (General) Act* 2005, the court in *Williams v R* [2012] NSWCCA 286; (2012) 229 A Crim R 67 observed at [60] that "there is nothing that extends the operation of that definition beyond that Act". It was also noted at [60] that: "'Drive' is not defined in the *Crimes Act* [1900]".

   An ability to steer a vehicle is not essential. Control over propulsion, that is, over the mode of moving and stopping the vehicle is sufficient to be a driver: *R v Affleck* (1992) 65 A Crim R 96 at 98; *Williams v R* at [62].
4. A person does not have to be shown to have been voluntarily and consciously managing and controlling the movement of the vehicle at the precise moment of impact: *Williams v R* at [67]. Even if the motor vehicle was not being driven dangerously at the precise moment of impact, a preceding period of driving in a dangerous manner may be so nearly contemporaneous with the impact as to satisfy this element of the offence: *Williams v R* at [67] applying *Jiminez v The Queen* at 578.
5. In *Jiminez v The Queen* at 584, the High Court said directions given in a dangerous driving case based on tiredness should address:
   - The evidence, if any, suggesting the driver honestly believed on reasonable grounds that it was safe to drive

- If the jury concludes the driving was dangerous to the public, they must also consider whether the driver honestly believed on reasonable grounds that it was safe to drive
- The onus of negativing that defence is on the prosecution
- In cases where the defence case is that there is no evidence the accused had any warning of the onset of sleep, identify the period of driving during which the driving is alleged to be dangerous. In such cases the jury must be informed that if the accused fell asleep, his/her actions while asleep were not voluntary and could not amount to dangerous driving.

6. To the extent that one member of the court in *Prineas v R* [2018] NSWCCA 221 at [44] suggests that it is preferable not to use the phrase "safe for [the accused] to drive" in a dangerous driving case involving sleep, it is contrary to the suggested directions in *Jiminez v The Queen*.

7. "Dangerous" does not require proof of some species of criminal negligence: *King v The Queen* (2012) 245 CLR 588 at [38].

8. "Grievous bodily harm" is "really serious bodily injury": *Swan v R* [2016] NSWCCA 79 at [57]. The word "really" indicates "grievous bodily harm" is a more serious form of injury than actual bodily harm: *Swan v R* at [57]–[62]. Ascertaining what constitutes really serious bodily injury may involve questions of fact and degree: *Swan v R* at [65]. An inclusive definition of "grievous bodily harm" is also found in s 4(1) *Crimes Act*.

9. As to injury to an unborn child who dies after birth, see *R v F* (1996) 40 NSWLR 245 or where a child is born prematurely as a result of injuries, see *Whelan v R* [2012] NSWCCA 147. As to when an infant is "born alive", see *R v Iby* (2005) 63 NSWLR 278.

[5-5420] Suggested direction — dangerous driving occasioning death

Because of the wide variation of issues which may arise in a dangerous driving trial, the suggested direction is generally based upon the simplest case scenario, that is, an allegation that the accused was driving in a dangerous manner by failing to properly manage and control the vehicle. The trial judge in a particular case must ensure that directions are only given upon issues that have been raised before the jury. It is for the Crown to allege the particulars of the dangerous manner of the driving and the judge should give directions accordingly. The suggested direction assumes that the allegation is the occasioning of death because such an offence must be dealt with on indictment.

The charge against [*the accused*] is that [*he/she*] drove a vehicle involved in an impact, which caused the death of [*name of victim*], and that at the time of that impact [*he/she*] was driving that vehicle in a manner dangerous to another person or persons. It is not necessary for the Crown to prove any particular person was at risk from the driving. It is sufficient that the driving is dangerous to any person who may be on or about the place where the vehicle is being driven.

To prove the offence, the Crown must establish beyond reasonable doubt each of the following elements of the offence:

1. that the accused was the driver of a vehicle; and
2. that vehicle was involved in an impact, namely [*insert relevant description from s 52A(5) or s 52A(6) but note the circumstances listed are not exhaustive*]; and
3. the impact caused the death of the deceased; and
4. at the time of the impact, the accused was driving the vehicle in a manner dangerous to another person.

If the Crown fails to prove any one of those four elements of the offence you must find the accused "not guilty".

[If appropriate where the issue of strict liability arises:

5. *at the time of the driving dangerously the accused had no honest and reasonable belief that it was safe to drive.]*

[If the offence is aggravated:

6. *at the time of the impact, that accused was driving in a circumstance of aggravation [specify the particular aggravation under s 52A(7)].]*

First to third elements

[If elements 1-3 are not in issue:

So far as the first three elements are concerned, the Crown relies on the following evidence [*set out the evidence*].]

[If there is an issue regarding the first element as to whether the accused was driving add:

A person drives a motor vehicle when he or she has management and control over its movement, whether by using the accelerator or gears, or simply by releasing the brakes and allowing gravity to operate. The driving must be the voluntary and conscious act of the accused.]

Fourth element: at the time of the impact, the accused was driving the vehicle in a manner dangerous to another person

The fourth element the Crown must prove beyond reasonable doubt is that the accused was driving in a dangerous manner at the time of the impact. The manner in which a person drives a vehicle includes all matters connected with the management and control of the vehicle when it is being driven, including its speed. Here the Crown alleges the manner of driving was dangerous because [*identify the precise manner of driving upon which the Crown relies, including the time period of driving involved*]. Whether or not that manner of driving was "dangerous" depends on all the circumstances in which it took place. This includes such factors as the time of day, the nature of the road surface, the weather conditions, and the general area in which the vehicle is being driven.

A person's management and control of a vehicle may, in some cases, be potentially dangerous to other persons by its very nature, whatever be the circumstances in which the vehicle is being driven. For example, driving a motor vehicle with no effective

brakes is an example of dangerous conduct in the use of a motor vehicle, regardless of where and in what circumstances it is being driven. This is because the ability to bring a vehicle suddenly to a stop is essential to the proper management of it.

In other cases, the particular circumstances in which the vehicle is being driven by a person makes the driving potentially dangerous even though the driving may not be dangerous in other situations. For example, driving through a red light in a busy intersection in the middle of a suburban shopping centre on a Saturday morning may be an example of driving which is dangerous because of the circumstances in which the driving occurs. That situation can be compared with driving through a red light on a country road in the early hours of the morning when it is clear that no other vehicle is in the area. In those circumstances driving through a red light might not be considered to be dangerous even though it may be a breach of the traffic regulations. What distinguishes these two examples is the degree of risk of harm to other persons that arises from the manner of driving in the particular circumstances.

The manner of driving will be dangerous if the Crown establishes beyond reasonable doubt that there has been a serious breach of the proper management and control of a motor vehicle and the breach is so serious it creates a real danger to another person or persons in the vicinity. The use of a motor vehicle is always potentially dangerous to some degree simply because it can so easily cause injury to another person in its vicinity. That potential can be minimised where the driver exercises proper control and management of the vehicle so as to avoid an impact with any other person or object. Of course drivers are subject to human frailties and not every driver always exercises all the care and skill expected. But that does not mean that a driver is driving dangerously simply because of such a failure.

The offence of dangerous driving is established where the driver so seriously fails to properly control and manage the vehicle that he or she creates a real danger of harm to other persons in or around the vicinity of the vehicle far exceeding that which arises simply from the normal use of a motor vehicle. Driving in a dangerous manner is a breach of the criminal law whether or not it results in any impact because of the real risk of harm that it creates. Let me emphasise there must be a serious breach of the proper management and control of the vehicle that results in a real danger to others.

You are concerned with the risk of harm arising from the manner of driving, rather than the result of the driving when deciding whether the driving in the particular circumstances was dangerous. So in deciding whether [*the accused's*] manner of driving was in all the circumstances dangerous you do not take into account the fact there was an impact or the result of the impact, including as it does the death of [*the victim*]. A person can drive dangerously but by pure good fortune or the skill of another driver, avoid any impact with another vehicle or a person or object in the vicinity of the vehicle. On the other hand a driver may collide with another vehicle or a person on or near the road as the result of some unavoidable and exceptional incident even though the person is driving with proper care and attention. As I said earlier you are concerned with the risk of harm arising from the manner of driving, rather than the result of the driving when deciding whether the driving in the particular circumstances was dangerous.

The test as to whether the conduct of the driver was dangerous is an objective one. The Crown does not have to establish [*the accused*] knew or realised [*he/she*] was driving

the vehicle in a dangerous manner. [*His/her*] conduct must be judged according to an objective community standard which applies to all drivers of vehicles. That standard does not take into account any personal characteristics of the driver, for example, his or her experience or inexperience as a driver. A person can be driving dangerously even though that person believes that he or she is doing his or her best to avoid a collision.

In this case the Crown relies upon the following evidence to prove beyond reasonable doubt that the driving was dangerous [*set out the evidence*].

[*If appropriate, where the issue of momentary inattention arises:*

Casual behaviour or a momentary lapse of attention by a driver, if it results in potential danger to another person or to other persons, is not outside the offence of dangerous driving merely because it is either casual or momentary. But what must nevertheless be shown in relation to such conduct is that it amounts to a serious breach of the proper management and control by the accused of the vehicle at the time of the impact and in the circumstances in which the driving occurred.**]**

[*Where the Crown relies upon the manner of driving at a period before the impact*:

You are entitled, in determining the manner in which the vehicle was driven at the time of impact, to consider the manner in which it was being driven at a point before the impact. Here the Crown relies upon the evidence of [*detail evidence of prior driving*]. Of course simply because a person is driving in a particular manner at one point of time it does not follow that the person is driving in that same manner at another point of time. You have to consider whether you can safely infer or conclude the manner of driving at the time of the impact from the manner in which the vehicle was being driven at an earlier point in time. Whether that inference can be drawn depends on matters such as a comparison of the surrounding circumstances at the two points in time, such as traffic conditions and the nature of the road, and of course the time delay between the time the vehicle was observed and the time of the impact. In effect the Crown has to prove to you that the manner of driving when the vehicle was seen and at the time of the impact was a continuous course of driving. The Crown must prove beyond reasonable doubt the manner of the driving at the time of the impact and that it was in all the circumstances dangerous.]

Fifth element: issues of strict liability

[If appropriate, where the issue of strict liability arises:

5. at the time of the driving dangerously the accused had no honest and reasonable belief that it was safe to drive.

(a) Mechanical defect

[***Note:*** *This direction has to be adapted and modified according to the circumstances of the case. For example, if the accused is aware of the defect in the vehicle the defence will not be made out if the accused did not turn his or her mind to the issue. On the other hand where the accused is driving his or her own vehicle there may be no reason for the accused to believe there was a mechanical or other defect. In that case the defence will be made out even if the accused did not turn his or her mind to the issue because there was no reason for the accused to be aware of the defect.*]

The Crown alleges the accused was driving in a manner dangerous because the vehicle was so defective that it was dangerous for anybody to drive it in that condition. The

Crown relies upon [*detail the defect*]. The Crown's allegation is that, because of that defect, no person, including [*the accused*], was able to properly control or manage the vehicle, so the simple fact of driving the vehicle was a serious breach of the proper management and control of the vehicle and resulted in a risk of harm to other persons that was so significant the driving was dangerous. In considering whether the driving of a vehicle in that defective condition was dangerous, you do not take into account the knowledge of [*the accused*] as to any defect in the vehicle. You apply an objective test and, therefore, do not take into account whether [*the accused*] knew that driving the vehicle created a danger. Nor do you take into account [*his/her*] skill in attempting to overcome the defect.

However, [*the accused*] says [*he/she*] had no knowledge at any time that the vehicle was defective even when [*he/she*] was driving it. [*His/her*] case is that [*he/she*] honestly and reasonably believed it was safe to drive the vehicle. [*He/she*] relies upon the following facts in support of that contention. [*Detail the defence submissions*.]

The position then is [*the accused*] having raised, what is in effect, an answer to the charge, the Crown must prove beyond reasonable doubt that [*he/she*] did not hold such a belief or, if [*he/she*] did, it was not reasonable to hold that belief in all the circumstances as known to [*him/her*]. To negate this claim raised by [*the accused*], the Crown is required to prove one or the other of those two things.

Whether [*the accused*] held the belief is a subjective matter. You are concerned with what in fact [*he/she*] believed at the time of driving. You are concerned with what was or was not in [*his/her*] mind at the time just before the impact occurred.

[*Outline the Crown case that the accused did not hold such a belief.*]

If the Crown fails on that issue, so that you at least accept the possibility [*the accused*] did have the belief that it was safe to drive, then, before you can convict [*him/her*], the Crown must prove beyond reasonable doubt that such belief was not reasonable in the circumstances as known to [*the accused*].

Whether it was reasonable for [*him/her*] to hold that belief is judged according to community standards. You ask yourself what would an ordinary person in the position of [*the accused*], that is, with [*his/her*] knowledge and experience, have believed at the time?

[*Outline the Crown case that even if the accused held a belief that it was safe to drive the belief was not a reasonable one*.]

To conclude in relation to this element, the accused's case is that [*he/she*] honestly and reasonably believed that it was safe to drive the vehicle. It is for the Crown to prove beyond reasonable doubt that the accused did not have that belief. If it is possible that [*he/she*] did have such belief, then the Crown must prove that it was not a reasonable belief in the circumstances known to [*the accused*].

(b) Accused unconscious eg falling asleep or other medical condition

As I have already explained to you, the Crown must prove [*the accused*] was driving the vehicle at the time of the impact. I have also told you that this involves [*him/her*] having management and control over the movement of the vehicle, including of course the steering wheel, the accelerator and the brakes. This means the driving by [*the accused*]

was a willed or conscious act. Here the allegation is that the accused fell asleep and so lost control of the vehicle. If that is so, then on one view, [*the accused*] was not driving the vehicle at the time of the impact.

However, in such a situation you must consider the position just before [*the accused*] lost consciousness by falling asleep. Was it dangerous for [*the accused*] to be driving the vehicle when [*he/she*] was about to lose consciousness. In looking at whether the driving was dangerous you do not consider what the accused believed or thought about [*his/her*] ability to stay in control of the vehicle. If you are satisfied beyond reasonable doubt [*the accused*] did lose control of the motor vehicle because [*he/she*] lost consciousness by falling asleep, you may find that it was dangerous to drive in a condition where the driver is liable at any time to be overcome by tiredness and fall asleep, however momentarily, while at the wheel of the vehicle.

If you find beyond reasonable doubt [*the accused*] did fall asleep [*or if applicable become unconscious*] just before the impact and it was this that caused [*him/her*] to lose control of the vehicle, then you may have no difficulty in finding [*he/she*] was driving in a manner dangerous shortly before the impact. But that does not determine the issue of the accused's guilt.

[*The accused's*] case is [*he/she*] had no reason to believe [*he/she*] might fall asleep at the point before losing control of the vehicle. [*The accused*] contends [*he/she*] honestly believed it was safe to drive. [*Set out the defence arguments.*]

The position then is that [*the accused*] having raised, what is in effect, an answer to the charge, it is for the Crown to prove to you beyond reasonable doubt [*the accused*] did not hold such a belief, or, if [*he/she*] did, it was not reasonable to hold that belief in all the circumstances as known to [*him/her*]. To negate this claim raised by [*the accused*], the Crown is required to prove one or the other of those two things.

Whether [*the accused*] held the belief is a subjective matter. You are concerned with what in fact [*he/she*] believed at the time of driving. You are concerned with what was or was not in [*his/her*] mind at the time just before the impact occurred.

[*Outline the Crown case that the accused did not hold such a belief.*]

If the Crown fails on that issue so that you at least accept the possibility [*the accused*] did have the belief that it was safe to drive, then, before you can convict [*him/her*], the Crown must prove beyond reasonable doubt that such belief was not reasonable in the circumstances as known to [*the accused*].

Whether it was reasonable for *[him/her*] to hold that belief is judged according to community standards. You ask yourself what would an ordinary person in the position of [*the accused*], that is with [*his/her*] knowledge and experience, have believed at the relevant time?

[*Outline the Crown case that even if the accused held a belief that it was safe to drive the belief was not a reasonable one.*]

To conclude in relation to this element, the accused's case is that [*he/she*] honestly and reasonably believed that it was safe to drive the vehicle. It is for the Crown to prove beyond reasonable doubt that [*he/she*] did not have that belief. If it is possible [*he/she*] did have such belief, then the Crown must prove that it was not a reasonable belief in the circumstances known to [*him/her*].

Statutory presumption regarding intoxication

[*Statutory presumption under s 52AA(1) that the accused is presumed to be under the influence if the prosecution proves the prescribed concentration of alcohol was present at the time of the impact.*

The law requires you as the jury to act on the basis that an accused person is under the influence of alcohol for the purpose of the offence with which [*the accused*] is charged if, at the time of the impact causing the victim's death, there was a concentration of alcohol in the accused's blood of at least 0.15 grams of alcohol in 100 millilitres of blood. Further the law is that the concentration of alcohol that is determined in relation to a sample of the accused's blood which has been analysed within two hours after the impact is for the purpose of the offence the concentration of alcohol in the accused's blood at the time of that impact [*where relevant add unless the accused has established that the concentration was less than 0.15 grams of alcohol in 100 millilitres of blood at the time of impact*].

There is a certificate of analysis of [*the accused's*] blood alcohol level taken at [*specify time*] in evidence before you. That analysis shows the concentration of alcohol in [*the accused's*] blood was [*state result of analysis*].You are to act on the basis this was the concentration of alcohol in [*the accused's*] blood at the time of the impact. As that reading is 0.15 grams [*or above*], you must reach your verdict on the basis that the accused was under the influence of alcohol at the time of the impact.

Driving under the influence of alcohol means that, because of the affect of the alcohol upon [*the accused*], [*he/she*] was no longer capable of, and did not in fact, exercise proper control and management of the vehicle which resulted in the impact alleged in the charge.]

[*If applicable, without statutory presumption:*

A person is under the influence of alcohol [*or drugs*] for the purpose of this offence where [*his/her*] ability to manage and control a motor vehicle is impaired by the voluntary intake of alcohol [*or drugs*]. A person may be "under the influence" in this sense without being drunk. Whether a person lacks full capacity to control and manage a motor vehicle in that sense, so as to be committing an offence, depends not only on direct evidence of what [*he/she*] may have consumed before the impact, but also on any inference or conclusion which you may properly draw from the circumstances before the impact including [*his/her*] manner of driving shortly before and up to the time of the impact. In this respect, the Crown relies upon … [*summarise evidence and submissions for the Crown*]. The accused, on the other hand, relies on … [*summarise evidence and submissions for the accused*].]

The manner in which a person drives a vehicle includes all matters connected with the management and control of the vehicle when it is being driven, including its speed. [*The directions must identify for the jury the precise manner of driving upon which the Crown relies, including the period of driving involved.*]]

Sixth element: if offence is aggravated

[*If the charge is an aggravated form of the offence add:*

6. The Crown also alleges that this offence was committed in what is called a "circumstance of aggravation".

This means that in addition to the four elements required to establish the offence, the Crown must also prove beyond reasonable doubt that [*specify the particular aggravation under s 52A(7)*].]

[*Available verdicts where a circumstance of aggravation is charged*

If the Crown has failed to establish any one of the first four elements of the offence of dangerous driving — that is, without the circumstances of aggravation — you must find the accused "not guilty".

If the Crown has established each of the elements of the aggravated offence of dangerous driving beyond reasonable doubt, you should find the accused "guilty" of that offence [*unless the statutory defence under s 52A(8) is relied upon*].

If the Crown has failed to establish the circumstance(s) of aggravation upon which it relies, but has established all the other elements of the offence, you should find the accused "guilty", [*unless the statutory defence under s 52A(8) is relied upon*].]

[The next page is 941]

Defraud — Intent to

[5-5500] Introduction

The following suggested direction may be adapted to all offences involving intent to defraud, such as those set out in Pt 4AA, Div 2 of the *Crimes Act* 1900. Prior to summing up in a case involving intent to defraud, careful consideration should be given to *Spies v The Queen* (2000) 201 CLR 603, where the High Court emphasised that in all offences alleging "defrauding", the prosecution must establish that the accused used "dishonest means" to achieve his or her object. "Dishonest means" was explained in *Peters v The Queen* (1998) 192 CLR 493 at 508 and 529.

[5-5510] Suggested direction

Here it is alleged by the Crown, and must be proved by the Crown beyond reasonable doubt, that [*the accused*] intended to defraud [*the victim*] by … [*specify the nature of the fraudulent conduct*].

To "defraud" is to intentionally use dishonest means to deprive another person of their property, or to imperil their rights or interests. It involves the intentional creation of a situation by one person to use dishonest means to deprive another person of money or property, or to imperil another person's rights or interests, [*here identify the knowledge, belief or intent that is said to render the relevant conduct dishonest*] knowing that they have no right to deprive that person of money or property, or imperil that person's rights or interests. The "dishonest" means which the Crown says [*the accused*] used here were … [*give details of the evidence*].

The Crown must establish beyond reasonable doubt that the accused had that knowledge, belief or intent and, if so, on that account, the relevant conduct was dishonest. In determining whether the conduct of the accused was dishonest, the standard which you apply is that of ordinary decent people.

[Where appropriate

There may be an intent to defraud even though the defrauder does not intend to benefit [*himself/herself*]. The essence of the meaning of the word "defraud" is "detriment" or "damage" or "loss" to the person defrauded by the use of dishonest means, not an advantage to the defrauder.**]**

For present purposes, the words "intent" and "intention" have the same meaning. They are very familiar words and in this legal context they carry their ordinary meaning. Intention may be inferred or deduced from the circumstances in which … [*specify the alleged fraudulent activity*] is alleged to have occurred, and from the conduct of [*the accused*] person before, at the time of, or after [*he/she*] did the act alleged to be fraudulent, namely … [*specify the alleged fraud*]. Whatever a person says about their intention may be looked at for the purpose of finding out what in fact that intention was at the relevant time … [*specify the time*]. In some cases, a person's acts or words may themselves provide the most convincing evidence of their intention.

Where a specific result is the obvious and inevitable consequence of a person's act, and where they deliberately do that act, you may readily conclude that they did that act with the intention of achieving that specific result. In the present case that is … [*set out the alleged fraud*].

You must remember that you are considering the intention of [*the accused*], not what your intention, or the intention of the ordinary person, or some imaginary person, might have been had you (or they) been in [*the accused's*] position.

I emphasise that what the Crown has to prove is the dishonest intent of [*the accused*] — not of any other person. Further, the intended means by which the purpose was to be achieved must be dishonest.

[5-5520] Notes

1. In *Macleod v The Queen* (2003) 77 ALJR 1047, the High Court dealt with the appropriate directions in a case involving a Director fraudulently appropriating property, contrary to s 173 (rep) of the *Crimes Act* 1900. The Court also dealt with the principles applicable to a claim of right raised by the Director.
2. See *R v Moussad* (1999) 152 FLR 373 for a direction in relation to defrauding the Commonwealth pursuant to s 29D (rep) of the *Crimes Act* 1914 (Cth).
3. An essential ingredient in every case is dishonesty: *Scott v Metropolitan Police Commissioner* [1975] AC 819 at 841; *R v Ward & Stonestreet* (1996) 88 A Crim R 159 cited with apparent approval in *Peters v The Queen* (1998) 192 CLR 493 at 542. The dishonesty must be deliberate: *R v Sinclair* [1968] 3 All ER 241.
4. Dishonesty need not be defined. It will suffice if the trial judge instructs the jury that in deciding whether the act was or was not dishonest, they should apply the current standards of ordinary decent people: *R v Glenister* (1980) 2 NSWLR 597 cited with apparent approval in *Peters v The Queen* (1998) 192 CLR 493 at 542. See also *R v Love* (1989) 17 NSWLR 608.
5. Where property is taken, and there is an issue as to whether the accused believed he or she had a legal right to take the property, the Crown must prove the absence of such a belief in the accused: *R v Condon* (1995) 83 A Crim R 335 at 346.
6. For the essential elements to be proved by the Crown where the charge is fraudulent misappropriation or fraudulently omitting to account (*Crimes Act* 1900, s 178A (rep)), see *R v Maharaj* (1995) 85 A Crim R 374.
7. A general averment in an indictment of intention to defraud is sufficient: *Criminal Procedure Act* 1986, Sch 3, cl 13.

[The next page is 951]

Extortion by threat — blackmail

***Crimes Act* 1900 (NSW), ss 99, 100, 100A, 101, 102, 103, 104, 105**

[5-5600] Introduction

This suggested direction deals with extortion under s 99 of the *Crimes Act* 1900, but can be adapted to charges brought under ss 100, 100A, 101, 102 and 103. Section 105 of the *Crimes Act* 1900 provides that a threat or menace may be of violence or an accusation. The suggested directions adopt the word "threat" in preference to "menace" for the sake of clarity.

[5-5610] Suggested direction — counts under s 99 of the Crimes Act 1900

[*The accused*] is charged with an offence which lawyers generally refer to as "extortion", but which most non-lawyers would term "blackmail" … [*read indictment to jury*]

The offence of extortion or blackmail is committed when one person dishonestly makes a demand on another person for specified property in the possession of or under the control of that person, and that demand is accompanied by threat or force.

It is important to bear in mind that it is not necessary that the alleged victim of extortion or blackmail should actually give way to the threat or the force, nor should actually hand the property over to the person making the demand for it.

The first element to be proved by the Crown beyond reasonable doubt is that [*the accused*] made a demand on [*the victim*] for the property which is set out in the indictment.

A demand may be made in express terms, or it may be in terms which imply to the alleged victim that a demand is being made. In the present case, the Crown alleges that [*the accused*] made [*his/her*] demand of [*the victim*] by … [*specify the Crown case as to demand*]. Thus, the demand, says the Crown, was made in so many words and was put to [*the victim*] directly.

[Alternatively

Here the Crown alleges that, although [*the accused*] did not make the demand in so many words, it was a clear inference from what was [*said/done*] to [*the victim*] that [*the accused*] was demanding that [*the victim*] should do what [*he/she*] was told.**]**

On the other hand, [*the accused*] denies that any such demand was made, whether in express words or by inference. [*The accused*] says that … [*specify defence case as to demand*].

If you are not satisfied beyond reasonable doubt that a demand was made, then that is the end of the matter. [*The accused*] is "not guilty" and must be acquitted. But if you are so satisfied, then you go on to consider the second element.

The second element to be proved by the Crown beyond reasonable doubt is that the demand was accompanied by [*a threat/force*]. What does the Crown allege here was the [*threat/force*] which [*the accused*] was making against … [*victim's name, or where appropriate, the property of victim's name*]?

The Crown has to prove what [*the accused*] actually said or did. When you have decided what [*the accused*] has been proved to have said or done, then you must ask yourselves whether these words and/or actions amounted to [*a threat/force*].

This is to be determined objectively, that is to say, you as the jury have to decide whether a person of ordinary firmness and courage would have regarded what [*the accused*] [*said/did/implied*] as [*a threat/force*], and would have likely to have been influenced by it so as to act in a manner contrary to [*his/her*] own wishes. This is the test to apply, rather than whether [*the victim*] was or would have likely to have been influenced by it to act in a way contrary to [*his/her*] wishes. That is what I meant by saying that the matter is to be determined objectively, by your assessment of the reaction of a person of ordinary firmness and courage, which may or may not have been the reaction of [*the victim*].

… [*Set out the respective Crown and defence cases as to the threat or force*].

If you are not satisfied beyond reasonable doubt that the demand, which you have found to have been made by [*the accused*], was in fact accompanied by [*a threat/force*] in the way in which I have explained to you, then that is the end of the matter and [*the accused*] is "not guilty". But if you are so satisfied, then you must consider the third element.

The third element that the Crown must prove beyond reasonable doubt, is that [*the accused*], at the time when [*he/she*] made the demand on [*the victim*], did so with the intention to steal the property mentioned in the indictment. To prove this, the Crown must satisfy you beyond reasonable doubt that [*the accused*], when [*he/she*] made the demand, intended permanently to deprive [*the victim*] of this property, knowing or believing that [*the accused*] was not legally entitled to the property and that [*the accused*] acted with a dishonest state of mind.

How is a person's intention established in a court of law?

… [*A suggested direction on intention is to be found at [3-210] and may be adapted to suit the circumstances of the case*].

… [*If the accused raises a claim of right, a suggested direction is to be found at [5-6165] and may be adapted to suit the circumstances of the case*].

As to this, the Crown says … [*specify the Crown case on intent to steal*]. On the other hand, [*the accused*] says that … [*specify the defence case on intent to steal*].

[5-5620] Notes

1. The demand need not be communicated to the "target", but there must be an intention to communicate it to the "target", and in circumstances apt to achieve that end. The behaviour in making the demand is the gist of the offence: *Austin v The Queen* (1989) 166 CLR 669.

2. A menace or threat referred to in s 105 of the *Crimes Act* 1900 (which is not a definition section) can include harm to, or threatened theft of, property: *DPP v Kuo* (1999) 49 NSWLR 226 and cases there cited.

3. For a case where claim of right was raised in a count for demanding with menaces with intent to steal, see: *R v Bernhard* [1938] 2 All ER 140.
4. For a case where there was an implicit threat, see: *DPP v Curby* [2000] NSWSC 745.

[The next page is 961]

False instruments

[5-5700] Introduction

Note: Offences under ss 300(1), 300(2), 301 and 302 *Crimes Act* 1900 were repealed as at 22 February 2010. For similar offences now: see ss 252, 253 *Crimes Act* 1900.

Apart from some statutory exceptions, what we used to call "forging and uttering" was replaced by a series of statutory offences in Div 2 Pt 5 *Crimes Act* introduced in 1989 but repealed on 22 February 2010. Under (the now repealed) s 300(1) *Crimes Act*, it was an offence to make a false instrument intending to use it to induce another person:

(a) to accept it as genuine, and

(b) because of that acceptance, to do or not do an act to his or her prejudice or to the prejudice of another.

By s 300(2) *Crimes Act*, it was an offence to use an instrument which is, and is known to be, false with the same intention. In *Nikolaidis v R* (2008) 191 A Crim R 556 at [141], it was held that s 300 required the Crown to prove a "triple intention":

- to make an instrument that is false. The person who "makes" the instrument is the person who is ultimately responsible for it coming into existence: *Nikolaidis v R* at [152]
- that the maker or another person (person B) will use the instrument, and
- that another person (person C) will be induced to act to the prejudice of that person (person C) or another person (person D).

[5-5710] Suggested direction — charges under s 300(1) Crimes Act 1900

[*The accused*] is charged with making a false instrument with the intention that [*he/she/other* [*specify*]] would use that instrument to induce [*other person*] to accept the instrument as genuine, and because of that acceptance, [*to do/not to do*] an act to that person's prejudice … [*specify*].

In order to establish its case against [*the accused*], the Crown must prove beyond reasonable doubt, firstly, that [*he/she*] made an instrument. An instrument includes a document … [*credit card, disc, tape, soundtrack etc as indicated in s 299(1) — specify the instrument relied on by the Crown*].

Making a false instrument is proved where the instrument purports to … [*specify the circumstances alleged by the Crown in paras (a) to (h) under s 299(2)*]. If you find beyond reasonable doubt that the instrument in question purports to have been [*made/altered*] as alleged by the prosecution, and that this was done by [*the accused*], then the Crown will have established that [*the accused*] [*made/altered*] that instrument. The word "purports" is used in the sense of "pretends" — so that the Crown must show that the document is not what it appears to be, in that it appears to have been [*made/altered*] by [*name*] when it was not [*made/altered*] by [*name*] … [*or as the case may be according to s 299(2) relied on by the Crown*].

The Crown must next prove that in [*making/altering*] the false instrument, [*the accused*] did so with the intention that [*he/she/other* [*specify*]] induced [*name of person*], not being the [*accused/person intended by the accused to use the instrument*] to accept the instrument as genuine, that is to say, as what it purports or pretends to be, and because of that acceptance, to do or refrain from doing something to the prejudice of [*person intended to be so induced*], in that [*name of person*] [*did/did not do*] an act which if [*done/not done*] would be to [*his/her*] prejudice in that … [*specify the particulars of prejudice relied upon by the Crown within s 305*]. If you find that to have been [*the accused's*] intention beyond reasonable doubt, then the Crown will have established that [*the accused*] intended prejudice to [*name of person*].

It is not necessary that the Crown prove that the person intended to be induced was induced or did [*do/ not do*] the act to [*his/her*] prejudice, but it is necessary for the Crown to prove beyond reasonable doubt that it was within [*the accused's*] intention at the time of making the document that [*name of person*] should be so induced.

"Intent" and "intention" are very familiar words and in this context — they have their ordinary everyday meaning.

Intention may be inferred or deduced from the surrounding circumstances in which the instrument was [*made/altered*], including the nature of the document itself and [*the accused's*] conduct before and at the time of, or even after [*he/she*] [*made/altered*] it … [*deal with other relevant matters relied on by the Crown as going to intention, such as the relationship between the parties. Deal with any evidence and/or submissions for the accused on this issue*].

[5-5720] Suggested direction — charges under s 300(2) Crimes Act 1900

[*The accused*] is charged with using an instrument which was false and which [*he/she*] knew to be false, with the intention of inducing another person to accept the instrument as genuine and because of that to [*do/not do*] some act to [*that other person's/another's*] prejudice … [*specify if disclosed*].

In order to establish its case against [*the accused*], the Crown must prove beyond reasonable doubt firstly that [*he/she*] used an instrument. An instrument means a document … [*includes a credit card, disc, tape, soundtrack etc as defined in s 299(1) — specify the instrument relied on by the Crown*]. The Crown alleges that [*the accused*] used the instrument by … [*specify the Crown's allegations and evidence in support and any evidence relied on by the accused on this issue, together with opposing submissions*].

An instrument is false if it purports to … [*specify the circumstances alleged by the Crown in paras (a)–(h) under s 299(2) if in issue and deal with any opposing evidence and/or submissions*]. If you find beyond reasonable doubt that this instrument here in question purports to … [*as alleged by the prosecution under s 299(2), specify*], and that [*the accused*] used the instrument as alleged, then the Crown will have established that [*he/she*] used a false instrument. The word "purports" is used in the sense of "pretends", so that the Crown must show that the instrument is not what it appears to be in that it appears to have been … [*specify the particulars of falsity relied upon by the Crown within s 299(2)*] when it was not.

The Crown must also establish beyond reasonable doubt that at the time when [*he/she*] used the false instrument, [*he/she*] knew it to be false. Knowledge is a state of mind. If it is to be shown to have existed generally, it must be inferred or deduced from the relevant circumstances existing before, at the time of or even after the use by [*the accused*] of the instrument. The relevant circumstances include the nature of the instrument itself … [*deal with evidence and submissions of both the Crown and the accused on knowledge, if it is in issue*].

In addition to proving that [*he/she*] knew it to be false, the Crown must also establish beyond reasonable doubt that [*he/she*] used the instrument with the intention that [*another person*] should be induced to accept the instrument as genuine, that is to say, as what it purports to be, and because of that acceptance, to [*do/not do*] something to the prejudice of the person who was so induced. A person will be prejudiced if, assuming the act had been [*done/not done*], it would … [*specify the particulars of prejudice relied upon by the Crown within s 305*].

If you find that to have been [*the accused's*] intention beyond reasonable doubt, then the Crown will have established that [*the accused*] intended prejudice to [*other person*].

It is not necessary that [*other person*] be in fact induced to [*do/not do*] an act, nor that [*he/she*] in fact [*did/did not*] do the act, but it is necessary that the Crown establish beyond reasonable doubt that it was the intention of [*the accused*] that [*other person*] be induced to [*do/not do*] an act to [*his/her*] prejudice, as alleged by the Crown.

Like knowledge, intention is a matter to be inferred or deduced from the relevant circumstances. These include … [*deal with the evidence relied upon by the Crown and any evidence to the contrary relied upon by the accused on the issue of intention and also the opposing submissions on this issue, if it arises*].

[The next page is 971]

False or misleading statements

[5-5800] Introduction

The statutory offences of obtaining property by false pretences were designed to meet perceived deficiencies in the law of larceny. These were contained in ss 179–185 (rep) *Crimes Act* 1900. Sections 179–185 were repealed on 22 February 2010 by the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act* 2009. Despite the repeal, this chapter of the Bench Book has been retained since offences under those repealed provisions are still coming before the courts.

The essential difference between "larceny" and "obtaining by false pretences" is that the former is an offence against possession, whilst the latter, at least in its original statutory form, included activities designed to unlawfully induce another to part with his or her property.

Gaps in the law have been filled by the creation of other offences. For example, in 1961 the statutory offence of obtaining credit by fraud (s 178C (rep)) was created, and in 1979 offences of obtaining money etc by deception or by false or misleading statements (ss 178BA (rep) and 178BB (rep)) were enacted in the *Crimes Act* 1900. Sections 178BA, 178BB and 178C were also repealed by the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act* 2009.

[5-5810] Section 178BA (rep) Crimes Act 1900

Section 178BA (rep) penalises the obtaining by deception of any money, valuable thing or "any financial advantage of any kind whatsoever". The section defines "deception" to include both deliberate or reckless words or conduct and (unlike the offence of false pretences) if by words includes representations of law as well as fact. The definition is also extended to include causing a computer system to make a response, and an act or omission with the intention of causing a machine "designed to operate by means of payment or identification" to make an unauthorised response, thereby creating an offence of "deceiving" a machine, such as putting foreign coins into a slot machine or obtaining money through an automatic teller machine (ATM). "Money" is defined in s 4 *Crimes Act* 1900, but there is no definition of "valuable thing" or "financial advantage". "Money" may include a cheque: *R v Hunt* (1996) 88 A Crim R 307.

As to a "valuable thing", the question of whether the expression is limited to tangible objects or entities, or whether it also includes intangibles, was left open in *R v Love* (1989) 17 NSWLR 608 at 617. The meaning of the expression, however, was regarded as being limited by the necessity of showing that it was capable of being "obtained".

A "financial advantage" may be "of any kind whatsoever". The requirement of "obtaining" in respect of the financial advantage may, however, serve to narrow the ambit of the phrase, but it has been held that the words should be given their plain meaning and should not be narrowly construed: *R v Walsh* (1990) 52 A Crim R 80, 81.

The elements of the offence are that the accused:

(i) by deception as defined in s 178BA(2);

(ii) dishonestly obtained for the accused or another person;

(iii) a financial advantage (or money or a valuable thing).

See: *R v Licardy* (unrep, 28/09/94, NSWCCA). The deception must have induced in the owner of the money or valuable thing an intention to part with his or her property rather than merely the custody or control of the money etc in question.

In the case of money, the general rule is that property in it will pass on delivery. In the case of a charge of obtaining a valuable thing by deception, the question of when and by what means it may be said to have been "obtained" may be affected by the nature of the thing in question: *R v Kron* (1995) 78 A Crim R 747 at 477.

In the case of a charge relating to a financial advantage, it is more difficult to apply the notion of the creation of an intent to part with something as in the case of money or a tangible thing. The extension of a credit facility by deception may involve an "obtaining" within the meaning of s 178BB (as well as s 178C (rep)) *Crimes Act* 1900.

In the context of the English *Theft Act* 1968, it has been held that an intention to repay an equivalent sum of money will not prevent conviction. It is to be noted, however, that s 178BA does not have an equivalent to s 118 *Crimes Act* 1900 in relation to the offence of larceny, and it may be that the existence of an intention to repay an equivalent sum in the case of money, or to return the valuable thing, will go to the question whether the Crown has established beyond reasonable doubt that the money or valuable thing was obtained "dishonestly".

Because of the requirement of a causal connection between the alleged deception and the intent to part with the subject matter of the charge, there will need to be evidence (direct or circumstantial) of a mind deceived, except in the case of a computer or a machine referred to in s 178BA(2) *Crimes Act* 1900. Although the money and so forth must be obtained "dishonestly", if the Crown proves a deception then this is evidence upon which the jury may find dishonesty on the part of the accused. As to a claim of right, see [5-6165].

[5-5820] Suggested direction

[*The accused*] is charged with dishonestly obtaining by deception [*money/valuable thing/ a financial advantage*]. In order to establish this offence, the Crown must prove beyond reasonable doubt that by [*his/her*] [*deliberate/reckless*] [*words/conduct*], [*the accused*] acted deceptively so as to induce in the mind of [*the person from whom the money etc was obtained*] an intention to part with [*the money/valuable thing/financial advantage*] to [*the accused*] or to another person … [*deal with evidence for the Crown and for the accused and the respective submissions as to these matters*].

The Crown must also prove that [*the accused/another*] did obtain the [*money/valuable thing/financial advantage*]. The Crown will have proved that [*the accused*] obtained the money when it … [*or its equivalent, for example, a cheque*] is given to [*the accused*] or someone else.

… [*A similar direction will be required in the case of a valuable thing*].

… [*In the case of a "financial advantage", the direction to be given will depend on the nature of the financial advantage in question. Thus the accused will have "obtained" an extension of credit when [he/she] or someone else is in a position to draw down the facility*].

… [*Deal with evidence for the Crown and for the accused and opposing submissions as to these matters*].

The Crown must also prove beyond reasonable doubt that at the time that the [*money/valuable thing/financial advantage*] was obtained, [*the accused*] was acting dishonestly.

Whether a person is acting dishonestly at any given time depends on his or her state of mind. It is the actual state of mind of the accused person at the time of the alleged obtaining which is in question when an allegation is made that a person acted dishonestly. You must judge whether that person was acting dishonestly at the given time by applying the ordinary standards of what is regarded as "dishonest" by ordinary decent members of our community.

If you are satisfied beyond reasonable doubt that [*the accused*] did, by [*his/her*] [*deliberate/reckless*] deceptive [*words/conduct*], obtain the [*money/valuable thing/ financial advantage*] in question, to which [*he/she*] knew [*he/she*] was not entitled, then it would be open to you to find that [*he/she*] was acting dishonestly at that time.

[Where the Crown relies on reckless rather than deliberate deception, add

Here the Crown says you will find beyond reasonable doubt that [*the accused*] by [*his/her*] [*words/conduct*] was deceptive because [*the accused*] was reckless as to the effect on the mind of [*deceived person*] in that [*the accused*] knew that such words or conduct might induce that person to [*part with the money/part with the valuable thing/confer the financial advantage charged*] … [**If claim of right is in issue**: *to which [he/she] knew [he/she] was not entitled*] and went ahead and [*said/did*] those things alleged by the Crown, regardless of whether [*his/her*] [*words/conduct*] would have that effect or not. [*The accused*], on the other hand, relies on the following … [*set out evidence and submissions for the accused*].**]**

[5-5830] Section 178BB (rep) Crimes Act 1900

As to s 178BB (rep) *Crimes Act* 1900, the section may be compared with s 176 (rep) which is, however, limited in its scope to corporate officers. Like s 178BA (rep), s 178BB extends to the obtaining of any "money or valuable thing or any financial advantage of any kind whatsoever" — as to which, see the notes in relation to s 178BA.

No element of dishonesty is, however, required to be proved by the Crown under s 178BB, although the jury should not be so directed: *R v Stolpe* (unrep, 30/10/96 NSWCCA).

Intent as to the obtaining must be proved, as must knowledge of the false or misleading nature of the statement relied on by the Crown, or "reckless disregard" as to whether the material particular in the statement is false or misleading.

The phrase "reckless disregard" in s 178BB may be compared with the phrase "whether deliberate or reckless" in the definition of "deception" in s 178BA(2). Although there is considerable discussion in the authorities as to the meaning of "reckless" and "reckless disregard" in various statutory contexts, it appears that a jury should be directed in terms that both expression import a subjective state of mind in the accused in relation to the deception (s 178BA(2)) or making of a false statement (s 178BB) in that, whilst foreseeing the possibility that it may be false, he or she made the statement not caring whether it was true or false, and without any honest belief as to its truth. See the discussion of authorities in *Pollard v Commonwealth DPP* (1992) 28 NSWLR 659.

It should be noted, however, that the Crown may only rely on "reckless disregard" on a charge of making a false or misleading statement and that, in relation to the publication or the concurrence in making or publishing a statement, the Crown is restricted to actual knowledge of the false or misleading character of the statement: *R v Rinaldi & Kessey* (1993) 30 NSWLR 605.

To "publish" means to convey the offending statement to the mind of another: *Webb v Bloch* (1928) 41 CLR 331, 363; *R v Rinaldi & Kessey* (1993) 30 NSWLR 605, 609. To "concur" in a publication involves no more than doing an act which, together with the acts of others (who may be behaving quite lawfully), brings about publication. The word is not coextensive with the concept of aiding, abetting, counselling or procuring in s 351 *Crimes Act* 1900: *R v Lee* (unrep, 19/06/97, NSWCCA).

A statement may be rendered false or misleading by material omission even though otherwise factually accurate: *R v Bishirgian* (1936) 1 ALR 586; *R v M* (1980) 2 NSWLR 195. A statement is false or misleading in a material particular if, of moment or significance, it is capable of influencing the mind of the person to whom it is directed, and is not merely trivial or inconsequential: *R v Clogher* [1999] NSWCCA 397, and the authorities cited.

[5-5840] Suggested direction

In order to establish this offence, the Crown must prove the following —

1. That [*the accused*] [*made/published/concurred in making or publishing*] a statement whether oral or in writing … [*set out the statement relied on by the Crown*];
2. which statement was false or misleading in a material particular … [*set out the particulars of falsity; materiality and the evidence for the Crown and the accused, and summaries opposing submissions*];

[If appropriate, add

A statement may be "false or misleading" not only by stating that which is positively untrue or misleading but also where, by omitting something, it renders that which is stated false or misleading.**]**

[If in issue, add

A statement is material if it is of significance and not merely trivial or inconsequential and is relevant to the purpose for which it was being made. In determining whether a statement is false or misleading, and also whether it was material in that sense, you will have regard to the whole of the statement and the context of circumstances in which the statement was made and the purpose for which the statement was made and received.**]**

3. that [*he/she*] did so with the intention of obtaining for [*himself/herself/another*] [*money/a valuable thing/financial advantage*] … [*if a valuable thing or a financial advantage, set out the nature of the thing or advantage relied upon by the Crown*];
4. which statement [*he/she*] knew to be false or misleading in a material particular … [*set out the Crown's case as to knowledge and the accused's case, and the opposing arguments*];

As I have said, the Crown must prove beyond reasonable doubt that when [*he/she*] [*made/published/concurred in making or publishing*] the statement that [*he/she*] knew that it was false or misleading. Knowledge is a state of mind and it is [*the accused's*] actual state of mind which the Crown must prove. This will almost invariably be something which can only be inferred from all the circumstances. If, at the end of your deliberations, having considered all the relevant evidence, you are of the view that there is a reasonable possibility that the Crown has not established that [*the accused*] did know that the statement was false or misleading, you must acquit [*the accused*].

It is important to keep in mind that it is [*the accused's*] actual state of mind at the time of … [*making etc*] the alleged statement which the Crown must prove, not what another person may or would have known in the circumstances.

[Where the charge is "making" and the Crown relies on "reckless disregard", add

Here the crown alleges [*in lieu of/in addition to actual knowledge*] that in making the alleged statement [*the accused*] acted in reckless disregard of the false or misleading nature of the statement. In order to establish this, the Crown must prove beyond reasonable doubt that when [*the accused*] made the statement [*he/she*] knew that the statement might possibly be false or misleading to persons acting on it and went ahead and made the statement regardless of whether it was false or misleading.**]**

[5-5850] Notes

1. Although a single statement may contain a number of allegedly false or misleading material particulars, a question of duplicity may arise where the Crown charges more than one allegedly false or misleading particular in a single count: *R v Giam* (1999) 104 A Crim R 416.

2. Where a single statement is charged but there is more than one allegedly false or misleading particular relied on by the Crown, any one of which is capable of supporting the charge, it is enough to establish the charge if any one is proved beyond reasonable doubt. The jury may be so directed, but the jury should also be directed that before convicting on the basis of any one allegedly false or misleading material particular, they must be unanimously of the view that the Crown has established beyond reasonable doubt it's case in respect of that particular: *R v Brown* [1984] 79 Cr App R 115. See also in different contexts: *R v Beach* [1994] 75 A Crim R 447; *KBT v The Queen* (1997) 191 CLR 417.

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Fraud — Part 4AA Crimes Act 1900

[5-5900] Introduction

Part 4AA was inserted into the *Crimes Act* (the Act) with effect from 22 February 2010 by the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act* 2009. The Part reproduces to a significant degree offences from the *Criminal Code* (Cth). The second reading speech was delivered on 12 November 2009. The commentary below is not intended to be exhaustive and reference should also be made to the legislation and other relevant secondary sources.

[5-5910] Definitions

Dishonesty — s 4B defines dishonesty as "dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people". It is a question of fact. As to claim of right: see **Larceny** at **[5-6100]** and the Suggested direction at **[5-6165]**.

Deception — there is a general definition of "deception" in s 192B. It means any deception, by words or other conduct, as to fact or as to law. It must be either reckless or intentional.

Recklessness — s 4A provides "… if an element of an offence is recklessness, that element may also be established by proof of intention or knowledge".

Obtaining property — the phrase "obtaining property of another" is defined in s 192C.

Property — is defined in s 4.

Obtaining a financial advantage obtaining a financial advantage or causing a financial disadvantage is dealt with in s 192D. A financial advantage or a financial disadvantage may be permanent or temporary.

[5-5920] Section 192E — fraud

Section 192E(1) makes it an offence for a person who, by any deception, dishonestly obtains property belonging to another or obtains a financial advantage or causes any financial disadvantage.

The obtaining may be dishonest even if the person is willing to pay for the property: s 192E(2).

The offence can involve all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time: s 192E(3).

The offence can be an alternative to a charge of larceny or an offence that includes larceny: s 192E(4).

The obtaining of the property or financial advantage or the causing of the financial disadvantage must be the result of the accused's deception although it is not necessary to show that the person deceived suffered the loss; *R v Ho* (1989) 39 A Crim R 145; *Flack v R* [2011] NSWCCA 167 at [37].

Nor, under s 192E(1)(b), is it necessary for the Crown to prove an identified person was deceived or to lead direct evidence from a person or persons to establish its case of deception: *Decision Restricted* [2019] NSWCCA 43 at [28]-[29], [64], [74]-[75]. How the deception in a particular case is proved depends on the form of deception practiced but, in a case where there is no direct evidence that the alleged deception was the operative cause of the dishonest obtaining of property, it may be a matter of inference proved by other evidence in the Crown case: *Decision Restricted* at [62], [74]-[75].

The term "financial advantage" should be given its ordinary meaning: *R v Walsh* (1990) 52 A Crim R 80 at 81.

Section 192D(1) provides a non-exhaustive definition of obtaining a financial advantage or causing a financial disadvantage.

Note: The Suggested directions below do not cover or describe every permutation of the offences given the definitions of "deception" in s 192B, "obtains property" in s 192C(1), "property belongs" in ss 192C(3), 192C(4), "obtain" financial advantage in s 192D(1) and "cause" financial advantage in s 192D(2). The facts may also require a direction in terms of s 192C(5) in respect of treating property as the accused's own regardless of the victim's rights. Therefore the directions below should be modified to accommodate other forms of the offences.

[5-5925] Section 192E(1)(a) — Suggested direction — fraud by dishonestly obtaining property

[*The accused*] is charged that [*he/she*], by a deception, dishonestly obtained property being [*the nature of the property*] that belonged to [*name of victim*].

The Crown alleges that the property belonged to [*the victim*] because [*he/she*] had possession of the property.

The Crown alleges that the accused obtained the property within the terms of the offence charged in that [*he/she*] obtained possession of the property for [*himself/herself*]. Conduct of that type amounts to obtaining.

In order to prove that the accused committed the offence, the Crown must prove beyond reasonable doubt that the accused obtained the property in the manner alleged and did so intending to permanently deprive [*name of victim*] of the property, that is [*he/she*] did not intend that the property would be returned to [*the name of the victim*].

[*If necessary add*

Merely to borrow the property or to lend the property to another is not sufficient to make out the charge unless the borrowing or lending was for such a period and in such circumstances as to be the equivalent of taking or disposing of the property outright.]

The deception that the Crown alleges and that must be proved beyond reasonable doubt is that the accused [*the nature of the deception alleged*] and you must be satisfied that as a result of that deceptive conduct the accused obtained the property the subject of the charge. The Crown must prove that the accused intended to carry out that deceptive conduct to obtain the property or was reckless in that regard. The accused is reckless where [*he/she*] foresaw the possibility of [*the victim*] being deceived by [*his/her*] conduct and parting with the property but [*he/she*] nevertheless continued with [*his/her*] course of conduct.

The Crown must prove beyond reasonable doubt that in deceiving [*the victim*] in the manner alleged and so obtaining the property, the accused acted dishonestly. Dishonest in this context means that the accused acted dishonestly according to the standards of ordinary people. You as ordinary members of the community determine what is dishonest conduct. You must not only find beyond reasonable doubt that the accused acted dishonestly in deceiving [*the victim*] but also that [*he/she*] knew that [*his/her*] conduct was dishonest according to the standards of ordinary people.

[*If necessary add*

A person may obtain property dishonestly even if [*he/she*] is willing to pay for the property.]

[If a claim of right is raised as a response to an allegation of dishonesty: see **Larceny** at [5-6165].]

[5-5930] Section 192E(1)(b) — Suggested direction — fraud by dishonestly obtaining financial advantage

[*The accused*] is charged that [*he/she*] by a deception dishonestly [*obtained a financial advantage for himself/herself*] **or** [*kept a financial advantage that he/she had*].

The Crown contends that the financial advantage is [*set out the financial advantage*]. It does not matter whether the financial advantage alleged was permanent or temporary.

The deception that the Crown alleges that the accused perpetrated was [*set out the deception*]. It must prove beyond reasonable doubt that the financial advantage was obtained as a result of that deception and that the accused perpetrated that deception intentionally to obtain the financial advantage or acted recklessly in that regard. Here reckless means foreseeing the possibility that as a result of the deception [*he/she*] would [*obtain a financial advantage*] **or** [*retain the financial advantage that he/she had*] and carrying on with the deception notwithstanding that possibility.

However, the Crown does not need to prove a particular person was deceived.

The Crown must prove beyond reasonable doubt that the accused acted dishonestly in [*his/her*] deceptive conduct. Dishonest in this context means that the accused acted dishonestly according to the standards of ordinary people. You as ordinary members of the community determine what is dishonest conduct in this regard. You must not only find beyond reasonable doubt that the accused acted dishonestly in deceiving [*the victim*] but also that [*he/she*] knew that [*his/her*] conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response to an allegation of dishonesty: see **Larceny** at [5-6165].]

[5-5935] Section 192E(1)(b) — Suggested direction — fraud by dishonestly causing financial disadvantage

[*The accused*] is charged that [*he/she*] by a deception dishonestly [*caused a financial disadvantage to another person namely ...*]. The Crown contends that the financial disadvantage the subject of the charge is [*set out the financial disadvantage*]. It does not matter for the purpose of the charge whether the financial disadvantage alleged was permanent or temporary.

The deception that the Crown alleges that the accused perpetrated was [*set out the deception*]. It must prove beyond reasonable doubt that the financial disadvantage was suffered as a result of that deception and that the accused perpetrated that deception intentionally to cause the financial disadvantage or acted recklessly in that regard. Here reckless means foreseeing the possibility that as a result of the deception [*he/she*] would [*cause a financial disadvantage to ...*] but went on to act as [*he/she*] did notwithstanding that possibility. However, it is not necessary for the Crown to prove a particular person was deceived.

The Crown must prove beyond reasonable doubt that the accused acted dishonestly in [*his/her*] deceptive conduct. Dishonest in this context means that the accused acted dishonestly according to the standards of ordinary people. You as ordinary members of the community determine what is dishonest conduct in this regard. You must not only find beyond reasonable doubt that the accused acted dishonestly in deceiving [*the victim*] but also that [*he/she*] knew that [*his/her*] conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response to an allegation of dishonesty: see **Larceny** at [5-6165].]

[5-5940] Section 192F — intention to defraud by destroying or concealing records

The section makes it an offence to dishonestly destroy or conceal accounting records with the intention of obtaining property or a financial advantage.

As to obtaining: see [5-5910] and s 192C.

As to obtaining a financial advantage: see [5-5910] and s 192D.

Dishonesty — is defined in s 4B: see [5-5910].

Note that "destroy" includes "obliterate": s 192F(2).

Property — is defined in s 4.

Note: The Suggested directions below do not cover or describe every permutation of the offences. (See earlier **Note** regarding the various definitions at **[5-5920]**). The directions ought be modified to accommodate other forms of the offences.

[5-5945] Section 192F(1)(a) — Suggested direction — destroy or conceal records with intent to obtain property

[*The accused*] has been charged that [*he/she*] dishonestly [*destroyed/concealed*] accounting records being [*set out the records alleged*] with the intention of obtaining property belonging to another, here [*name of the victim*]. Property belongs to another person, if that person has possession of the property.

The Crown must prove beyond reasonable doubt that the accused did [*destroy/conceal*] those records and [*he/she*] did so with that intention. It must also prove that in [*destroying/concealing*] those records [*he/she*] acted dishonestly. Dishonest in this context means that the accused acted dishonestly according to the standards of ordinary people. You as ordinary members of the community determine what is dishonest

conduct in this regard. You must not only find beyond reasonable doubt that the accused acted dishonestly in [*destroying/concealing*] those records but also that [*he/she*] knew that this conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response: see **Larceny** at [5-6165].]

The intention of obtaining property belonging to another means that the accused intended to obtain possession of the property for [*himself/herself*].

The Crown must prove that the accused intended to deprive the person who was in possession of the property here [*the name of the victim*] permanently.

[*If necessary add*

It is not enough for the Crown to prove that the accused simply intended to borrow the property or to enable some other person to use it before returning it to [*the name of the victim*]. But the offence will be made out if the Crown proves beyond reasonable doubt that the accused intended to treat the property as if it were [*his/her*] own and to dispose of it regardless of [*the victim's*] rights to the property. Borrowing or lending the property to another may amount to an intention of disregarding [*the victim's*] rights if the borrowing or lending is for such a period and in such circumstances that it is the equivalent of taking or disposing of it outright.]

[5-5950] Section 192F(1)(b) — Suggested direction — destroy or conceal records with intent to obtain financial advantage

[*The accused*] has been charged that [*he/she*] dishonestly [*destroyed/concealed*] accounting records being [*set out the records alleged*] with the intention of [*obtaining a financial advantage for himself/herself*] **or** [*keeping a financial advantage that the accused has*]. The financial advantage alleged here is [*set out the financial advantage*]. It does not matter whether the financial advantage is permanent or temporary.

The Crown must prove beyond reasonable doubt that the accused did [*destroy/conceal*] those records and [*he/she*] did so with that intention. It must also prove that, in [*destroying/concealing*] those records, [*he/she*] acted dishonestly. Dishonest in this context means that the accused acted dishonestly according to the standards of ordinary people. You as ordinary members of the community determine what is dishonest conduct in this regard. You must not only find beyond reasonable doubt that the accused acted dishonestly in [*destroying/concealing*] those records but also that [*he/she*] knew that this conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response: see **Larceny** at [5-6165].]

[5-5955] Section 192F(1)(b) — Suggested direction — destroy or conceal records with intent to cause financial disadvantage

[*The accused*] has been charged that [*he/she*] dishonestly [*destroyed/concealed*] accounting records being (set out the records alleged) with the intention of [*causing a financial disadvantage to another person namely* ...] or [*inducing* a third person (namely) to do something that results in another person (namely) suffering financial disadvantage. The financial disadvantage alleged here is [*set out the financial disadvantage*]. It does not matter whether the financial disadvantage is permanent or temporary.

The Crown must prove beyond reasonable doubt that the accused did [*destroy/conceal*] those records and [*he/she*] did so with that intention. It must also prove that in [*destroying/concealing*] those records [*he/she*] acted dishonestly. Dishonest in this context means that the accused acted dishonestly according to the standards of ordinary people. You as ordinary members of the community determine what is dishonest conduct in this regard. You must not only find beyond reasonable doubt that the accused acted dishonestly in [*destroying/concealing*] those records but also that [*he/she*] knew that this conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response: see **Larceny** at [5-6165].]

[5-5960] Section 192G — intention to defraud by false or misleading statement

The section makes it an offence to dishonestly make, publish or concur in making or publishing, a statement that is false or misleading in a material particular with the intention of obtaining property or a financial advantage.

As to obtaining property: see [5-5910] and s 192C.

As to obtaining a financial advantage: see [5-5910] and s 192D.

Dishonesty — is defined in s 4B: see [5-5910].

Property — is defined in s 4.

Material — is not defined but to be material the statement must be of moment or of significance and not merely trivial or inconsequential in relation to the object to be achieved by making it: *R v Maslen and Shaw* (1995) 79 A Crim R 199.

False — is not defined. A statement may be false because material facts have been omitted from it whereby it creates a false impression: *R v M* (1980) 2 NSWLR 195.

Note: The Suggested directions below do not cover or describe every permutation of the offences and ought be modified to accommodate other forms of the offences.

[5-5965] Section 192G(a) — Suggested direction for obtaining property belonging to another — intention to defraud by false or misleading statement

[*The accused*] has been charged that [*he/she*] dishonestly [*made/published/concurred in the making/publishing of*] a statement being [*detail statement alleged*] knowing that the statement was false or misleading in a material particular with the intention of obtaining the property of another person being [*the name of the victim*].

The falsity or misleading nature of the statement that the Crown alleges was [*made/published by the accused/the accused concurred in the making/publishing of*] is that [*detail the allegation of falsity or misleading nature of statement made*]. The Crown must prove beyond reasonable doubt that the accused [*made/published/concurred in the making/publishing of*] the statement alleged in the charge. Further, the Crown must prove beyond reasonable doubt that the accused knew that this statement was false or misleading in the way alleged by the Crown.

Finally, the Crown must prove beyond reasonable doubt that the falsity or misleading nature alleged was of a material particular in that statement. A particular is material if it is of significance or consequence in that statement and not merely trivial or incidental.

In determining whether the particular alleged to be false or misleading was material to the statement [*made/published*] you take into account the purpose for which the statement was [*made/published*] and whether the particular was capable of influencing the mind of the person to whom the statement was [*made/published*] in respect of the purpose for which the statement was [*made/published*].

So unless the Crown has proved beyond reasonable doubt each of these two facts:

(a) the accused [*made/published/concurred in the making or publishing of*] a statement, and

(b) the statement was false or misleading in a material particular,

the Crown has failed to make out the charge regardless of why the statement was [*made/published*].

If, however, the Crown has proved each of those two facts beyond reasonable doubt, then you have to consider the intention with which the accused [*made/published the statement/concurred in the making/publishing of the statement*]. The charge alleges and so the Crown must prove beyond reasonable doubt that [*the statement was made/published by the accused/the accused concurred in the making/publishing of*] the statement with the intention, that is, for the purpose of, obtaining property belonging to another.

The intention of obtaining property belonging to another means that the accused intended to obtain possession for [*himself/herself*].

The Crown must prove that the accused intended to deprive the person who [*was in possession or control of the property*] or [*had a proprietary right or interest in the property*] here [*the name of the person*] permanently.

[*If necessary add*

It is not enough for the Crown to prove that the accused simply intended to borrow the property or to enable some other person to use it before returning it to [*the name of the victim*]. But the offence will be made out if the Crown proves beyond reasonable doubt that the accused intended to treat the property as if it were [*his/her*] own and to dispose of it regardless of [*the victim's*] rights to the property. Borrowing or lending the property to another may amount to this intention of disregarding [*the victim's*] rights if the borrowing or lending is for such a period and in such circumstances that it is the equivalent of taking or disposing of it outright.]

So the Crown alleges and must prove beyond reasonable doubt that what the accused intended to do with the property was in effect to permanently deprive [*name of victim*].

Finally, if the Crown has proved beyond reasonable doubt all these matters that is:

(a) that the accused [*made/published a statement/concurred in the making/publishing of a statement*], and

(b) that the accused knew that the statement was false or misleading in a material particular, and

(c) that the accused [*made/published a statement/concurred in the making/publishing of a statement*] intending to obtain property belonging to another,

the Crown must prove one final matter beyond reasonable doubt.

The Crown must prove that the accused did these things dishonestly. Dishonestly in this context means that the accused acted dishonestly according to the standards of ordinary people. You as ordinary members of the community determine what is dishonest conduct in this regard. You must not only find beyond reasonable doubt that the accused acted dishonestly in his involvement with a false or misleading statement in order to obtain another person's property but also that [*he/she*] knew that this conduct was dishonest according to the standards of ordinary people.

[If necessary give a direction on claim of right: see **Larceny** at [5-6165].]

[5-5970] Section 192G(b) — Suggested direction for obtaining a financial advantage or causing a financial disadvantage — intention to defraud by false or misleading statement

[*The accused*] has been charged that [*he/she*] dishonestly [*made/published/concurred in the making/publishing of a statement*] being [*detail statement alleged*] knowing that the statement was false or misleading in a material particular with the intention of [*obtaining a financial advantage/causing a financial disadvantage*]. The [*financial advantage/disadvantage*] alleged by the Crown here is [*set out the particular from the indictment*].

The falsity or misleading nature of the statement that the Crown alleges was [*made/published by the accused/the accused concurred in the making/publishing of*] is that [*detail the allegation of falsity or misleading nature of statement made*]. The Crown must prove beyond reasonable doubt that the accused [*made/published/concurred in the making/publishing of the statement*] alleged in the charge. Further, the Crown must prove beyond reasonable doubt that the accused knew that this statement was false or misleading in the way alleged by the Crown.

Finally, the Crown must prove beyond reasonable doubt that the falsity or misleading nature alleged was of a material particular in that statement. A statement is false or misleading in a material particular if the alleged false or misleading matter is of significance or consequence in that statement as a whole. That is, it was not merely trivial or incidental having regard to the contents of the statement. In determining whether the particular matter alleged to be false or misleading was material to the statement [*made/published*] you can take into account:

(a) the purpose for which the statement was [*made/published*], and also

(b) whether the particular matter was capable of influencing the mind of the person to whom the statement was [*made/published*] in respect of the purpose for which the statement was [*made/published*].

So unless the Crown has proved beyond reasonable doubt each of these two facts:

(a) the accused [*made/published/concurred in the making or publishing of*] a statement, and

(b) the statement was to the accused's knowledge false or misleading in a material particular,

the Crown has failed to make out the charge regardless of why the statement was [*made/published*].

If, however, the Crown has proved each of those two facts beyond reasonable doubt, then you have to consider the intention with which the accused [*made/published the statement/concurred in the making/publishing of the statement*].

The charge alleges and so the Crown must prove beyond reasonable doubt that [*the statement was made/published by the accused/the accused concurred in the making/publishing of the statement*] with the intention, that is for the purpose, of [*obtaining the financial advantage or causing the financial disadvantage*] that the Crown alleges.

[**If the Crown alleges an intention to obtain a financial advantage add**:

The Crown must prove beyond reasonable doubt that the accused acted as [*he/she*] did with the intention of [*obtaining a financial advantage for himself/herself*] **or** [*keeping a financial advantage that the accused has*]. The financial advantage alleged here is [*set out the financial advantage*]. It does not matter whether the financial advantage was to be a permanent or temporary one.]

[**If the Crown alleges an intention to cause a financial disadvantage add**:

The Crown must prove beyond reasonable doubt that the accused acted as [*he/she*] did with the intention of [*causing a financial disadvantage to another person namely …*]. The financial disadvantage alleged here is [*set out the financial disadvantage*]. It does not matter whether the financial disadvantage was to be a permanent or temporary one.]

Finally, if the Crown has proved beyond reasonable doubt all these matters that is:

(a) that the accused [*made/published a statement/concurred in the making/publishing of a statement*], and

(b) that the accused knew that the statement was false/misleading in a material particular, and

(c) that the accused [*made/published/concurred in the making/publishing of a statement*] intending to obtain [*a financial advantage/cause a financial disadvantage*],

the Crown must prove one final matter beyond reasonable doubt.

The Crown must prove that the accused did these things dishonestly. Dishonestly in this context means that the accused acted dishonestly according to the standards of ordinary people. You as ordinary members of the community determine what is dishonest conduct in this regard. You must not only find beyond reasonable doubt that the accused acted dishonestly in his involvement with a false or misleading statement in order to [*obtain a financial advantage/cause a financial disadvantage*] but also that [*he/she*] knew that this conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response: see **Larceny** at [5-6165].]

[5-5980] Section 192H — intention to deceive by false or misleading statements of officer of organisation

The offence is concerned with an officer of an organisation making a false or misleading statement with the intention of deceiving members or creditors of the organisation about its affairs.

Section 192H(2) contains definitions for "Creditor", "Officer", "Organisation".

Dishonesty — is defined in s 4B.

Note: The Suggested directions below do not cover or describe every permutation of the offences under s 192H and ought be modified to accommodate other forms of the offence where necessary.

[5-5985] Section 192H(1) — Suggested direction — intention to deceive by false or misleading statements of officer of organisation

[*The accused*] has been charged that being an officer of an organisation with the intention of deceiving [*members/creditors*] of that organisation about its affairs, dishonestly [*made/published a statement/concurred in the making/publishing of a statement*], being [*set out the statement alleged in the indictment*] that to [*his/her*] knowledge was or might have been [*false/misleading*] in a material particular.

This charge requires the Crown to prove beyond reasonable doubt a number of different facts. If the Crown fails in that obligation on any fact the charge fails and the accused must be found not guilty. Let us take them separately.

Firstly, the Crown must prove beyond reasonable doubt that the accused was an officer of an organisation. An organisation is defined by the provision creating the offence to include any body corporate or unincorporated association. Here the organisation alleged is [*set out the organisation*].

A person is an officer of such an organisation if [*he/she*] is a member of that organisation who is concerned in its management or is a person who purports to act as an officer of the organisation. Here the Crown alleges that the accused was [*set out the allegation as to officer*].

The second fact the Crown must prove beyond reasonable doubt is that the accused as such an officer [*made/published a statement or concurred in the making/publishing of a statement*]. I have told you what the particular statement alleged in this case is, as set out in the charge in the indictment.

The third fact the Crown must prove beyond reasonable doubt is that, when acting in respect of that statement as the Crown alleges the accused did, [*he/she*] knew that the statement was or may have been [*false/misleading*] in a material particular. The Crown alleges that the statement was [*false/misleading*] in that it contained the following [*set out the alleged false or misleading matter*].

A statement is [*false/misleading*] in a material particular if the alleged [*false/misleading*] matter is of significance or consequence in that statement as a whole. That is it was not merely trivial or incidental having regard to the contents of the statement. In determining whether the particular matter alleged to be [*false/misleading*] was material to the statement [*made/published*] you can take into account:

(a) the purpose for which the statement was [*made/published*], and also

(b) whether the particular matter was capable of influencing the mind of the person to whom the statement was [*made/published*] in respect of the purpose for which the statement was [*made/published*].

The fourth fact the Crown must prove beyond reasonable doubt was that the statement was [*made/published/the accused concurred in it being made or published*] with the intention of deceiving [*member/creditors*] of the organisation about the state of the organisations affairs. To deceive someone is to cause that person to believe something that is knowingly untrue to the person practising the deceit.

[**If the allegation is that the intention was to deceive creditors and is relevant insert**:

For this offence, a creditor of an organisation includes a person who has entered into a security for the benefit of the organisation.]

The fifth fact that the Crown must prove beyond reasonable doubt is that in acting the way the Crown alleges that the accused did, [*he/she*] acted dishonestly. Dishonestly in this context means that the accused acted dishonestly according to the standards of ordinary people. You as ordinary members of the community determine what is dishonest conduct in this regard. You must not only find beyond reasonable doubt that the accused acted dishonestly in his involvement with a false or misleading statement in order to deceive but also that [*he/she*] knew that this conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response: see **Larceny** at [5-6165].]

[The next page is 1001]

House, safe and conveyance breaking implements in possession

[5-6000] Introduction

The offences are created by s 114(1)(b) of the *Crimes Act* 1900. "Conveyance" is exclusively defined for the purposes of this provision in s 114(2).

The offence is proved where the Crown establishes beyond reasonable doubt that the accused had in his or her possession implements "capable" of being used for house breaking or such. It is not necessary for the Crown to prove that the accused had the implements in his or her possession for the "purpose" of house, safe or conveyance breaking, or with the intention of committing any specific offence of that kind: *R v Ellemes* (1974) 3 All ER 130; *R v Reynolds* (unrep, 22/08/86, NSWCCA) at 6, followed in *R v Pierpoint* (1993) 71 A Crim R 187 at 192. When, and if, the Crown has discharged the onus on it relating to possession and the nature of the implements, the burden of establishing lawful excuse for such possession is upon the appellant, on the balance of probabilities: *Crimes Act* 1900, s 417; *R v Reynolds* (unrep, 22/08/86, NSWCCA); *Evidence Act* 1995, s 141.

As to possession, see [3-700]. In *R v Pierpoint* (1993) 71 A Crim R 187 at 194, the following passage from *R v Dib & Dib* (1991) 52 A Crim R 64 at 66 was cited with apparent approval —

> What must usually be conveyed to the jury in addition to the elements of knowledge … is that at the relevant time when possession is alleged an accused had (subject to any investigatory and seizure powers given to the police and others) the right to exclude any person not acting in concert with him from interference with the property in question. He must have that property either in his manual possession or in a place to which he (and any person acting in concert with him) may go without physical bar in order to obtain such manual possession of it.

As to whether the implement is "any implement of house breaking" (or safe breaking or any implement capable of being used to enter or drive or enter and drive a conveyance), any implement that is capable of being used as a house breaking or such implement from its common, though not exclusive, use or from the particular circumstances of the case in question, may be regarded as a house breaking implement: *R v Patterson* (1962) 2 QB 429 followed in *R v Pierpoint* (1993) 71 A Crim R 187 at 192.

R v Pierpoint (1993) 71 A Crim R 187 (at 192) is also authority for the proposition that although it is not incumbent upon the Crown to prove that it was the accused's intention or purpose to use the implement for house breaking, evidence of his or her intent or purpose in having possession of the implement is relevant both to the issue of whether the instrument is a "house breaking implement" and also to the issue of lawful excuse.

[5-6010] Suggested direction

[*The accused*] is charged with having in [*his/her*] possession, without lawful excuse, an implement of [*house breaking/safe breaking/ or capable of being used to enter or*

drive a conveyance] … [*describe the instrument*]. In order to establish its case against the accused, the Crown must prove beyond reasonable doubt, firstly, that the accused had the implement in question in [*his/her*] possession and, secondly, that it was the type of implement alleged, that is to say, one capable of being used for [*house breaking/safe breaking/conveyance breaking*].

Once the Crown has established each of these matters to your satisfaction, beyond reasonable doubt, the onus passes to the accused, to show that [*he/she*] had a lawful excuse for possession of the implement in question at that time. It is important to note that the onus of proof resting on the accused to show that [*he/she*] had such a lawful excuse is not the more strict and onerous standard of beyond reasonable doubt imposed on the Crown, but the lesser standard of showing that more probably than not [*he/she*] had the implement in [*his/her*] possession for the purpose [*he/she*] claims … [*identify the purpose*].

Of course, if the Crown has not established one or other or both of the matters which the Crown must prove, then the question of whether the accused had a lawful excuse does not arise, because these are matters necessary for the Crown to establish if it is to prove its case. If it does not establish these matters, you would be bound to return a verdict of "not guilty" on this basis alone.

Of the matters which the Crown must prove, the first is as to possession. In order to establish that the accused had possession of the implement in question at the relevant time, the Crown must show that [*he/she*] knowingly had custody and control of the implement with the intention of exercising that custody and control to the exclusion of any other person … [**If there is an issue of joint possession**: *who was not acting in concert with the accused*] [*he/she*] must have that property either under [*his/her*] immediate physical custody and control … [**If there is an issue of joint possession**: *or in a place to which [he/she/any person acting in concert] may go*] without physical bar in order to obtain and assert that immediate physical custody and control of it.

As to the second of these two matters, namely, whether the Crown has satisfied you beyond reasonable doubt that the implement in question is indeed a [*house breaking/safe breaking/conveyance breaking*] implement, it will be such an implement in law if it is capable in fact of being used as a [*house breaking/safe breaking/conveyance breaking*] implement because it is commonly, although not exclusively, used as such … [*and/or because of the particular circumstances in which it was in the accused's possession in this case*].

… [*Deal with the relevant circumstances including the nature of the implement; when and where it was found; whether it was concealed etc; and with any other evidence relied upon by the Crown, and also any evidence relied upon by the accused on this issue, which may include the evidence that the accused relies upon in support of the issue of lawful excuse. Deal also with the opposing submissions*].

It is not necessary for the Crown to show that the accused had the intention of using the implement for the purpose of any specific [*house breaking/safe breaking/conveyance breaking*] or generally for such a purpose. [*Nevertheless, evidence relating to the intention or purpose for which the accused had the implement in [his/her] possession in the circumstances alleged by the Crown will be a factor which you may take into consideration in determining whether or not the Crown has established that the implement is of the nature alleged by the Crown*].

Assuming that the Crown has established beyond reasonable doubt both of the essential matters which it must prove, then, and only then, does the onus shift to the accused to establish, on the balance of probabilities, that it is more likely than not that [*he/she*] had a lawful excuse for having this implement in [*his/her*] possession at that time and in those circumstances.

[*The accused*] claims … [*set out the evidence of or relied on by the accused as amounting to a lawful excuse*]. I direct you as a matter of law that if you come to the conclusion that what the accused claims is probably so, then [*he/she*] has made out [*his/her*] case and you will be bound to enter a verdict of "not guilty".

If, on the other hand, you are not satisfied that what [*he/she*] claims is probably so, having already come to the conclusion beyond reasonable doubt that the Crown has established both matters which it must establish, it would be open to you, and you should, convict the accused.

[The next page is 1011]

Larceny

***Crimes Act* 1900 (NSW), Pt 4, subdiv 5**

[5-6100] Introductory note

This direction covers all elements of the offence. In most cases it will be unnecessary to refer in detail to them all. It should be drawn to the attention of the jury that, to justify a conviction, not all the property referred to in the charge (whether it be money or goods) need be proved to have been stolen — part of the property alleged will suffice.

[5-6105] Suggested direction

The accused is charged with stealing … [*identify the property*]. What amounts in law to stealing? The essential elements of that offence are —

1. that the property must belong to someone other than the accused;
2. it must be taken and carried away; and
3. the taking must be without the consent of the owner of the property.

Beyond those three elements or requirements, there are an additional three elements which relate to the accused's mental state at the time of the taking, namely —

4. the property must be taken with the intention of permanently depriving the owner of it;
5. the property must be taken without a claim of right made in good faith; and
6. the property must be taken dishonestly.

So far as the three last mentioned elements are concerned (the mental elements), it is essential that they exist at the time of the taking. I propose now to tell you a little more about those various elements that have significance in the present case.

<u>That the property must belong to someone other than the accused</u>

The law differentiates in a number of contexts between possession, control and ownership. Each of those concepts can become quite involved and complex. Fortunately, in the circumstances of the present case, it is neither necessary for me to seek to explain all their refinements to you, nor for you to understand all of those refinements.

However, to give you but the broadest of examples: if you were to buy, say, an expensive diamond from a jeweller, assuming that it was legally [*his/hers*] to sell to you in the first place, then, the moment you took physical delivery of it you would own it, have the control of it, and be in possession of it.

If, however, you proceeded to place it in a bank security box for safe keeping, you would, for some legal purposes anyway, cease to possess it, although you would still own it and be in control of it. If a robber broke into the bank and took your diamond, the robber would then be in possession of it, even though you would, in law, continue to be its owner.

When I direct you that the property must belong to someone other than the accused, all that is required is that, at the time of the taking, it must be owned, controlled or possessed by someone other than the accused. Thus in this context, the law uses the concept of belonging in the widest possible sense.

That it must be taken and carried away

Before there is a stealing in law, there must be some physical movement of the property in question, no matter how slight, by the accused or someone acting on [*his/her*] behalf. The slightest movement will suffice.

That the taking must be without the consent of the owner

In the present case, the Crown has alleged that the property was the property of [*name*] and has called supporting evidence. If you are satisfied, to the standard already mentioned, that this is so, then [*name*] is the owner of the property. You must then be satisfied to that same standard that the taking was without [*name's*] consent.

We come then, to the further three elements which relate solely to [*the accused's*] mental state at the time of the alleged taking.

The intention of permanently depriving the owner of it

It does not amount to stealing if the property is taken only for a temporary purpose, unless the person taking the property realises at the time of taking that it is certain or almost certain that the result of [*his/her*] actions will be that the owner of the property will be permanently deprived of it.

That the property must be taken without a claim of right made in good faith

If the accused genuinely claims that [*he/she*] was legally justified in taking the property then, even if legally wrong in that claim, [*he/she*] is not guilty of stealing. However, the claim must be one of legal right. The question is whether, at the time of the taking, the accused genuinely believed that [*he/she*] had such a legal right. It is not sufficient that the accused believed that [*he/she*] had a moral entitlement to the property.

That the property must be taken dishonestly

What this means is that the accused, by the intentional taking of the property without mistake and with knowledge that the property of another person was being taken, acted dishonestly. Whether [*he/she*] was acting dishonestly is for you to determine, applying the current standards of ordinary decent people … [*see: R v Glenister (1980) 2 NSWLR 597; R v Weatherstone (unrep, 20/8/87, NSWCCA)*].

[5-6110] Notes — claim of right

The authorities relating to a claim of right are reviewed in *R v Fuge* (2001) 123 A Crim R 310 at 314–315. The principles extracted from the authorities (omitting citations) are as follows —

(i) The claim of right must be one that involves a belief as to the right to the property or money in the hands of another.

(ii) The claim must be genuinely, that is, honestly held — whether it was well founded in fact or law or not.

(iii) While the belief does not have to be reasonable, a colourable pretence is insufficient.

(iv) The belief must be one of a legal entitlement to the property and not simply a moral entitlement.

(v) The existence of such a claim, when genuinely held, may constitute an answer to a crime in which the means used to take the property involved an assault, or the use of arms — the relevant issue being whether the accused had a genuine belief in a legal right to the property rather than a belief in a legal right to employ the means in question to recover it.

(vi) The claim of right is not confined to the specific property or banknotes which were once held by the claimant, but can also extend to cases where what is taken is their equivalent in value, although that may be qualified when, for example, the property is taken ostensibly under a claim of right to hold them by way of safekeeping, or as security for a loan, yet the actual intention was to sell them.

(vii) The claim of right must, however, extend to the entirety of the property or money taken. Such a claim does not provide any answer where the property or money taken intentionally goes beyond that to which the *bona fide* claim attaches.

(viii) In the case of an offender charged as an accessory, what is relevant is the existence of a *bona fide* claim in the principal offender or offenders. There can be no accessorial liability unless there has in fact been a foundational knowing of the essential facts which made what was done a crime, and unless the person who is charged as an accessory intentionally aided, abetted, counselled or procured those acts.

(ix) It is for the Crown to negative a claim of right where it is sufficiently raised on the evidence, to the satisfaction of the jury.

[5-6115] Suggested direction — defence of intention to restore

The following direction is suggested where the defence raises intention to restore under s 118 of the *Crimes Act* 1900. See also *Foster v The Queen* (1968) 118 CLR 117.

> If, members of the jury, you find that the accused did intend to appropriate the property for [*his/her*] own use or for [*his/her*] own benefit or for that of another, but intended eventually to restore the same (or return the equivalent sum of money) that in itself does not entitle the accused to an acquittal. If you are satisfied beyond reasonable doubt that the accused intended to appropriate the goods to [*his/her*] own use for [*his/her own benefit/for the benefit of another*], even if [*he/she*] intended eventually to return the property, then the Crown has established this element.

If the question of consent of the owner or claim of right are raised as issues, the onus is on the Crown to negative these ingredients.

[5-6120] Notes — larceny/receiving (special verdict)

See s 121 of the *Crimes Act* 1900. This is only available when the accused is charged with larceny (or any offence including larceny) and with receiving in respect of the same property. To the extent to which the property charged in the larceny charge is

not common to the property charged in the receiving count, such a verdict is not available. It is only where there is common property charged in each count that the special verdict will be available and such a verdict, if returned, will be limited to that common property: *R v Clarke* (1995) 78 A Crim R 226; *R v Nguyen* (unrep, 20/02/97, NSWCCA).

These authorities establish that the special verdict only arises where —

(i) the Crown is unable to establish beyond reasonable doubt whether the property was stolen or received because the evidence is consistent with both offences having been committed;

(ii) the jury are unanimously satisfied that —

(a) the accused is guilty of larceny or receiving; and

(b) in respect of the same property; but

(c) they are unable to say which.

For a recent case see *R v Campbell* [2004] NSWCCA 314.

[5-6125] Suggested direction — after directions on larceny and receiving

The accused is charged with stealing and, in the alternative, with receiving property.

After considering the evidence, you may not be satisfied beyond reasonable doubt that [*he/she*] either stole it or received the property. In that event, the accused is entitled to be found "not guilty", if you are unanimously of that view.

On the other hand, you may be unanimously satisfied beyond reasonable doubt that [*he/she*] did steal the property. If you are unanimously of that view, your duty would be to return a verdict of "guilty" on the first count and you would not be asked for a verdict on the second count.

Alternatively, you may not be satisfied beyond reasonable doubt that the accused stole the property, in which case you would turn to consider the second count. If, in respect of that count, you were unanimously satisfied beyond reasonable doubt that [*he/she*] received the property, then again your duty would be to bring in a verdict of "not guilty" on the first count, but "guilty" on the second count.

Another alternative position which you may arrive at is, that having unanimously found the accused "not guilty" on the first count, you may also unanimously find that you are not satisfied beyond reasonable doubt as to [*his/her*] guilt on the second count. In that case, your unanimous verdict would be one of "not guilty" in respect of both charges.

There is, however, another alternative which the law makes available. It arises and arises only where —

1. you are not satisfied that the Crown has established its case beyond reasonable doubt as to the first charge; and
2. you are not satisfied beyond reasonable doubt that the Crown has established its case in relation to the second charge; but
3. You are satisfied beyond reasonable doubt that the accused either stole the property or received it, and furthermore you are also unanimously satisfied beyond

reasonable doubt that you cannot say which. In that case, the law provides for what is termed a "special verdict" to that effect, that is to say, that the accused is guilty of either stealing or receiving, but you are unable to say which.

[If applicable, add

There is, however, one further matter in relation to that "special verdict" which I must direct you about as a matter of law. You may remember that in dealing with the charges of larceny and receiving I told you that provided you were satisfied beyond reasonable doubt that the accused stole the property in relation to the charge of stealing, or received it in the case of the charge of receiving, you may bring in a verdict of "guilty" in respect of that count. I confirm those directions of law. But I add this qualification to it for the purposes of the "special verdict" to which I have just referred. You may only bring in that special verdict in respect of property which is common to both the stealing and the receiving charge.**]**

I have written these possible verdicts down on a piece of paper which will be handed to the [*foreman/forewoman*] after Counsel have seen it. When you return to court after reaching your verdict, my associate will ask the [*foreman/forewoman*]: "As to the first count (larceny) is the accused 'guilty' or 'not guilty'". If the answer to that question is "guilty" then no further question will be asked.

If the answer to that question is "not guilty", my associate will then say to the [*foreman/forewoman*]: "As to the second charge (receiving) is the accused 'guilty' or 'not guilty'?". If the answer is "guilty", then no further questions will be asked. If, on the other hand, the answer is "not guilty" then my associate will ask the [*foreman/forewoman*]: "Do you return a special verdict that the accused is 'guilty' of either stealing or receiving (the same property) but you are unable to say which?". The response to that question will be either "We do return a special verdict" or "We do not return a special verdict", as the case may be.

[5-6130] Suggested written direction — verdict as to the charge of larceny

1. If you are unanimously satisfied beyond reasonable doubt that the Crown has established its case — return a verdict of "guilty of larceny". Go no further.
2. If you are not unanimously satisfied beyond reasonable doubt that the Crown has proved its case — the accused can not be convicted of larceny. Go to [5-6135].

[5-6135] Suggested written direction — verdict as to the charge of receiving

1. If you are unanimously satisfied beyond reasonable doubt that the Crown has established its case of receiving — return a verdict of "guilty of receiving". Go no further.
2. If you are not unanimously satisfied beyond reasonable doubt that the Crown has established its case as to this charge — the accused can not be convicted of receiving. Go to [5-6140].

[5-6140] Suggested written direction — verdict as to the charge of special verdict

1. If you are not unanimously satisfied that the Crown has established its case as to larceny; and
2. You are not unanimously satisfied that the Crown has established its case as to receiving; but
3. You are unanimously satisfied that the Crown established beyond reasonable doubt that the accused either stole or received the same property, being the whole or part of the property charged in each count, but you are unable to say which, you may bring in a special verdict of "guilty of either stealing or receiving".

[5-6145] Suggested written direction — questions

When you have indicated that you have reached a verdict, your [*foreman/forewoman*] will be asked —

1. As to the larceny count is the accused "guilty" or "not guilty"?
2. (**If guilty**) so says your [*foreman/forewoman*] so says you all?
3. (**If not guilty**) As to the receiving charge is the accused "guilty" or "not guilty"?
4. (**If guilty**) So says you [*foreman/forewoman*] so says you all?
5. (**If not guilty**) Do you or do you not return a special verdict that the accused is "guilty of either stealing or receiving" and you can not say which?

[5-6150] Larceny of motor vehicles

Section 154A of the *Crimes Act* 1900 creates a number of offences, the most prevalent of which is taking and driving a motor car without the consent of the owner or the person in lawful possession. The scope of the section, however, is considerably wider and includes not only motor cars but other forms of conveyance as defined in subs 2, such as carts, bicycles and ships. The offence is widened by including taking for the purpose —

(i) of driving it; or

(ii) secreting it; or

(iii) obtaining a reward for its restoration or pretended restoration;

(iv) or for any other fraudulent purpose.

The section is further extended by making it an offence to drive a conveyance knowing that it has been taken without consent or allowing oneself to be carried in or on the conveyance with that knowledge.

The section was introduced in 1924 in order to deal with the prevalence of "joy riding" in motor vehicles, that is to say, taking and driving away without consent, but not with the intention of permanently depriving the owner or person in possession of the vehicle and hence falling short of larceny at common law.

All the offences under s 154A are deemed to be larceny and the accused may be indicted as for that offence. The maximum penalty for the offence of larceny is imprisonment for five years (s 117). There is now a distinct offence in s 154F of "stealing" a motor car. The word "steals" in s 154F requires proof of an intention permanently to deprive the owner or person in possession of the motor car in order to establish that offence. The s 154F offence is punishable by a maximum penalty of imprisonment for ten years. The legislative policy expressed in s 154A and s 154F is apparently to continue to treat the "joy riding" of a wide variety of conveyances as being a less serious offence than the specific offence of larceny of a motor car — maintaining the distinction between the "joy rider" and the motor car thief.

Where the offence charged is "taking and driving", the word "drives" imports some degree of movement of the conveyance. However, it has been held in England that to "drive" a vehicle does not include releasing the hand brake and letting it run down a hill or towing it or pushing it and thus, by any of those means, moving it: *R v Bogacki* (1973) 57 Cr App R 593 at 597. The English provision has been repealed and replaced by s 12 of the *Theft Act* 1968 (UK) which deleted the requirement of "driving" and expressed the offence in terms of "taking" for the use of the accused or of any other person. The court in *R v Bogacki* held that the word "takes" also imports the concept of movement and requires that for a conviction under s 12 of the *Theft Act* 1968 (UK) it must be shown that the accused, in taking the conveyance, did so with some movement of it, however small.

Presumably the lack of any requirement of "driving" in some of the s 154A offences means that movement by means of towing or pushing or releasing a hand brake would satisfy the requirement of a "taking" in respect of those offences.

Where the charge under s 154A includes the allegation that the accused drove the conveyance or where that was the alleged purpose of the taking, the word "drive" conveys (as part of its meaning) the application of motive force by the accused — so that in addition to having control of the steering and braking mechanisms of the vehicle, the accused must also be shown to have control over its means of propulsion (whatever the means of propulsion are, whether by the engine or the force of gravity, by the accused having initiated the movement of the vehicle downhill by releasing the hand brake, etc).

On the other hand, simply steering a vehicle being towed by another vehicle does not constitute "driving" since the steerer of the towed vehicle does not have any control over the means of propulsion of the vehicle: *Hampson v Martin* (1981) 2 NSWLR 782. The determining factor in whether "driving" is established is the control over propulsion, that is, over the mode of moving and stopping the vehicle: *R v Affleck* (1992) 65 A Crim R 96.

The act of "driving" involves a voluntary act but there is a presumption of voluntariness and, unless there is evidence which raises the matter as an issue, the presumption applies in favour of the Crown: *Jiminez v The Queen* (1992) 173 CLR 572; *R v Dunne* (unrep, 26/03/93, NSWCCA).

The word "other", qualifying "fraudulent purpose", suggests that the purpose of "secreting" or "obtaining a reward" must also be shown to be fraudulent. In this context, it is suggested that "fraudulent" means "dishonest", and the jury would need to be directed on this issue. The jury should be told that to establish that the accused

took the conveyance "fraudulently", he or she must be shown to have acted dishonestly in the sense that the purpose at the time of the taking of the conveyance was dishonest and that, in deciding whether the act of taking was dishonest, they should apply the current standards of ordinary decent people: *R v Glenister* (1980) 2 NSWLR 597 esp at 607–608. In the context of s 154A(1)(a), it would also be appropriate to tell the jury that it would be open to them to find that the accused's purpose was dishonest if he or she knew that they had no right to take the conveyance for the purpose of secreting it or obtaining a reward for its restoration or pretended restoration. Where a claim of right is raised, see: *R v Love* (1989) 17 NSWLR 608.

[5-6155] Suggested direction — charge is taking and driving (s 154A(1)(a))

The accused is charged that [*he/she*] without the consent of the owner (or person in lawful possession) of a … [*specify conveyance*] took and drove it.

To establish this charge, the Crown must prove beyond reasonable doubt that the accused took and drove the … [*specify conveyance*]. In order to do so, the Crown must establish that the accused drove the … [*specify conveyance*] in the sense that [*he/she*] moved it, having control over its means of propulsion and its steering and braking mechanisms. Any degree of movement, however minimal, is sufficient … [*if in issue, canvass evidence for the Crown and for the accused and the opposing submissions*].

The Crown must also prove that the taking and driving of the … [*specify conveyance*] was without the consent of the owner (or person in lawful possession).

[If there is an issue as to ownership or possession, canvass the evidence/opposing submissions and add

I direct you, as a matter of law, that if you accept the evidence of [*owner/person in lawful possession*] that [*he/she*] was, at the time of the alleged taking, [*the owner/ person in lawful possession*] of the … [*specify conveyance*], then it is open to you to find on that issue in favour of the Crown, provided you are satisfied as to it beyond reasonable doubt … [*deal with any other evidence of ownership and/or possession such as certificates under traffic legislation*].

I further direct you that if you are satisfied that the [*owner/person in lawful possession*] did [*own/lawfully possess*] the … [*specify conveyance*] at the time of the alleged taking, and that [*he/she*] did not consent to the taking and driving of it by the accused, then it is open to you to find that the Crown has established the second of these two essential matters which it must prove beyond reasonable doubt if you are to return a verdict of "guilty" in accordance with the directions I have given you.**]**

[5-6160] Suggested direction — where the accused is charged with taking the vehicle for the purpose of driving it

In this case, the direction will be as above in relation to the taking involving movement, however minimal, of the conveyance by the act of the accused; ownership or possession, as the case may be; and lack of consent.

The charge is that the accused took the … [*specify conveyance*] without the consent of the [*owner/person in lawful possession*] for the purpose of driving it. The word

"purpose" relates, of course, to the accused's state of mind and the Crown must prove beyond reasonable doubt that when [*he/she*] took the … [*specify conveyance*], [*he/she*] took it with that alleged purpose in mind.

Whether you are satisfied beyond reasonable doubt that the Crown has proved that the accused had that purpose will be a matter for you to determine having regard to all the relevant circumstances before, at the time of and even after the alleged taking. Since it is a state of mind which must be proved, this will be a matter of your drawing an inference or conclusion as to [*his/her*] state of mind, that is to say [*his/her*] purpose, from all the surrounding circumstances … [*if in issue, canvass the evidence for the Crown and the accused and opposing submissions*].

[5-6165] Suggested direction — where the charge is one of taking for the purpose of secreting, or obtaining a reward, or for any other fraudulent purpose

… [*Deal with issues of taking; ownership/lawful possession; lack of consent in [5-6155]. Deal also with the question of the purpose of the accused adapted from [5-6160]*].

Where the charge is one of secreting

In order to establish this essential element of the charge, the Crown must prove that the accused took the vehicle for the purpose of secreting it, that is to say, for the purpose of concealing it. In this case, the Crown alleges that the accused had the purpose of concealing the … [*specify conveyance*] from [*its owner/person in lawful possession/an insurance company representatives/etc*] … [*indicate the Crown's case accordingly and deal with any evidence on the issue and opposing submissions*].

Whilst it is necessary, it is not sufficient for the Crown to prove beyond reasonable doubt that the accused took the … [*specify conveyance*] for the purpose alleged. The Crown must also establish beyond reasonable doubt that, in doing so, the accused acted fraudulently, that is to say, dishonestly.

In order to establish that [*he/she*] acted dishonestly, the Crown must prove that [*he/she*] had a dishonest state of mind at the time of the alleged taking.

In determining whether [*his/her*] state of mind was dishonest, you should apply the current standards of what is and what is not regarded as dishonest by ordinary decent people in the community.

I direct you, as a matter of law, that if you accept that the accused without the consent of the [*owner/person in lawful possession*] took this … [*specify conveyance*] and did so for the purpose of concealing it from [*its owner/lawful possessor/insurance company agent/etc*] then it would be open to you to infer from those circumstances that [*he/she*] took this … [*specify conveyance*] dishonestly … [*deal with evidence for the Crown, and the accused and opposing submissions*].

[If the accused raises as an issue a claim of right, add

Here the accused asserts that [*he/she*] had a genuine and honest belief at the time that [*he/she*] took the … [*specify conveyance*] that [*he/she*] had a lawful right to do so. If a person is acting under such a belief, which is genuinely and honestly held, then it can not be said that that person was dishonest in taking the thing in question, even if it was without the consent of the [*owner/person in lawful possession*].

It matters not whether in law there was no such right, or whether the accused mistakenly believed that [*he/she*] had such a right, or whether [*he/she*] had any reasonable grounds for such a belief. If that belief existed at the time of the taking then, as I have said, the state of mind of the accused would not have been dishonest.

Furthermore, I repeat that the Crown must prove beyond reasonable doubt that in taking the … [*specify conveyance*], the accused did act dishonestly. This issue having been raised therefore, it is for the Crown to establish beyond reasonable doubt, that the accused had no such genuine belief as asserted by [*him/her*].

If, at the end of your deliberations on this matter, you are left in a state of reasonable doubt as to whether the accused may have had such a genuine and honest belief, then the Crown would not have established this part of its case and your duty would be to acquit the accused, because in that event, the Crown would not have established a necessary element of the charge, namely that in taking the … [*specify conveyance*], the accused was acting dishonestly … [*canvass evidence for Crown and the accused on the issue of claim of right and of dishonesty generally, and the opposing submissions*].**]**

[5-6170] Suggested direction — where the charge alleged is taking for the purpose of obtaining a reward for restoration or pretended restoration of the conveyance

… [*Deal with issues of taking, purpose, ownership or lawful possession, and lack of consent*].

The Crown alleges that the purpose of the accused in taking the … [*specify conveyance*] was to obtain a reward for its [*restoration/pretended restoration*] … [*deal with evidence for the Crown and any evidence for the accused on this issue and the opposing submissions. Proceed then to deal with "fraudulently" by adapting what is written above under (C) in relation thereto*].

[5-6175] Suggested direction — where the charge is under s 154A(1)(b): driving or allowing oneself to be carried in a conveyance knowing that it had been taken without the consent of the owner or person in lawful possession

… [*Deal with issues of taking and lack of consent, as essential elements of the charge which the Crown must establish beyond reasonable doubt, adapting what is said above for that purpose*].

The Crown must also prove beyond reasonable doubt that before the accused drove the … [*specify conveyance*] it had been taken without the consent of the [*owner/person in possession*] … [*direct the jury in terms of the accused driving it, that is, being in control of the method of propulsion of the conveyance and of its braking and other mechanisms*].

[Where it is alleged that the accused allowed himself or herself to be carried in or on the conveyance, after dealing with the requirement of a previous non-consensual taking, add

The Crown must also establish that the accused allowed [*himself/herself*] to be carried [*in/on*] the … [*specify conveyance*] in the knowledge that it had previously been taken

without the consent of the [*owner/person in lawful possession*]. "Knowledge" is a state of mind and it must exist at the time when the accused, by [*his/her*] voluntary act, entered [*in/on*] the … [*specify conveyance*] and permitted [*himself/herself*] to be carried [*in/on*] it.

Being a state of mind existing in the past, it is generally a matter to be inferred from all the relevant circumstances, but it is essential that the Crown show that the accused had the knowledge that the … [*specify conveyance*] had been taken beforehand without the consent of the [*owner/person in possession*].

It is not sufficient for the Crown to show that after the accused had entered [*in/on*] the … [*specify conveyance*] and permitted [*himself/herself*] to be carried [*in/on*] it that [*he/she*] acquired that knowledge and remained [*in/on*] the … [*specify conveyance*].

… [*Deal with the evidence relied upon as to knowledge by the Crown and the accused and opposing submissions and also, if in issue, when that knowledge was acquired and the voluntariness of the accused's act in allowing himself or herself to be so carried, which may arise, for example, if the knowledge was acquired whilst the conveyance was in motion and he or she could not safely get out or off.*] **]**

[The next page is 1031]

Manslaughter

[5-6200] Introduction

There are two broad categories within the offence of manslaughter: voluntary manslaughter and involuntary manslaughter. In cases of voluntary manslaughter the elements of murder are present, but the culpability of the offender's conduct is reduced by reason of provocation or substantial impairment by abnormality of mind: *The Queen v Lavender* (2005) 222 CLR 67 at [2]; *Lane v R* [2013] NSWCCA 317 at [50], [63]. Manslaughter by excessive self-defence established under s 421 *Crimes Act* 1900 is also a form of voluntary manslaughter: *Lane v R* at [50]. The offender has one of the mental states for murder but a reasonable person in his or her position would not have considered a lethal response was reasonable in the circumstances: *Grant v R* [2014] NSWCCA 67 at [63]–[66].

As to **Provocation** see **[6-400]**, **Substantial impairment because of mental health impairment or cognitive impairment** see **[6-550]** and **Self-defence** see **[6-450]**.

Manslaughter may be charged as a separate count in the indictment or an accused may be convicted of manslaughter on an indictment charging murder alone: *R v Downs* (1985) 3 NSWLR 312. This chapter focuses upon involuntary manslaughter.

Where the Crown alleges the accused's liability arises from a joint criminal enterprise, see **[2-770]**. The maximum penalty for manslaughter is 25 years imprisonment: s 24 *Crimes Act*.

[5-6210] Involuntary manslaughter

There are two categories of involuntary manslaughter at common law:

(i) manslaughter by unlawful and dangerous act, and

(ii) manslaughter by criminal negligence.

A helpful general discussion of these discrete types of manslaughter can be found in *Lane v R* [2013] NSWCCA 317 at [51]–[65].

[5-6220] Act of the accused caused death

The act of the accused — or in the case of (ii) in **[5-6210]** above, the act or omission — must cause the death of the deceased: *Lane v R* [2013] NSWCCA 317 at [63]–[64]. For **Causation** generally, see **[2-300]** and for the **Voluntary act of the accused**, see **[4-350]**.

[5-6230] Manslaughter by unlawful and dangerous act

Manslaughter by unlawful and dangerous act occurs where the accused causes the death of the deceased by a voluntary act that was unlawful and dangerous: a dangerous act being one that a reasonable person in the position of the accused would have appreciated was an act that exposed another person to a risk of serious injury: *Wilson v The Queen* (1992) 174 CLR 313; *Burns v The Queen* (2012) 246 CLR 334 at [75]; *Lane v R* [2013] NSWCCA 317 at [57]. A breach of the motor traffic

regulations is not an unlawful act for this form of manslaughter: *R v Pullman* (1991) 25 NSWLR 89 and see *R v Borkowski* (2009) 195 A Crim R 1 where a majority of the court at [1] and [51]–[54] applied *R v Pullman*. It is essential that the jury is directed that the relevant test is the reasonable person in the accused's position: *R v Cornelissen* [2004] NSWCCA 449 at [82]–[83] applying *Wilson v The Queen* at 334. That requires attributing to the reasonable person the accused's awareness and knowledge of the circumstances surrounding the alleged act: *R v Thomas* [2015] NSWSC 537 at [41], [71].

In assessing whether the reasonable person would have realised the act was dangerous, the fact finder can take into account, in appropriate cases, the accused's age (*DPP (Vic) v TY* (2006) 14 VR 430 at [12]), or a moderate or extreme intellectual disability. It has been held these are "objectively ascertainable attribute[s]": *R v Thomas* at [69]. The significance of these factors will of course vary from case to case and will only need to be referred to if they are in some way relevant.

Where the accused's intellectual disability is to be taken into account, the description of the degree of disability will ordinarily involve using terms used by experts (for example "moderate", "severe" or "profound"). These terms do not have the meaning a lay person might think and may without explanation be misleading. There is a helpful discussion in *Muldrock v The Queen* (2011) 244 CLR 120 at [50]. For this reason, it will be necessary to explain to the jury the meaning of the terms used by the experts to assess a person's intellectual functioning.

A transitory emotional or mental state which the accused might have had at the time cannot be taken into account: *R v Wills* [1983] 2 VR 201 at 212. The approach taken in *R v Edwards* [2008] SASC 303 at [385], of utilising the test for manslaughter by gross criminal negligence and attributing a variety of factors personal to the accused to the reasonable person, was disapproved in *R v Thomas* at [44]–[48].

As to manslaughter by unlawful and dangerous act generally, see: *Criminal Practice and Procedure NSW* at [8-s 18.55]; *Criminal Law (NSW)* at [CA.24.60]ff.

[5-6240] Suggested direction — manslaughter by unlawful and dangerous act

Note: The following suggested direction assumes that the act of the accused caused the death of the deceased and that the accused's act was intentional. Alternatives to this scenario are provided in square brackets.

[*The accused*] is charged with the offence of manslaughter. Manslaughter is the unlawful killing of another human being. Although it is an offence of homicide, it is a less serious offence than murder because the Crown does not allege that [*the accused*] acted with the intention of killing [*the deceased*]. It is not the Crown's case that [*the accused*] intended to inflict any serious harm upon [*the deceased*].

The offence of manslaughter can be committed in a number of ways but here the Crown alleges that:

1. the death of [*the deceased*] was caused by an act of [*the accused*]
2. [*the accused*] intended to commit the act that caused death
3. the act of [*the accused*] was unlawful, and
4. the act of [*the accused*] was dangerous.

1. The death of [*the deceased*] was caused by an act of [*the accused*]

[*If causation is not in issue, add:*

The Crown must prove beyond reasonable doubt that the intentional act of [*the accused*] caused the death of [*the deceased*]. That is not an issue in this case and you can proceed on the basis that this fact has been proved beyond reasonable doubt.]

[*If causation is in issue, then directions need to be given as to the basis upon which the Crown alleges that an act of the accused substantially contributed to the death of the deceased: see* ***Causation*** *at [2-300]ff.*]

2. [*The accused*] intended to commit the act that caused death

[*If it is not in issue that the act of [the accused] was intentional, add:*

The Crown must prove beyond reasonable doubt that the act of [*the accused*] was intentional. This case is not in dispute. So you should find that particular ingredient of the crime to be proved beyond reasonable doubt.]

[*If there is an issue of whether the act of the accused was intentional then directions should be given according to the issues in the case. See* ***Voluntary act of the accused*** *at [4-350].*]

3. The act of [*the accused*] was unlawful

The Crown must prove beyond reasonable doubt that [*the accused's*] act was unlawful. The Crown asserts that the act was unlawful because … [*set out the Crown's allegation*].

[*If the question of self-defence arises, then see the suggested directions at [6-460].*]

4. The act of [the accused] was dangerous

Finally, the Crown must prove beyond reasonable doubt that the act of [*the accused*] was not only unlawful but also dangerous. An act is dangerous if a reasonable person, in the position of [*the accused*] at the time the act was committed, would have realised that the act exposed another person, whether it be the deceased or not, to a risk of serious injury. It does not matter whether [*the accused*] believed that [*his/her*] act was dangerous. The test is whether a reasonable person, that is, an ordinary member of the community in the position of [*the accused*], would have realised or appreciated that the act was dangerous.

In deciding whether the reasonable person in the position of the accused would have realised that the act was dangerous you can take into account any evidence of [*the accused's*] awareness and knowledge of the circumstances surrounding the alleged act.

[*The following further directions in relation to the reasonable person need not necessarily be given and should be adapted to the circumstances of the case:*

A reasonable person in the position of [*the accused*] is one who is not subject to the peculiar eccentricities of [*the accused*] or any temporary or fleeting emotional or mental state to which [*the accused*] might have had at the time. The reasonable person is not affected by alcohol or drugs.

[*Where appropriate:* the reasonable person is to be taken as being of the age and maturity of [*the accused*] at the time of the alleged act.]

[*Where appropriate:* the reasonable person is taken to be a person with [*the accused's*] intellectual disability.]

Therefore, the reasonable person in this case is to be taken as …

[*Where appropriate: set out the relevant evidence of the accused's age and maturity/intellectual disability at the time of the act alleged. In relation to the attributes of the intellectual disability, explain any expert opinion admitted in the proceedings (see earlier discussion at [5-6230]). For example, in R v Thomas [2015] NSWSC 537, the accused had an impaired ability with the processing of information and conceptual reasoning.*]

The question is whether the Crown has proved beyond reasonable doubt that a reasonable person in the position of [*the accused*], would have realised that the act allegedly committed by [*the accused*] exposed another person to a risk of serious harm.]

[5-6250] Manslaughter by criminal negligence

In cases of manslaughter by criminal negligence, juries should be directed in accordance with *Nydam v R* [1977] VR 430 at 445 which the High Court approved in *The Queen v Lavender* (2005) 222 CLR 67 at [17], [60], [72], [136] and *Burns v The Queen* (2012) 246 CLR 334, per French CJ at [19]. In brief, the offence was described in *Nydam v R* as follows:

> In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.

Before the offence can be committed the accused must owe a legal duty of care to the deceased, such a duty having been recognised by the common law: *Burns v The Queen* at [97], [107]; *Lane v R* [2013] NSWCCA 317 at [59]–[62]. As to where such a duty commonly exists, see *R v Taktak* (1988) 14 NSWLR 226 and *Burns v The Queen* at [97]. The question of whether a given set of facts gives rise to a duty of care is a question for the judge. It is a question for the jury whether the facts exist: *Burns v The Queen* per French CJ at [20]. It is essential that the act or omission that amounts to a breach of duty is the act or omission that causes death: *Justins v R* (2010) 79 NSWLR 544 at [97]; *Lane v R* at [61].

The common law defence of honest and reasonable mistake of fact does not apply to the offence: *The Queen v Lavender* at [57]–[60].

The test for criminal negligence is objective: *The Queen v Lavender* at [60]; *Patel v The Queen* (2012) 247 CLR 531 at [88]. The court in *R v Sam (No 17)* [2009] NSWSC 803 at [14], [21], [31] articulated the personal attributes of the accused that may be assigned to the reasonable person. The standard to be applied in some cases must take account of special knowledge on the part of a person, as relevant to how a person with that knowledge would act: *Patel v The Queen* at [90].

As to manslaughter by gross criminal negligence generally, see: *Criminal Practice and Procedure NSW* at [8-s 18.50]; *Criminal Law (NSW)* at [CA.24.180]ff.

[5-6260] Suggested direction — manslaughter by criminal negligence

Note: The suggested direction below assumes that the death of the victim is not a fact in dispute and that the accused's act/omission caused or accelerated that death. The direction assumes that the facts, which the Crown alleges gives rise to the existence of a duty of care, are in issue. There may be cases where there is no such issue, for example, where the offence involves a parent and child, and, therefore, it is unnecessary to direct the jury on the existence of a duty of care generally.

[*The accused*] is charged with the offence of manslaughter. Manslaughter is the unlawful killing of another human being. Although it is an offence of homicide, it is a less serious offence than murder because the Crown does not allege that the accused acted with the intention of killing the deceased. It is not the Crown case that [*the accused*] intended any harm at all to be inflicted upon [*the deceased*] let alone that [*he/she*] should die.

The offence of manslaughter can be committed in a number of ways but here the Crown alleges that the killing of [*the deceased*] was caused by a deliberate [*act/omission*] of [*the accused*] that was so seriously negligent on the part of [*the accused*] and created such a high risk of serious injury or death to another person that it amounted to a criminal offence.

In order to prove manslaughter on this basis the Crown must prove a number of facts beyond reasonable doubt. Unless you find each of these facts proved to that standard [*the accused*] must be acquitted.

The Crown must prove each of the following beyond reasonable doubt:

1. the death of [*the deceased*]; and
2. [*the accused*] owed a legal duty of care to [*the deceased*]; and
3. [*the accused*] [*committed an act/omitted to do an act*]; and
4. the [*act/omission*] caused (that is, was a substantial cause of) or accelerated, the death of [*the deceased*]; and
5. [*the accused's*] [*act/omission*] was negligent in that [*he/she*] breached the duty of care which [*the accused*] owed to [*the deceased*]; and
6. [*the accused's*] [*act/omission*] amounted to criminal negligence and merited criminal punishment for the offence of manslaughter because:
   (a) it fell so far short of the standard of care which a reasonable person would have exercised in the circumstances; and
   (b) involved such a high risk that death or really serious bodily harm would follow as a result of the [*act/omission*].

1. The death of [*the deceased*]

The Crown must prove beyond reasonable doubt the death of [*the deceased*]. That is not an issue in this case and you can proceed on the basis that this has been proved beyond reasonable doubt.

2. [*The accused*] owed a legal duty of care to [*the deceased*]

The Crown must prove that [*the accused*] owed a legal duty of care to [*the deceased*]. Every person owes a duty to conduct himself or herself in a manner that he or she will

not cause injury to another person in circumstances where a reasonable person in his or her position would have foreseen a risk of injury from such conduct to that other person. The law recognises that one person owes a legal duty of care to another in certain situations.

[*It is suggested that any examples given to the jury concerning a legal duty of care should be relevant to the kind of case that is before the court, that is, negligence based on an omission to act (see Burns v The Queen (2012) 246 CLR 334 at [97], [107]) as opposed to negligence arising from an act of the accused such as driving. The following may be used as examples depending on the facts of the case. In the majority of cases no exposition upon legal duties of care will be necessary but the following may be added if it is thought a particular case warrants it.*

Generally speaking one citizen owes no duty of care to another citizen. Therefore, by way of example, a member of the community is under no legal duty to save a stranger from drowning, even if there were no risk to the safety of the potential life-saver. Similarly, the law does not impose a duty of care on suppliers of prohibited drugs to take reasonable steps to preserve the life of their customers.

There are other circumstances where the law does recognise one person owes a legal duty of care to another. For example, when you drive a motor vehicle on a public street then you owe a duty of care to other road users, whether they are drivers or pedestrians. When you breach that duty of care you may be driving negligently because your standard of driving has fallen short of what is expected of a reasonable, prudent driver in the particular situation in which you were driving. This is simply an example of how a duty of care arises and the consequences of breaching that duty of care.]

A duty of care owed by one person to another can normally arise in at least four situations: first, because of an obligation imposed by law, such as the driving of a motor vehicle; secondly, because of a certain relationship between the two persons, for example the relationship of a parent and child, or a doctor and patient; thirdly, where a person has assumed a duty of care over another by a contractual relationship, for example in an employment relationship; and, fourthly, where, by the person's voluntary conduct, he or she has assumed a duty of care for another person.

The Crown here asserts that [*the accused*] owed a legal duty of care to [*the deceased*] because [*set out the Crown's allegation of the way in which the duty of care has arisen*]. I direct you that, if you find beyond reasonable doubt on the evidence before you that the facts are as the Crown alleges them to be, then according to the law [*the accused*] owed a duty of care to [*the deceased*].

[*If there is an issue as to whether the facts giving rise to a duty of care exist then set out the arguments of the parties.*]

3. [*The accused*] [*committed an act/omitted to do an act*]

[See ingredient 4 below.]

4. The [*act/omission*] caused (that is, was a substantial cause of) or accelerated, the death of [*the deceased*]

I now turn to ingredients three and four. The Crown must prove beyond reasonable doubt that [*the accused*] [*committed an act/omitted to do an act*] and that this [*act/omission*] caused (that is, was a substantial cause of) or accelerated the death of

[*the deceased*]. In this case neither ingredients three and four are in issue. Therefore, you can proceed on the basis that the Crown has proved these ingredients beyond reasonable doubt.

5. [*The accused's*] [*act/omission*] was negligent in that [*he/she*] breached the duty of care which [*the accused*] owed to [*the deceased*]

The Crown must prove beyond reasonable doubt that [*the accused*] breached the duty of care owed by [*him/her*] to [*the deceased*]. The Crown alleges that [*he/she*] [*state Crown allegation that [the accused] acted or omitted to act in such a way as to constitute a breach of that duty of care*].

It is for you, as the jury, to determine the standard of care required to be exercised by a reasonable person, that is an ordinary member of the community, in the situation in which [*the accused*] was placed. If [*the accused*] failed to do what a reasonable person would have done [*or did what a reasonable person would not have done*] in the situation in which [*the accused*] found [*himself/herself*] then you would find that [*the accused*] breached the duty of care owed to [*the deceased*]. Unless you are satisfied beyond reasonable doubt that there was a breach of duty of care, then [*the accused*] cannot be guilty of manslaughter.

In deciding whether there was a breach of duty of care, you have to consider what a reasonable person would have done in the situation in which [*the accused*] was placed. A reasonable person is one who has some, but not all of the personal attributes of [*the accused*]. A reasonable person is a person of generally the same age as [*the accused*]; with [*his/her*] experience and [*training*] and with [*his/her*] knowledge of the facts. The reasonable person is a person of normal courage and resolve. So you have to put this reasonable person into [*the accused's*] shoes at the time of the incident and attribute to that person [*the accused's*] knowledge of the circumstances at the time [*the accused*] committed the act or acts, or failed to take a relevant course of action.

If [*the accused*] failed to act as a reasonable person would have done in that situation, then [*the accused*] has breached the duty of care that [*he/she*] owed [*the deceased*]. It does not matter whether [*the accused*] knew that [*he/she*] was breaching [*his/her*] duty of care, or whether [*the accused*] believed that [*he/she*] was acting in an appropriate way in the circumstances which [*he/she*] faced. You are not concerned with [*the accused's*] personal beliefs about the correctness or appropriateness of [*his/her*] conduct. You are concerned with what a reasonable person in [*the accused's*] position would have thought was appropriate and necessary.

[*If applicable:*

In deciding that issue [*the accused*] has invited you to take account of ... [*insert particular fact or circumstance which [the accused] knew, or thought [he/she] knew which contributed to [his/her] opinion that [he/she] was acting in an appropriate way (see The Queen v Lavender (2005) 222 CLR 67 at [59]–[60])*.]

6. [*The accused's*] [*act/omission*] amounted to criminal negligence and merited criminal punishment for the offence of manslaughter

The Crown must prove beyond reasonable doubt that [*the accused's*] [*act/omission*] amounted to criminal negligence and merited criminal punishment for the offence of manslaughter.

A mere breach of duty is not enough to amount to the offence of manslaughter. A breach of duty is often called carelessness or negligence. A breach of the duty of care may make a person liable to pay compensation to another person for damages in a civil action. However, that liability is not sufficient for the offence of manslaughter. [*The accused's*] conduct must be so gravely in error and carry with it such a high risk of serious injury that it deserves to be punished as a serious criminal offence.

The breach of duty must have a certain quality before [*the accused*] can be guilty of this offence. [*The accused's*] conduct must, first, fall so short of what was required and, secondly, must give rise to such a high risk of serious injury or death, that the conduct deserves criminal punishment. Often negligence giving rise to manslaughter is described as gross or even wicked. It is negligence of such a serious kind that it far exceeds simple carelessness or negligence that occurs frequently in our society.

If [*the accused's*] breach of duty meets this level of seriousness and carries with it a high risk of serious injury or death, it does not matter that [*the accused*] never intended, or appreciated that [*his/her*] actions might harm [*the deceased*].

[5-6270] Alternative verdicts

Section 25A(7) *Crimes Act* 1900 provides that, in a trial for manslaughter, the jury can return an alternative verdict for an offence of assault causing death while intoxicated (s 25A(2)) or an offence of assault causing death under s 25A(1). Sections 52AA(4) and 52BA(4) *Crimes Act* permit the jury to return an alternative verdict for the offences under ss 52A and 52B where the accused is indicted for murder or manslaughter.

See **[5-6340]** as to the judicial requirement to leave manslaughter as an alternative to murder.

[The next page is 1041]

Murder

***Crimes Act* 1900 (NSW), s 18**

[5-6300] Introduction

Murder, as defined by s 18(1)(a) *Crimes Act* 1900, is made out where a voluntary act or omission of the accused causes the death of the deceased and the act is committed with:

1. an intent to inflict grievous bodily harm, or
2. an intent to kill, or
3. reckless indifference to human life, or
4. committed by the accused or some accomplice with him or her in an attempt to commit, or during or immediately after the commission of, an offence punishable by at least 25 years imprisonment (constructive murder).

Section 18 does not apply to the circumstance of a person who kills himself or herself intentionally, or accidentally, or in an attempt to commit, or during or immediately after the commission of, a crime (referred to in point 4, above) or by attributing to another person an act which caused a self-killing: *IL v The Queen* (2017) 260 A Crim R 101 at [25], [79]–[80].

Malice, as referred to in s 18(2)(a), has no role to play where the Crown is able to prove an act described in s 18(1): *IL v The Queen* at [90], [95], [168]. In the case of constructive murder, once the mental element for the foundational offence is established to the requisite standard, malice is also established: *IL v The Queen* at [169].

As to murder generally, see *Criminal Practice and Procedure NSW* at [8-s 18.1]ff; *Criminal Law (NSW)* at [CA.19A.20]ff.

Reckless indifference to human life is the doing of an act with the foresight of the probability of death arising from that act: *The Queen v Crabbe* (1985) 156 CLR 464; *Royall v The Queen* (1991) 172 CLR 378; *Campbell v R* [2014] NSWCCA 175 at [304]. In some cases there may be little difference between doing an act with an intention to kill (or to inflict grievous bodily harm) and doing an act in the recognition that it would probably cause death: *Campbell v R* at [311]. As to the relevance of intoxication to this head of murder, see *R v Grant* (2002) 55 NSWLR 80.

The Complicity chapter at **[2-700]** sets out the circumstances where a person may be criminally liable in various ways for a crime physically committed by another person. In the case of murder it is common for the Crown to frame an accused's liability on the basis of accessorial liability, joint criminal enterprise or extended common purpose. These distinct areas of the law are explained at **[2-710]**ff and **[2-740]**ff respectively together with suggested directions. As to the application of joint enterprise to constructive murder, see further at **[2-770]**.

The following additional issues listed below commonly arise in murder trials. A discussion of each of these issues with suggested directions can be located where indicated below:

- Voluntary act of the accused, see **[4-350]**ff including the specific references to act(s) of the deceased and causation at **[4-355]** and **[4-360]**
- Causation, see **[2-300]**ff

- Intoxication, see **[3-250]**ff
- Self-defence and excessive self-defence, see **[6-450]**ff
- Provocation, see **[6-400]**ff
- Substantial impairment by abnormality of mind, see **[6-550]**ff.

[5-6310] Suggested direction — mental element of murder

Note: The direction below addresses the mens rea for murder where the Crown alleges that the accused intended to kill or inflict grievous bodily harm or was recklessly indifferent to human life. The direction should be adapted according to the issues in the specific case. Putting aside the positive judicial obligation to leave an alternative verdict(s) (see **[5-6330]** below), a judge should not give directions for a factual scenario or a form of liability not relied upon by the Crown: *R v Robinson* (2006) 162 A Crim R 88 at [157].

The Crown has to prove beyond reasonable doubt that, at the time [*he/she*] did the deliberate act which caused the death of [*the deceased*], [*the accused*] had an intention to kill the deceased, or an intention to inflict grievous bodily harm upon [*him/her*], or that the act which caused death was done with reckless indifference to human life. This is the second element of the basic ingredients of murder. It is often referred to as the mental element of the offence of murder which the Crown has to prove beyond reasonable doubt.

These three states of mind are separate and distinct. The Crown needs to prove beyond reasonable doubt that [*the accused*] had any one of them at the time [*he/she*] did the act causing death. In relation to the mental element of the crime of murder, what the Crown has to prove is the state of mind of the accused at the point of time of the act causing death.

[*If there is an issue about the act causing death the various alternatives should be addressed*.]

Of course, you can infer or conclude what a person's state of mind is at any particular point from a consideration of the person's state of mind leading up to that particular time and sometimes afterwards. You do not take the particular point of time out of the context in which it occurred. You look at it as part of a series of events that took place, both before and after the act causing the death of the deceased occurred.

Intention

I will explain the first two states of mind — an intention to kill or inflict grievous bodily harm — together since they are related.

For the offence of murder, the Crown has to prove beyond reasonable doubt that, at the time [*he/she*] committed the deliberate act that caused the deceased's death, [*the accused*] did that act with either an intention to kill or an intention to inflict grievous bodily harm upon [*the deceased*]. Grievous bodily harm is simply bodily injury of a really serious kind. This type of injury does not have to be permanent or even life threatening. You decide what sort of injury would be described as being really serious because that is an issue of fact for you.

Intent and intention are very familiar words. In the legal context in which we are considering them, they carry their ordinary everyday meaning. A person's intention

may be inferred or concluded from the circumstances in which the death occurred and from the conduct of the accused person before, at the time of, or after he or she did the specific act which caused the death of the deceased. In some cases, a person's acts may provide the most convincing evidence of his or her intention at the time. Where a specific result is the obvious and inevitable consequence of a person's act, and where the person deliberately does that act, you may readily conclude that he or she did that act with the intention of achieving that particular result.

In this case …

[*Outline the Crown's argument concerning the evidence of the accused's intention and any counter arguments by the defence.*]

So the first two states of mind which are necessary for the crime of murder are either, that [*the accused*] had an intention to kill [*the deceased*], or an intention to inflict really serious bodily injury upon [*him/her*].

Reckless indifference

The third state of mind, which the Crown relies upon to prove murder, is known in legal terms as reckless indifference to human life. If, at the time [*the accused*] committed the act that caused the death of [*the deceased*], [*he/she*] foresaw or realised that this act would probably cause the death of [*the deceased*] but [*the accused*] continued to commit that act regardless of that consequence, then [*the accused*] would be guilty of murder.

What is at the nub of this mental state is that [*the accused*] must foresee that death was a probable consequence, or the likely result, of what [*he/she*] was doing. If [*the accused*] did come to that realisation, but decided to go on and commit the act regardless of the likelihood of death resulting, and if death does in fact result, then [*the accused*] is guilty of murder. The conduct of a person who does an act that the person knows or foresees is likely to cause death is regarded, for the purposes of the criminal law, to be just as blameworthy as a person who commits an act with a specific intention to cause death.

For this basis of murder, [*the accused's*] actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt. It is not enough that [*he/she*] believed only that really serious bodily harm might result from [his/her] conduct or that [*the accused*] merely thought that there was the possibility of death. Nothing less than a full realisation on the part of [*the accused*] that death was a probable consequence or the likely result of [*his/her*] conduct is sufficient to establish murder in this way.

Again, you are concerned with the state of mind that [*the accused*] had at the time [*he/she*] committed the act causing death. What you are concerned about when considering the mental element of the offence of murder is the actual state of mind of [*the accused*], that is, what [*he/she*] contemplated or intended when [*the act causing death*] was committed.

[5-6320] Constructive (felony) murder

Section 18(1)(a) provides that murder is committed where the act causing death was done in an attempt to commit, or during or immediately after the commission, of a crime punishable by imprisonment for 25 years. For a historical discussion of constructive murder, see *IL v The Queen* (2017) 260 A Crim R 101.

Whether the act causing death was done "during or immediately after" the crime is a question of fact for the jury and it is important that the judge instruct jurors to turn their mind to the issue where it is in dispute: *Hudd v R* [2013] NSWCCA 57 at [101]. The judge should instruct the jury in terms of the language used in s 18(1)(a) rather than some other verbal formula: *R v Attard* (unrep, 20/4/93, NSWCCA) per Gleeson CJ at pp 6–7. It is essential that the judge direct the jury as to the basis of the accused's liability for the foundational offence: *Batcheldor v R* (2014) 249 A Crim R 461 at [80]–[82].

The act causing death should be identified by the Crown and the judge should direct the jury accordingly. The Crown must also prove that it was a voluntary or willed act of the accused or his or her accomplice: *Penza v R* [2013] NSWCCA 21 at [167]. This may, in an appropriate case, require the jury to determine whether there was a voluntary act of the accused, for example where the accused asserts that the discharge of the weapon was an accident, see **Voluntary act of the accused** at **[4-350]**ff. In this regard there is a distinction between a voluntary act and an intentional one.

[5-6330] Suggested direction — constructive murder

Note: The direction below does not cover the scenario where the Crown relies upon the application of joint criminal enterprise to constructive murder. See **[2-770]** for a suggested direction and the decision of *R v Sharah* (1992) 30 NSWLR 292 at 297–298 referred to in *IL v The Queen* (2017) 260 A Crim R 101.

There is another alternative way in which the Crown says that [*the accused*] is guilty of murder. In relation to this alternative, the Crown does not have to establish any specific intention to injure. It is quite different from the earlier ways in which the Crown has sought to argue that the accused is guilty of murder.

The crime of murder can be committed where the act of the accused which caused the death of the deceased was done in an attempt to commit, or during or immediately after the commission by the accused, or an accomplice, of a really serious offence. A really serious offence is a crime punishable by imprisonment of life or 25 years.

[**If attempt is in issue add**

The crime of murder can also be committed where the act of the accused which caused the death of the deceased was done in an attempt to commit, or during or immediately after an attempt by the accused, or an accomplice to commit, a really serious offence as I just described to you.]

In this case the Crown alleges that the really serious offence that was committed was one of [*short description of crime*]. I direct you, as a matter of law, that this is a crime that is punishable by imprisonment of [*life or 25 years*].

[**If there is a dispute as to whether the act occurred during, or immediately after the commission of the crime, add:**

The act causing death must be done during or immediately after the commission of the really serious offence. It is a question of fact for you to decide on the evidence whether it occurred during or immediately after the commission of the crime. In this case it is important that you consider this issue because it is in dispute.

Refer to the evidence relied upon by the Crown and defence on the issue.]

The Crown must establish beyond reasonable doubt that the accused, or an accomplice with the accused, did commit [if applicable: *attempted to commit*] the really serious offence. In this case, the Crown must prove beyond reasonable doubt all the ingredients of [*short description of crime*]:

[*Set out the ingredients of the crime or attempted crime relied upon by the Crown and whether the Crown alleges the accused or his or her accomplice committed the crime or attempted to commit the crime*]

So it is the Crown case that the act which caused the death of [*the deceased*] occurred during or immediately after the commission of a really serious offence [*or in an attempt to commit that particular crime*].

[5-6340] Alternative verdict of manslaughter

Manslaughter must be left to the jury as an alternative charge to murder where it is open on the evidence or, in other words, where such a verdict is viable: *Nguyen v The Queen* [2013] HCA 32 at [23]; *James v The Queen* (2014) 253 CLR 475 at [19]–[23]; *Martinez v R* [2019] NSWCCA 153 at [78]; *Lane v R* [2013] NSWCCA 317 at [39], [100]–[102]. The jury should be instructed about the availability of a verdict of manslaughter regardless of the attitude taken by the parties, and even where one or both of the parties object: *Lane v R* at [39]; *R v Kanaan* (2005) 64 NSWLR 257 at [75]; *Penza v R* [2013] NSWCCA 21 at [168]–[176]. The duty extends to leaving the possibility of returning a verdict of manslaughter on a different basis to that proposed by counsel at trial: *Martinez v R* [2019] NSWCCA 153 at [73], [78].

Section 25A(7) *Crimes Act* 1900 provides that in a trial for murder the jury may return an alternative verdict for an offence of assault causing death while intoxicated under s 25A(2) or assault causing death under s 25A(1). Sections 52AA(4) and 52BA(4) *Crimes Act* permit the jury to return an alternative verdict for the offences under ss 52A and 52B where the accused is indicted for murder or manslaughter.

[The next page is 1051]

Negligence and unlawfulness

***Crimes Act* 1900 (NSW), s 54**

[5-6400] Introduction

The common law presumption of *mens rea*, in one or other of its forms, is subject to an exception in relation to manslaughter by criminal negligence (charged separately in an indictment and as an alternative verdict available to a jury on a charge of murder).

The presumption applies to statutory offences subject to a legislative intent appearing to the contrary: *He Kaw Teh v The Queen* (1985) 157 CLR 523.

Statutory exceptions exist, for example, in the offence of negligent driving under s 117 of the *Road Transport Act* 2013 and in the indictable offences created by s 54 of the *Crimes Act* 1900.

On a charge of causing grievous bodily harm by a negligent act or omission under s 54 of the *Crimes Act* 1900, it has been held that there are degrees of negligence applicable to various kinds of statutory offences based on negligence, including also the common law offence of manslaughter by criminal negligence. Thus the degree of negligence required to establish an offence under s 42 of the *Road Transport (Safety and Traffic Management) Act* 1999 is less than that which it is necessary to establish an offence under s 54 of the *Crimes Act* 1900. The degree of negligence required to establish an offence under s 54 (based on negligence), however, requires proof of the same high standard of negligence appropriate to the crime of manslaughter based on negligence at common law: *R v D* (1984) 3 NSWLR 29.

In *R v Pullman* (1991) 25 NSWLR 89, adopting what was said in the speech of Lord Atkin in *Andrews v DPP* (1937) AC 576, it was held that to prove manslaughter by negligence at common law, the Crown must establish such a high degree of disregard for the life and safety of others as to be regarded as a crime against the community generally, and as conduct deserving punishment. It follows, of course, that this applies also to causing grievous bodily harm by a negligent act under s 54 of the *Crimes Act* 1900.

In delivering his speech in *Andrew's* case, Lord Atkin dealt with the appropriate epithet which might be applied to the degree of negligence necessary to establish manslaughter at common law. His Lordship said, "… probably of all the epithets that can be applied, … 'reckless' most nearly covers the case". In referring to the relevant portion of His Lordship's speech, the court in *Pullman* did not refer to this part of the judgment. It is suggested that this was deliberate, since the introduction of the word "reckless" creates difficulties when regard is had to the subjective requirement which "reckless indifference" imports as part of the definition of murder in s 18 of the *Crimes Act* 1900.

Section 54 of the *Crimes Act* 1900 is not limited in its operation to negligent acts or omissions. It also includes unlawful acts or omissions. In *R v Pullman* (1991) 25 NSWLR 89, notwithstanding the omission from s 54 of any requirement that the relevant unlawful act must also be dangerous, it was held by way of analogy to manslaughter by unlawful and dangerous act (applying the court's decision in *R v D*

(1984) 3 NSWLR 29) that an "unlawful act" for the purpose of s 54 must also be a "dangerous act". One should query, however, whether the unlawful act should also be a dangerous one.

It was also held in *Pullman* that an act which constitutes a mere breach of some statutory or regulatory prohibition does not, *per se*, constitute an unlawful act sufficient to found a charge of manslaughter by unlawful and dangerous act. To be "unlawful", the act must be criminal as opposed to being merely tortious: applying *Pemble v The Queen* (1971) 124 CLR 107 at 122. This also applies to a charge under s 54 based on an unlawful act.

The authorities establish that on a charge under either head of s 54, the jury should be instructed in similar terms as they would be to a charge of manslaughter by unlawful and dangerous act or criminal negligence as the case may be. Judges should, however, note that this is the cautious view and the judgment in *Pullman* should be given consideration.

Where the charge is one of causing grievous bodily harm by an unlawful act, the jury should be directed that the act of the accused must have been deliberate (in the sense of voluntary) and not accidental, and that a reasonable person in the accused's position (performing that act) would have realised they were exposing another or others to an appreciable risk of really serious injury: *Wilson v The Queen* (1970) 174 CLR 313.

In the case of a negligent act or omission, the jury will need to be directed that the accused was under a duty of care recognised by the law, such that by his or her deliberate act or omission, constituting a breach of that duty of care, he or she fell so far short of the standard of care which a reasonable person would have exercised in the circumstances, and which involved such a high risk of grievous bodily harm to another or others, that the act or omission of the accused merited criminal punishment: see **[5-6230]–[5-6250]** which provides a summary of the situations in which the duty of care may arise.

Where there is an issue of causation, the jury will need to be directed that the accused's act or omission contributed significantly to the grievous bodily harm suffered by the victim, but that it need not be the sole or immediate cause of that harm: *Royall v The Queen* (1991) 172 CLR 378 at 398. The principle that the accused must take the victim as he or she finds them applies so that the existence of a constitutional defect in the victim unknown to the accused, making the victim more susceptible to grievous bodily harm, does not raise an issue of accident: *R v Moffat* (2000) 112 A Crim R 201.

Where in issue, the jury should be directed that causation is to be determined by the application of common sense to the facts as the jury finds them — "appreciating that the purpose of the enquiry is to decide whether to attribute legal responsibility in a criminal matter". In *R v Toma* [1999] NSWCCA 350, this was described as "a standard direction on causation".

In the context of a charge of murder, a difference of view has been expressed as to whether the accused's act (causative of the death) must have been reasonably foreseeable as to that consequence. In *R v Toma* [1999] NSWCCA 350, which was also a murder case, the proposition that the jury should have been instructed in these terms was rejected. It was left open, however, as to whether there may be some cases in which such a direction may be required on the issue of causation.

It is suggested that in an offence such as that created by s 54 of the *Crimes Act* 1900, which requires no element of *mens rea* as to the consequences of the accused's act or omission (whether unlawful or negligent), foresight or foreseeability is not required where an issue of causation arises. However it has been held in relation to the statutory equivalent in England of s 59 of the *Crimes Act* 1900 (assault occasioning actual bodily harm), which is analogous to s 54, in a case like *Royall v The Queen* (1991) 172 CLR 378 in which the conduct of the accused caused the victim to take the final step, that is, jumping from a moving car, which led to the actual bodily harm, that reasonable foresight of the victim's act as a consequence of what the accused had done was a matter for consideration by the jury: *R v Roberts* (1971) 56 Cr App R 95, cited by the High Court in *Royall v The Queen*. It may be, therefore, that where a *novus actus* is in issue, foreseeability is required.

[5-6410] Suggested direction — accused charged with causing grievous bodily harm by negligent act

[*The accused*] is charged that by [*his/her*] negligent act [*he/she*] caused grievous bodily harm to [*the victim*]. In order to establish this offence, the Crown must first prove beyond reasonable doubt the act of [*the accused*], that is … [*identify the act alleged*].

[Where there is an issue of accident or the voluntariness of the alleged act, add

The Crown must not only establish that [*the accused*] did the act, but it must also prove beyond reasonable doubt that it was the deliberate act of [*the accused*].

[*The accused*] is not to be held liable for any act which was accidental (or not [*his/hers*] in the sense that it was not [*his/her*] conscious act) … [*canvass the evidence for the Crown and the accused and the opposing submissions on this issue*].**]**

The Crown must next prove beyond reasonable doubt that by [*his/her*] act [*the accused*] caused grievous bodily harm to [*the victim*]. Grievous bodily harm means really serious bodily injury.

[If the matter is in issue, add

On this, the Crown relies upon the following evidence … [*summarise the evidence for the Crown*]. [*The accused*], on the other hand, relies on the following … [*summarise evidence for the accused and put any opposing submissions as to the issue*].**]**

[Where causation is in issue, add

The Crown must next satisfy you, beyond reasonable doubt, that it was that deliberate (voluntary) act of [*the accused*] which caused the alleged grievous bodily harm to [*the victim*]. In determining whether it has established this, you will apply your common sense to the facts as you find them, appreciating that the purpose of the inquiry is to decide whether to attribute legal responsibility in a criminal matter. Provided you are satisfied that the act of [*the accused*] contributed significantly to the grievous bodily harm allegedly suffered by [*the victim*], it need not be the sole or direct cause of that grievous bodily harm.**]**

[Where it is asserted that the victim had a constitutional defect unknown to the accused, add

[*The accused*] relies on evidence that [*the victim*] at the time of the alleged act of [*the accused*] suffered from a constitutional defect or condition of which [*the accused*] was then unaware … [*identify the evidence relied upon by the accused and any evidence on this issue relied upon by the Crown*].

Even if, however, you are satisfied that [*the accused*] did not know of the physical condition of [*the victim*], it would nevertheless be open to you to find that the Crown has established that the act of [*the accused*] did cause the grievous bodily harm allegedly done to [*the victim*] because the law is that if a person does an act such as is alleged here, then [*he/she*] must take the victim as [*he/she*] finds [*him/her*], that is to say, with any physical conditions or weaknesses which that victim may have.**]**

The Crown must also satisfy you beyond reasonable doubt that the act of [*the accused*] was a negligent act. In order to establish this part of its case, the Crown must prove two things beyond reasonable doubt.

Firstly, it must prove that at the time of doing the act [*the accused*] was under a duty recognised by law, not a simply a moral or duty, but a legal duty, to refrain from doing the act which the Crown alleges [*he/she*] did. Secondly, the Crown must show that in so acting [*the accused*] was in breach of that duty which, as a matter of law, [*he/she*] owed to [*the victim*].

Here the Crown alleges that [*the accused*] was under a duty to [*the victim*] not to act as [*he/she*] did because … [*state the nature of the duty relied upon by the Crown, that is, under a statute; by virtue of a relationship between the accused and the victim; where the accused had assumed a contractual duty of care towards the victim; or where the accused had voluntarily assumed care of a victim unable to help him or herself*].

In asserting that there was such a duty in the circumstances of this case, the Crown relies upon the following evidence … [*outline the evidence relied upon by the Crown and, where the matter is in issue, any evidence relied upon by the accused, and the opposing submissions*]. I direct you that if you accept the evidence of the Crown beyond reasonable doubt, then the Crown will have established that there was such a duty as it alleges here.

The Crown must also establish beyond reasonable doubt that the act of [*the accused*] in breach of [*his/her*] duty of care was such that it fell short of the standard of care which a reasonable person would have exercised in the circumstances, and involved such a high risk of grievous bodily harm to another as to merit criminal punishment. A person acts in breach of a duty of care which [*he/she*] has towards another person if [*he/she*] does something which a reasonable person in [*his/her*] position would not do in the circumstances.

The reasonable person with whose conduct you must compare the act of [*the accused*] in this case must be assumed to possess the same personal attributes as [*the accused*], being of the same age and the same level of experience, and having the same knowledge as [*the accused*] would have had of the circumstances in which [*he/she*] found [*himself/herself*]. That reasonable person should also be regarded as a person of ordinary fortitude and strength of mind, that is to say, not unduly timid nor indeed unduly robust in that regard.

You would be justified in finding that [*the accused*] merited criminal punishment only if you are satisfied beyond reasonable doubt that, in acting as [*he/she*] is alleged to have done, the conduct of [*the accused*] fell so far short of the standard of care which such a reasonable person would have exercised in the circumstances, that it involved a high risk that grievous bodily harm would follow if the act alleged were done.

The Crown does not have to establish that [*the accused*] had any intention to injure anyone.

Provided you are satisfied that [*his/her*] act was deliberate and in breach of a duty to [*the victim*], and you are also satisfied that a reasonable person in [*his/her*] position would have foreseen that risk of injury, it matters not whether [*the accused*] [*himself/herself*] realized that [*he/she*] was exposing [*the victim*] to a risk of really serious bodily injury. The question is whether a reasonable person in the position of [*the accused*] would have realized that the risk existed.

[5-6420] Accused charged with causing grievous bodily harm by omission to act

There is no essential difference between the direction to be given here and the direction given above except, of course, that there is no requirement of an act. The jury should be directed in terms of a duty of care towards the victim, which includes the doing of the act alleged by the Crown not to have been done by the accused, and establishing that it was his or her legal duty to do so.

[5-6430] Suggested direction — accused caused grievous bodily harm to the victim by their unlawful act

[*The accused*] is charged that by [*his/her*] act, which was unlawful, [*he/she*] caused grievous bodily harm to [*the victim*].

… [*The jury should be directed as under [5-6410] in respect of the requirement of a non accidental, deliberate and conscious act of the accused where the question of accident or voluntariness arises as an issue. The jury should also be directed in terms of causation as under [5-6410] and as to the meaning of "grievous bodily harm"*].

The Crown must establish, beyond reasonable doubt, that the act of [*the accused*] was unlawful. It is not every unlawful act, however, which is sufficient for this purpose. What the Crown must show is that the act relied upon for the purposes of this case was not simply contrary to law but was also a dangerous act [*see: R v Pullman (1991) 25 NSWLR 89*].

As to the question of whether the act relied upon by the Crown was unlawful, the Crown relies upon … [*canvass the evidence relied upon by the Crown as proving unlawfulness and any evidence relied upon by the accused, and the opposing submissions*].

I direct you, as a matter of law, that if you accept the evidence of the Crown, then that act (in those circumstances) was an unlawful act.

On the other hand, if you are left in reasonable doubt on that matter, after having taken into consideration the evidence relied upon by both the Crown and [*the accused*], and the opposing submissions of counsel, the Crown will not have established its case and [*the accused*] is entitled to be acquitted.

As I have said, however, it is not sufficient that the Crown shows that the act alleged was unlawful in the sense of being against the law. The Crown must also satisfy you beyond reasonable doubt that the act was dangerous.

An act is dangerous in law if it is such that a reasonable person in the position of [*the accused*] would have realised that by doing such an act, [*the victim*] was being exposed to an appreciable, that is to say, significant risk of really serious injury.

The Crown does not have to establish that the act of [*the accused*] was done with any intention to injure. Nor does it have to establish that [*the accused*] [*himself/herself*] realised that [*he/she*] was exposing [*the victim*] to the risk of such injury.

The question is whether a reasonable person in the position of [*the accused*], being a person of the same age and experience as [*the accused*], and having the same degree of knowledge as [*the accused*] would have had of the circumstances, and also being a person of ordinary fortitude and strength of mind, would have realised that by doing that act [*he/she*] was exposing [*the victim*] to a risk of really serious bodily injury.

[5-6440] Accused caused grievous bodily harm to the victim by an unlawful omission

It is difficult to envisage such a case which would not also fall under **[5-6420]** and no suggested directions are given under this head.

[The next page is 1061]

Receiving Stolen Property

***Crimes Act* 1900 (NSW), ss 187–188**

[5-6500] Notes

1. The elements of the offences are —

   (i) that the property referred to in the indictment had been stolen, "the stealing whereof amounts to a serious indictable offence": *Crimes Act* 1900, s 188:

   "Stealing" for the purposes of both s 188 and s 189 (which deals with minor indictable offences) is inclusively defined: *Crimes Act* 1900, s 187. It includes, of course, larceny at common law, which is dealt with in s 117 of the *Crimes Act* 1900 and which extends beyond larceny to "any indictable offence by this Act made punishable like larceny". An example of this is contained in s 125 (dealing with larceny by a bailee) and, by operation of s 187, the offence of obtaining property by deception.

   "Serious indictable offence" is defined exclusively to mean an indictable offence punishable by imprisonment for life or for a term of five years or more: *Crimes Act* 1900, s 4. It would, therefore, include most (but not all) of the offences in Pt 4, Div 1 of the *Crimes Act* 1900.

   (ii) that the accused received, disposed of, or attempted to dispose of the property;

   (iii) that at the time the accused received, disposed of, or attempted to dispose of the property, he or she knew or believed it to be stolen: *R v Schipanski* (1989) 17 NSWLR 618.

2. The law relating to "recent possession" may be relied upon by the Crown in relation to an offence of receiving, as it does to larceny: see [5-6100].

3. "Receiving" entails possession. The term is defined in s 7 of the *Crimes Act* 1900 but in most cases it would be insufficient to simply direct the jury in terms of that definition. In the case of actual physical possession, the Crown must prove an intention to exercise custody and control exclusively, except as to others who may be acting in concert with the accused: *R v Collins* (unrep, NSWCCA, 10/12/92); *R v Delon* (1992) 29 NSWLR 29.

4. The guilty knowledge (or belief) must exist at the time of coming into possession of the stolen goods — possession acquired after the goods have been acquired is not sufficient, however it may, depending on the circumstances of the case, justify an inference of knowledge that they were stolen when the accused came into possession of them: *R v Wilson* (unrep, NSWCCA, 1/10/93).

The Crown must prove that, at the time of receipt of the goods, the accused knew or believed them to have been stolen. It is not required to establish actual knowledge — it being sufficient to establish a subjective belief by the accused that they were stolen. It is the accused's state of mind which must be emphasised to the jury and not the state of mind of a hypothetical reasonable person, although what a reasonable or ordinary person may have believed in the circumstances is a relevant consideration which may lead to an inference of actual belief in the mind of the accused: *R v Schipanski* (1989)

17 NSWLR 618; *R v McConnell* (1993) 69 A Crim R 39 which emphasise that where "wilful blindness" is introduced, the trial judge must clearly explain that it is but an evidentiary step in the process of reasoning towards the state of mind of the accused.

[5-6510] Suggested direction

Because of the wide variety of offences which may fall within the category of "serious indictable offence" within s 188 of the *Crimes Act* 1900, this direction is limited to property "stolen" in the sense of larceny at common law. Where some other "serious indictable offence" is relied upon by the Crown, the direction will need to be adapted accordingly.

There are three elements of this offence that the Crown must prove beyond reasonable doubt before you would be entitled to convict the accused. I will deal with each of them in turn.

First, the Crown must prove that the property referred to in the indictment had in fact been stolen before the accused received it.

Property is stolen if it is taken from the possession, custody or control of a person who has it in [*his/her*] possession, custody or control without the consent of that person and with the intention of permanently depriving [*him/her*] of it. The fact of theft can be proved by inferring it from the circumstances in which the accused came into possession of the property.

[Where appropriate

It must be taken without a claim of right made in good faith and it must be taken fraudulently, that is to say, it must be taken intentionally, deliberately, dishonestly and without mistake … [*see: Larceny* [5-6100]].**]**

It is not necessary on a charge of receiving for the Crown to prove who stole the property. Indeed, the identity of the thief may be unknown … [*it may be necessary to direct the jury as to a special verdict pursuant to s 121 of the Crimes Act 1900, as to which see* [5-6100]].

In this case, the Crown has led evidence that the … [*specify stolen property*] was [*owned by/in the possession/in the control of*] [*the possessor*] and that it was taken without [*his/her*] permission. If you are satisfied beyond reasonable doubt that this in fact occurred, and that whoever took it did so with the intention of permanently depriving [*the owner/possessor*] of it, then, as a matter of law, the property would have been stolen and you should so find. If you are not so satisfied, then you should acquit the accused … [*this assumes no issue of claim of right*].

Secondly, the Crown must prove that the accused received the property. This involves proof that [*he/she*] was in possession of it.

[Where possession is in issue, add

A person has possession of goods if [*he/she*] has those goods in [*his/her*] possession, custody or control. The accused must also intend to exercise custody or control over the goods to the exclusion of any other person [*who was not acting in concert with* the accused *in this alleged offence*]. Provided the accused has that intention, [*he/she*] need not have the goods under direct physical custody or control. It is sufficient that the

accused has the goods in some place to which [*he/she*] has [*either alone/jointly with some other person acting in concert with [him/her]*] access so as to exercise physical custody or control.**]**

In this case, the evidence relied upon by the Crown is … [*specify*]. The accused, on the other hand, relies on … [*specify*]. If you are satisfied beyond reasonable doubt that the accused did have the property in [*his/her*] custody or control, then it would be open to you to find that [*he/she*] had received it.

The Crown must also prove beyond reasonable doubt that, at the time the accused so received the … [*specify property*], [*he/she*] knew or believed that it was stolen.

It is the accused's actual state of mind at the time when [*he/she*] so received the property with which you are concerned, and it is the accused's knowledge or belief at the time of receipt of the goods which is significant, not [*his/her*] knowledge or belief at some subsequent time.

[Where appropriate, add

Although you may take into consideration subsequently acquired knowledge or belief as a circumstance in arriving at a conclusion as to whether the Crown has proved what the accused's knowledge or belief was at that time.**]**

[Where appropriate, add

It is not what any other person in the circumstances of the accused might have known or believed, however, knowledge or belief may be inferred or concluded from a consideration of the surrounding circumstances — provided any such inference or conclusion is a rational one (not based on speculation or conjecture) and provided also that it is the only rational inference or conclusion open on the evidence. You may consider, as one of the circumstances to be taken into account, what the accused might have known or believed.**]**

If you are left of the view that there were grounds for suspicion and the evidence goes no further than that, then that would be insufficient. Mere negligence or carelessness, or even recklessness in not realising that the goods were stolen, is not sufficient. The question is not, "Ought [*he/she*] to have realised that they were stolen?", it is, "Did [*he/she*] know or believe that they were stolen?".

[The next page is 1071]

Robbery

***Crimes Act* 1900 (NSW), ss 94–98**

[5-6600] Elements of the offence (s 94)

Robbery is a hybrid offence containing elements of larceny and assault —

1. There must be an unlawful taking and carrying away of property with the intention of permanently depriving the owner or person in lawful possession thereof. The property must be taken without the consent of the latter, and "consent" obtained by force or by threat (putting that person in fear of violence) is no consent. It may be necessary to direct the jury as to other elements of the offence of larceny depending on the circumstances of the particular case. For instance, a claim of right may be raised. As to larceny generally, see [5-6100].
2. The property must be taken —
   (i) from the person of another;
   (ii) in the presence of another;
   (iii) from the immediate personal care and protection of another.
3. The property must be taken by actual violence or by putting the owner or person in lawful possession in fear of actual violence. Section 94 also creates offences of "assault with intent to rob" and "steal from the person".

[5-6610] Suggested direction

The first matter which the Crown must prove beyond reasonable doubt is that there was a taking and carrying away by [*the accused*] of the property of another, and that [*the accused*] (at that time) had the intention to permanently deprive [*the owner/lawful possessor*] of it.

All that is required to establish a taking and carrying away is that the property must be moved by [*the accused*] … [*summarise evidence for the Crown and, if in issue, any evidence relied upon by the accused*].

As to the intention to permanently deprive the owner or person in lawful possession of the property … [*adapt the direction given as to Intention [3-200]*].

In general, an intention to permanently deprive may be inferred or concluded from the forceful taking of property … [*if there is an issue as to the matter, summarise evidence relied upon by the Crown and the accused*].

[Where there is an issue as to a claim of right, add

The taking of the property must be unlawful. Here [*the accused*] claims that [*he/she*] was legally justified in taking the property. A genuine claim, even if legally wrong, means that the taking is not unlawful. Since this issue has been raised for your determination in this trial, it is for the Crown to establish that [*the accused*] had no such genuine belief. [*The accused*] does not have to prove that [*he/she*] did have such a legal right.

The onus rests on the Crown to prove beyond reasonable doubt that [*he/she*] did not have that as a genuine belief … [*canvass the evidence for the Crown and the accused, and opposing submission*].**]**

The Crown must next prove that the property was taken from [*the owner/lawful possessor*] [*or from the presence of that person or from [his/her] immediate personal care and protection*] … [*summarise evidence relied upon by the Crown and by the accused if the matter is in issue*].

The Crown must prove that the property was taken without the consent of [*the owner/person in possession*] in that it was taken by [*force/by putting the person in fear*]. The law is that the taking of property with the intention of permanently depriving the person from whom the property is taken from possession of it by inducing that person to hand over the property under threat or fear, is not consent in law … [*if in issue, summarise evidence for the Crown and for the accused. If it is suggested that there was a surreptitious taking, for example, where the owner or person in lawful possession was asleep, so that there was no conscious mind affected by any threat of force, or if there was no threat of force, then this issue will also have to be canvassed, as will the question of any alternative verdict*].

[5-6620] Suggested direction — where the charge is "assault with intent to rob"

The first essential matter which the Crown must prove, if it is to establish its case, is that there was an assault. An assault may, but need not, involve an actual application of force by [*the accused*] to another person. It may equally be proved by a threat of the application of force … [*specify whether the Crown relies upon an assault or a battery*].

To establish an assault, the Crown must prove that the act of [*the accused*] … [*specify whether it be the actual application of force or the threatened application of force*] was deliberate and not accidental.

[Where the Crown relies on a threatened application of force, add

The Crown must prove that in so threatening [*the owner/person in lawful possession of the goods*], [*the accused*] intended to raise in the mind of that person an apprehension that actual force or violence (no matter how slight) would be effected.

As to [*the accused's*] intention … [*adapt the suggested directions at [3-210] to the particular circumstances of the case at hand*].

There need be no injury inflicted upon [*the owner/person in possession*] in the case of an assault constituted by a threat.**]**

[In the case of an assault constituted by an actual application of force, add

In the case of an assault constituted by an actual application of force, the force applied need only be of the slightest kind to constitute an assault, for example, a mere touching may sometimes be sufficient to constitute an assault.

The Crown must also prove that the act was done with the intent to deprive the owner or person in possession of property without [*his/her*] consent … [*as to which, see suggested directions under [5-6610]*].**]**

[5-6630] Where the charge is "steal from the person"

The suggested directions as to **Larceny [5-6100]** should be adapted to the particular case, but an essential element of the charge is that the stealing must be "from the person" of the owner or person in lawful possession. There must be complete removal, though partial removal may sustain an alternative verdict of guilty of larceny or attempted stealing from the person. Provided there is complete removal "from the person", it does not matter whether the removal is by force or by stealth.

[5-6640] Notes

1. For robbery, there must be violence or threat of violence which induces the victim to part with the property taken. It is not sufficient if there was violence or threat thereof made after the property was taken: *R v Foster* (1995) 78 A Crim R 517.
2. The element of larceny is not satisfied by proof of larceny in one of its "deemed" forms, as in s 154A: *R v Salameh* (1986) 26 A Crim R 353.
3. Although the actual or threatened application of force must precede the taking, the victim need not be shown to be physically present when the taking occurs: *Smith v Desmond* [1965] AC 960.
4. As to threats involving something less than an application of physical violence, see s 102 of the *Crimes Act* 1900 on accusing or threatening to accuse of a crime with intent to extort property. In light of the existence of this offence, it seems unlikely that the Crown would rely on a case of robbery in like circumstances. Nor is it considered that a threat to property would sustain a charge of robbery, although there is no Australian authority on this.
5. Recent possession may apply, see **[4-000]**.
6. **Alternative verdicts** — On any charge under s 94 of the *Crimes Act* 1900, an alternative verdict of "attempt" is available. On a charge of robbery or stealing from the person, an alternative verdict of an assault with intent to commit the offence is also available: *Criminal Procedure Act* 1986, s 162. On a charge of robbery or stealing from the person there may be a conviction for larceny under s 117 of the *Crimes Act* 1900. Where the charge is under s 95 of the *Crimes Act* 1900, alleging robbery etc in circumstances of aggravation, an alternative verdict under s 94 of the Act may be returned, as may a verdict under s 117. Where an alternative verdict is sought to be left to the jury for consideration, it should be opened by the Crown and, in any case, must be raised before closing addresses: *R v Pureau* (1990) 19 NSWLR 372.

[The next page is 1081]

Supply of prohibited drugs

[5-6700] Introduction

Supply

As to the supply of a prohibited drug: see s 25 *Drug Misuse and Trafficking Act* 1985 (DMTA). "Supply" is defined in s 3 DMTA.

See generally, *Criminal Practice and Procedure NSW* at [10-s 3] and [10-s 25] and accompanying annotations; *Criminal Law NSW* at [DMTA.25A.40]ff.

Knowingly take part in supply

Section 6 DMTA defines the concept "knowingly take part in" conduct which amounts to an offence under the Act including the supply of a prohibited drug: see *Criminal Practice and Procedure NSW* at [10-s 6] and especially [10-s 6.15]; *Criminal Law NSW* at [DMTA.6.20].

Deeming provision

Section 29 DMTA contains a provision that deems possession of a drug to be for the purpose of supply where the amount of the drug is not less than the "traffickable quantity" specified for the particular drug the subject of the charge. Under the section, once possession of not less than a traffickable amount of a drug is proved beyond reasonable doubt, the accused has the onus of proving on the balance of probabilities that he or she had the drug otherwise than for supply.

See generally, *Criminal Practice and Procedure NSW* at [10-s 29] and annotations; *Criminal Law NSW* at [DMTA.29.20].

"Carey defence"

"Supply" does not include temporary possession of a prohibited drug with the intention of returning it to the owner of the drug: see *R v Carey* (1990) 20 NSWLR 292. *Alliston v R* [2011] NSWCCA 281 discusses when the issue should be left to the jury. *Alliston* holds that *Carey* can apply to part of the drug in the possession of the accused, so that the "defence" may result in the accused being found not guilty of supplying a large commercial quantity or a commercial quantity but guilty of a lesser offence such as supply simpliciter. *Alliston* does not suggest that the deeming provision does not apply to all of the drug in a case of supply under s 25(1).

Amount of the drug

Alliston is also an example of a factual situation where it is necessary to emphasise to the jury that the Crown must prove beyond reasonable doubt, not only that the accused was in possession of a prohibited drug, but also the amount of that drug. That case concerned the quantity of the drug stated in the charge but it applies also to charges of supply based upon s 29. Unless the Crown proves beyond reasonable doubt that the accused was in possession of at least a traffickable quantity, the deeming provision under s 29 DMTA does not apply. This issue may arise where the drug is in more than one place or package as was the case in *Alliston*.

There are only three amounts that are relevant to a trial on indictment. The "large commercial quantity" and "commercial quantity" are relevant to the nature of the supply and are to be proved by the Crown as part of the charge. The "traffickable quantity" is an evidentiary provision that operates to place an onus on the accused.

The "small quantity" and "indictable quantity" are relevant only to jurisdiction of the Local Court.

The Crown can base its case of supply within the terms of any of the various forms of supply listed in s 3 including actual supply or possession for supply under s 29 or both.

Supply to minors

Section 25 DMTA contains a number of subsections involving offences of supplying by an adult (a person over the age of 18 years) to a minor (a person under the age of 16 years). In such cases, particular note should be taken of the alternative charge provisions which are differently worded: cf ss 25(2B) and (2E).

Ongoing supply

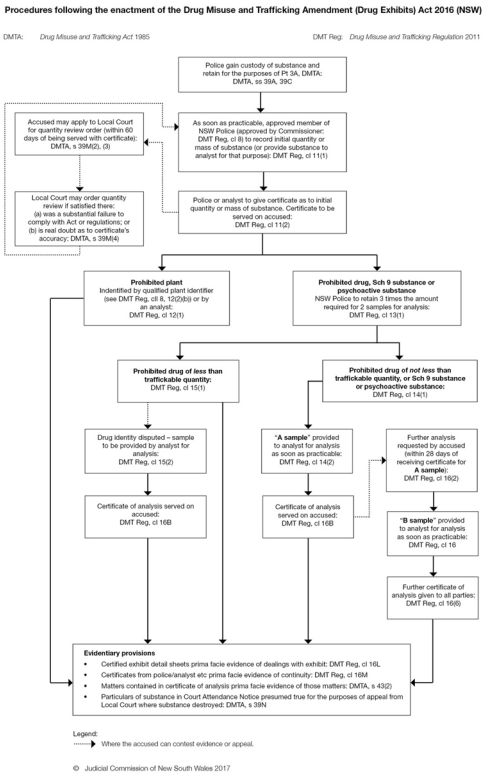
Section 25A DMTA creates an offence of supplying drugs on an ongoing basis. The offence does not apply to cannabis. The jury must be satisfied of the same three occasions of supply relied upon as the basis for the offence and given directions to this effect: see s 25A(3) and *R v Seymour* [2001] NSWCCA 272 at [11]–[12]. The word "supplies" in s 25A must be read in accordance with the extended definition of supply in s 3(1) of the Act: *Nguyen v R* [2018] NSWCCA 176 at [33]–[34], [37]; *Younan v R* [2018] NSWCCA 180 at [21], [23]–[24].

See generally, *Criminal Practice and Procedure NSW* at [10-s 25A.1]; *Criminal Law NSW* at [DMTA.25A.120].

Drug exhibits

Police procedures for drug exhibits are in Pt 3A of the *Drug Misuse and Trafficking Act* 1985 and Pt 3 of the *Drug Misuse and Trafficking Regulation* 2021.

The flow diagram explains the procedures, including any time limits. In short, these provisions provide that the quantity or mass of a substance must be recorded by an approved member of the NSW Police Force (or provided to an analyst for that purpose), as soon as practicable after coming into the custody of the NSW Police Force, and before any samples are taken for analysis. A certificate is then issued to the accused. Provision is also made for the retention and transportation of substances, evidentiary presumptions for chain of custody of drug exhibits and a Local Court review of the initial quantity or mass of a substance recorded on a certificate.



[5-6710] Suggested direction — actual supply

Note: Because of the wide variety of possible bases of liability under the definition of supply in s 3 DMTA, the suggested direction is restricted to the ordinary meaning of the term, that is, "to give or provide".

[*The accused*] is charged with supplying a prohibited drug namely [*specify drug*].

There are three elements of the offence the Crown must prove beyond reasonable doubt. They are:

1. that [*the accused*] supplied a substance
2. the substance was a prohibited drug, and
3. [*the accused*] knew that what was supplied was a prohibited drug.

I will deal with each of these elements in turn.

1. **Supply**

   The first element the Crown must prove is that [*the accused*] supplied a substance to another person. For the purposes of this case, it will have done so if it establishes beyond reasonable doubt that [*he/she*] intentionally gave or provided the substance to somebody, whether by way of sale or otherwise. [*Specify the allegation made by the Crown in the particular case.*]

2. **Prohibited drug**

   The second element the Crown must prove is that the substance supplied was a prohibited drug. Here the Crown alleges that the substance supplied was [*specify*

drug]. I direct you, as a matter of law, that if you accept the evidence relied on by the Crown that the substance is or includes [*specify drug*], then that substance is in law a prohibited drug. There is an Act of Parliament that contains a list of substances that are declared to be prohibited drugs for the purpose of this offence. [*Specify drug*] is one of the drugs listed in that Act.

It is not necessary that the Crown prove that the whole of the substance supplied consisted of that prohibited drug. The law is that anything that contains a prohibited drug in any proportion is to be treated as a prohibited drug. In other words, the purity of the prohibited drug is irrelevant.

[*If in issue, canvass the evidence relating to these matters.*]

[*Where the substance is not a prohibited drug: see s 40 DMTA and substitute the suggested direction at [5-6720] below.*]

3. **Knowledge**

The third element the Crown must prove is that [*the accused*] knew or believed at the time [*he/she*] supplied the substance to the other person that it was a prohibited drug. The Crown does not have to prove [*he/she*] knew the drug was the particular one specified in the charge, but it does have to prove [*he/she*] knew or believed that the substance was a prohibited drug. The Crown may do so by showing [*the accused*] actually knew or believed that what was being supplied was a prohibited drug, or was aware that there was a significant or real chance that it was.

[*Where appropriate, add*

It is [*the accused's*] actual knowledge or belief which must be proved by the Crown, and not simply what some person in [*the accused's*] position may have known or believed. However, you may infer or conclude what a person knew or believed from considering all the surrounding circumstances, provided any such inference or conclusion is a rational one and is not based on mere speculation or suspicion. Because of the requirement that the Crown proves this element of the offence beyond reasonable doubt, any inference or conclusion you draw about [*the accused's*] knowledge or belief must be the only rational inference or conclusion open on the evidence. In this context, you may consider as one of the circumstances to be taken into account what a reasonable person in the position of [*the accused*] would have known or believed as to the nature of the substance being supplied. However, I must stress that what you are concerned with is whether you are satisfied beyond reasonable doubt that [*the accused*] [*himself/herself*] had this knowledge or belief at the time of the supply.**]**

[*Canvass evidence on the issue of knowledge etc and opposing submissions.*]

[*Substitute references to "growing plant" and "prohibited plant" for "substance" and "prohibited drug" if necessary.*]

[5-6720] Suggested direction — where substance supplied is not a prohibited drug

Section 40 DMTA provides that, where the substance being supplied is not a prohibited drug but for the purposes of supply is represented as being a prohibited drug, the substance is deemed to be a prohibited drug for the purposes of the DMTA.

In such a case, the suggested directions set out in [5-6710] can be used except that in relation to the element of "prohibited drug" the following be substituted:

2. **Prohibited drug**

The second element the Crown must prove beyond reasonable doubt is that the substance supplied was a prohibited drug. In this case, the evidence is that the substance was not in fact a prohibited drug. There is an Act of Parliament that contains a list of substances that are declared to be prohibited drugs for the purpose of this offence. The substance alleged to have been supplied by [*the accused*] is not contained in that list. However, the Crown relies upon a provision in the law that states that where a substance, which is not a prohibited drug, is, for the purpose of its being supplied, represented (whether verbally, in writing or by conduct) as being a prohibited drug, then it is to be regarded as being, a prohibited drug.

[*Briefly refer to evidence and submissions on this aspect.*]

[5-6730] Suggested direction — actual supply of commercial quantity

Section 25(2) DMTA provides for an offence of supplying not less than a commercial quantity of a prohibited drug. However, there is an increased penalty where the amount supplied is not less than a large commercial quantity. Although it is not a separate offence, if the Crown wishes to rely upon the penalty for a large commercial quantity this should be averred in the indictment. As to the quantities specified for particular drugs: see Sch 1 DMTA.

Where the charge alleges the supply was of a large commercial or commercial quantity, the suggested directions set out in **[5-6710]** are applicable but there should be directions added as to the element in respect of the quantity, whether it be the large commercial or the commercial quantity, as follows:

4. **[Large] commercial quantity**

In this case, the Crown alleges that what was supplied was the [*large*] commercial quantity of the prohibited drug, so a fourth element the Crown must prove beyond reasonable doubt is that the amount of the drug supplied was not less than the quantity prescribed by the law for this particular drug as being the [*large*] commercial quantity. I direct you that for the drug [*specified drug*], the [*large*] commercial quantity prescribed by the law is [*set out the prescribed quantity*]. The Crown case is that what was supplied was [*set out quantity alleged by Crown*].

5. **Knowledge of [large] commercial quantity**

The fifth and final element the Crown must prove is that [*the accused*] knew or believed at the time [*he/she*] supplied the drug that it was an amount which was not less than the [*large*] commercial quantity. The Crown does not have to prove [*the accused*] knew that the amount of the drug was [*quantity alleged by Crown*] but it does have to prove that [*the accused*] actually knew, or believed, that the drug being supplied was in an amount which was not less than [*prescribed [large] commercial quantity*], or that [*the accused*] was aware that there was a significant or real chance that it was.

[*Where appropriate, add*

As I said a moment ago about the Crown proving [*the accused's*] knowledge that the substance supplied was a prohibited drug, it is [*the accused's*] actual knowledge or belief which must be proved, not what some person in [*the accused's*] position may have known or believed. However, knowledge or belief may be inferred or concluded from consideration of the surrounding circumstances, provided any such inference or conclusion is a rational one and is not based on speculation or suspicion.

Because of the requirement that the Crown proves this beyond reasonable doubt, any inference or conclusion that you draw about [*the accused's*] knowledge or belief must be the only rational inference or conclusion open on the evidence. In this context, you may consider as one of the circumstances to be taken into account what a reasonable person in the position of [*the accused*] would have known or believed as to quantity of the substance being supplied.

However, as I have already said, what you are concerned with is whether you are satisfied beyond reasonable doubt that [*the accused*] [*himself/herself*] had this knowledge or belief, at the time [*he/she*] supplied the drug, that it was in an amount which was not less than the [*large*] commercial quantity.

[*Canvass evidence on the issue of knowledge, etc and opposing submissions*].**]**

If the Crown fails to prove these last two elements that are concerned with the quantity of the drug but proves beyond reasonable doubt the first three elements of the charge, then you are entitled to find that [*the accused*] is not guilty of the charge of supplying a [*large*] commercial quantity but find [*him/her*] guilty of the offence of simply supplying the prohibited drug. In that case, when the charge is read out to the foreperson for the purposes of taking your verdict, your foreperson will answer "not guilty of the charge of supplying a [*large*] commercial quantity but guilty of supply".

[***If appropriate*** *on a charge of supplying a large commercial quantity the jury can bring in a verdict of one of two alternatives: "not guilty of supplying a large commercial quantity but guilty of supplying a commercial quantity" or "not guilty of supplying a large commercial quantity but guilty of supply"*.]

[5-6740] Suggested direction — supply based upon s 29 DMTA — "deemed supply"

This suggested direction assumes that the Crown allegation is based upon possession for the purpose of supply and the application of s 29 DMTA.

In directing on "possession" there is no need for the suggested direction to refer to joint possession unless that is the allegation raised: *R v Wan* [2003] [2003] NSWCCA 225 at [14].

Where the only issue is whether the accused knew that he or she had a (large) commercial or commercial quantity of drug in his or her possession, there is no need

for the judge to instruct the jury in detail on the deeming provision except to explain the nature of the "supply" being alleged and such a direction should be separate from that relating to knowledge of the quantity charged: *R v Micalizzi* [2004] NSWCCA 406.

[*The accused*] is charged with supplying a prohibited drug namely [*specify drug*]. Although the charge is one of supplying a prohibited drug, the Crown does not have to prove that [*the accused*] actually supplied that drug. I will explain how the law operates to bring about that result shortly.

There are three elements of the charge the Crown must prove and they must each be proved beyond reasonable doubt. They are:

1. there was a substance which was a prohibited drug
2. [*the accused*] possessed that substance
3. [*the accused*] possessed that substance for the purposes of supply.

1. **Prohibited drug**

   The Crown must prove beyond reasonable doubt that the substance which it alleges that [*the accused*] supplied was a prohibited drug. Here the Crown alleges that the prohibited drug was [*specify drug*]. I direct you, as a matter of law, that if you accept the evidence relied on by the Crown that the substance which [*the accused*] is alleged to have supplied is or includes [*specify drug*], then that substance is in law a prohibited drug. There is an Act of Parliament that contains a list of substances that are declared to be prohibited drugs for the purpose of this offence. [*Specify drug*] is one of the drugs listed in that Act.

   It is not necessary that the Crown prove that the whole of the substance consisted of that prohibited drug. The law is that anything that contains a prohibited drug in any proportion is sufficient. In other words, purity of the prohibited drug is irrelevant.

   [*If in issue, canvass the evidence relating to these matters.*]

2. **Possession**

   Dealing next with the question of possession, the Crown must prove that [*the accused*] intentionally had the substance in [*his/her*] physical custody or control to the exclusion of any other person.

   [*Where the allegation is of joint possession, add*

   — except some other person acting jointly with [the accused] in possessing the substance.]

   [*Where the allegation is that the accused did not have physical possession of the substance*

   The Crown must prove that [*the accused*] intentionally had the substance in some place to which [*he/she*] had access and might go to obtain physical custody or control of it to the exclusion of any other person.]

   [*Where the allegation is of joint possession, add*

   — either alone or together with some other person acting jointly with [*him/her*] in possessing the substance.]

The Crown must also prove that in intentionally having such custody or control of the substance, [*the accused*] knew or believed at the time that the substance was a prohibited drug. The Crown does not have to prove that [*the accused*] knew that the drug was the particular one specified in the charge, but it does have to prove beyond reasonable doubt that [*the accused*] knew or believed that it was a prohibited drug. The Crown may do so by proving [*the accused*] actually knew or believed that what [*he/she*] had custody or control of was a prohibited drug, or was aware that there was a significant or real chance that it was.

[*Where appropriate, add*

It is [*the accused's*] actual knowledge or belief which must be proved, not what some person in [*the accused's*] position may have known or believed. However, knowledge or belief may be inferred or concluded from consideration of the surrounding circumstances, provided any such inference or conclusion is a rational one and is not based on speculation or suspicion. Because of the requirement that the Crown proves this beyond reasonable doubt, any inference or conclusion that you draw about [*the accused's*] knowledge or belief must be the only rational inference or conclusion open on the evidence. In this context, you may consider as one of the circumstances to be taken into account what a reasonable person in the position of [*the accused*] would have known or believed as to the nature of the substance that the person had in [his/her] custody or control. However, I must stress that what you are concerned with is whether you are satisfied that [*the accused*] [*himself/herself*] had this knowledge or belief that the substance was a prohibited drug.

[*Canvass evidence on the issue of knowledge, etc and opposing submissions.*]**]**

If the Crown has not proved beyond reasonable doubt that [*the accused*] was in possession of the substance alleged to be a prohibited drug, then the Crown case has failed and [*the accused*] must be found not guilty of the charge.

3. **For the purpose of supply**

The Crown must prove that [*the accused*] had the substance in [*his/her*] possession for the purpose of supply.

The charge is that [*the accused*] "supplied a prohibited drug" but that does not require proof that [*the accused*] actually supplied somebody with the drug. The ordinary meaning of the word "supply" is "to give or provide something to somebody". But in this case, there is no evidence of [*the accused*] having given or provided anything to anybody. The Crown does not make that allegation against [*the accused*] and does not have to do so in order to prove the charge.

The law gives an extended meaning to the word "supply" beyond the normal, everyday meaning of the word. I direct you as a matter of law that, for the purposes of determining the offence before you, the word "supply" includes having a substance which is a prohibited drug for the purpose of giving it or providing it to another person. In other words, "supply" means having a prohibited drug in a person's possession for the purpose of supply.

Here a particular rule of law comes into operation and must be applied by you. The law says that if an accused person has in [*his/her*] possession a specified quantity or more of a prohibited drug, then [*he/she*] is regarded as having possession of

that drug for the purpose of supply it; that is, to give it or provide it to some other person. In relation to the particular drug here alleged to be [*specify drug*], the law specifies such a quantity as [*state traffickable quantity*].

So, if you are satisfied the Crown has proved beyond reasonable doubt that the substance was a prohibited drug; that [*the accused*] was in possession of it (and I remind you that proof of possession includes proof that [*the accused*] knew or believed at the time that it was a prohibited drug) and that the amount of the drug was at least [*state traffickable quantity*], then the Crown has proved all of the elements of the offence of supply and [***if appropriate**, subject to an exception I am just about to mention*] you should return a verdict of guilty.

[*Where accused relies on possession other than for supply, add*

The exception is this. If you are satisfied that the Crown has proved beyond reasonable doubt each of these three elements, then it is a defence to this charge if [*the accused*] proves that [*he/she*] had the drug in [*his/her*] possession otherwise than for the purpose of supply.

[***or if appropriate**, obtained possession of the prohibited drug on and in accordance with the prescription of a medical practitioner or etc.*]

Supply here has its ordinary meaning, that is, to give or to provide the drug to somebody else, whether by way of sale or otherwise. So, what [*the accused*] needs to prove is that [*he/she*] had the drug in [*his/her*] possession for some purpose other than to give it, or provide it, to somebody else. [*The accused's*] case is that [*he/she*] had the drug [*specify defence case, for example, all the drug for [his/her] own use, or the Carey defence.*]

While the onus of proving this rests on [*the accused*], [*he/she*] does not have to prove it to the high standard of proof beyond reasonable doubt: that is the standard of proof placed only on the Crown. It is sufficient if [*the accused*] proves this matter on the balance of probabilities. The "balance of probabilities" means more likely than not, or more probable than not. I remind you that the elements of the charge the Crown must prove must be proved beyond reasonable doubt: that is in effect that [*the accused*] was in possession of at least [*the traffickable quantity*] of the prohibited drug. However, if you are satisfied that the Crown has proved those facts to that standard, you then come to consider whether [*the accused*] has proved that [he/she] had the drug in [*his/her*] possession otherwise than for the purpose of supplying it, and the standard to which [*the accused*] is required to prove this fact is on the balance of probabilities.

If, having considered the relevant evidence and submissions in relation to the matter, you are of the view that it is more probable than not, or more likely than not, that [*the accused*] had the drug in [*his/her*] possession for a purpose other than for supplying it, then you must return a verdict of "not guilty". If, on the other hand, you are not so satisfied, then you should find [*the accused*] guilty of the offence charged, provided always, of course, (as I have indicated) that you are satisfied, beyond reasonable doubt, as to the matters which the Crown must prove.

[*Review evidence and submissions.*]

To recap, the Crown is required to prove beyond reasonable doubt:

1. that the substance with which the case is concerned was a prohibited drug, and
2. that [*the accused*] was in possession of it, and
3. that [*the accused*] supplied it in the sense that [*he/she*] was in possession of it for the purpose of supplying it. If you are satisfied of the first 2 of those 3 matters, and that the amount of the drug was [*indicate traffickable quantity*] or more, then the law is that [*the accused's*] possession of the drug was for the purpose of supplying it.

I remind you that proof of [*the accused*] being in possession of the drug includes proof [*he/she*] knew or believed at the time of the possession that it was a prohibited drug.

If you are satisfied the Crown has proved these facts beyond reasonable doubt, then you should find [*the accused*] guilty unless [*the accused*] has proved on the balance of probabilities that [*his/her*] possession of the drug was for some purpose other than to supply it.

[5-6750] Suggested direction — supply of [large] commercial quantity based upon s 29 DMTA "deemed supply"

The suggested direction in **[5-6740]** is appropriate, but there should be a reference to two further elements the Crown must prove beyond reasonable doubt as follows:

4. **[Large] commercial quantity**

   In this case, in addition to the three elements to which I have already referred, the Crown must prove two additional matters beyond reasonable doubt. They are:

   In this case, the Crown alleges that what was supplied was the [large] commercial quantity of the prohibited drug, so a fourth element the Crown must prove beyond reasonable doubt is that the amount of the drug supplied was not less than the quantity prescribed by the law for this particular drug as being the [large] commercial quantity. I direct you that for the drug [*specify drug*] the [large] commercial quantity prescribed by the law is [*set out the prescribed quantity*]. The Crown case is that what was supplied was [*set out quantity alleged by Crown*].

5. **Knowledge of [large] commercial quantity**

   The fifth and final element the Crown must prove is that [*the accused*] knew or believed at the time [*he/she*] supplied the drug that it was in an amount which was not less than the [large] commercial quantity. The Crown does not have to prove that [*the accused*] knew that the amount of the drug was [*quantity alleged by Crown*] but it does have to prove [*the accused*] actually knew, or believed, that the drug being supplied was in an amount which was not less than [*prescribed* [*large*] *commercial quantity*], or that [*the accused*] was aware that there was a significant or real chance that it was.

[*Where appropriate, add*

As I said a moment ago about the Crown proving [*the accused's*] knowledge that the substance supplied was a prohibited drug, it is [*the accused's*] actual knowledge or belief which must be proved, not what some person in [*the accused's*] position may have known or believed. However, knowledge or belief may be inferred or concluded

from consideration of the surrounding circumstances, provided any such inference or conclusion is a rational one and is not based on speculation or suspicion. Because of the requirement that the Crown proves this beyond reasonable doubt, any inference or conclusion that you draw about [*the accused's*] knowledge or belief must be the only rational inference or conclusion open on the evidence. In this context, you may consider as one of the circumstances to be taken into account what a reasonable person in the position of [*the accused*] would have known or believed as to the quantity of the substance being supplied. However, as I have already said, what you are concerned with is whether you are satisfied beyond reasonable doubt that [*the accused*] [*himself/herself*] had this knowledge or belief, at the time [*he/she*] supplied the drug, that it was in an amount which was not less than the [large] commercial quantity.

[*Canvass evidence on the issue of knowledge etc, and opposing submissions*.]]

If the Crown fails to prove these last two elements concerned with the quantity of the drug over and above the traffickable quantity but proves beyond reasonable doubt the first three elements of the charge, then you are entitled to find [*the accused*] not guilty of the charge of supplying a [large] commercial quantity but guilty of the offence of simply supplying the prohibited drug. In that case, when the charge is read out to the foreperson for the purposes of taking your verdict your foreperson can answer "not guilty of the charge of supplying a (large) commercial quantity but guilty of supply".

[***If appropriate*** *on a charge of supplying a large commercial quantity, the jury can bring in a verdict of one of two alternatives: "not guilty of supplying a large commercial quantity but guilty of supplying a commercial quantity" or "not guilty of supplying a large commercial quantity but guilty of supply".*]

[5-6760] Suggested direction — ongoing supply

Note: The following suggested direction is based on a case where there is evidence in the Crown case to prove the accused directly received a "financial or material reward" as a consequence of the supplies constituting the offence. However, "supplies" in s 25A must be read in accordance with the extended definition of supply in s 3(1): *Nguyen v R* [2018] NSWCCA 176 at [33]–[34]. See further the notes below.

[*The accused*] is charged with an offence of supplying a prohibited drug on three or more separate occasions during a period of 30 consecutive days for financial or material reward. The Crown must prove beyond reasonable doubt each of the following three elements:

1. [*the accused*] supplied a prohibited drug on three or more separate occasions
2. the occasions all occurred within a period of 30 consecutive days, and
3. in respect of each of the occasions you are satisfied occurred [*the accused*] received a financial or material reward.

1. **The accused supplied a prohibited drug on three or more separate occasions**

   Let me start by telling you what the Crown is required to prove in order to establish an offence of supplying a prohibited drug.

   [*The suggested direction for "actual supply" at [5-6710] should be used and adapted where necessary.*]

So, that is what the Crown is required to prove in order to establish an individual offence of supplying a prohibited drug. The Crown must prove beyond reasonable doubt that [*the accused*] supplied a prohibited drug on three or more separate occasions.

The Crown relies on the following occasions [*briefly identify the separate occasions*].

[*Where the Crown alleges that the accused supplied different drugs*

It is not necessary to prove [*the accused*] supplied the same prohibited drug on each occasion. Provided you are satisfied [*he/she*] supplied a prohibited drug, it does not matter what type of prohibited drug it was.**]**

[*Where the Crown relies on more than three occasions*

The Crown is therefore relying upon more than three occasions. It is necessary for the Crown to prove beyond reasonable doubt that [*the accused*] supplied a prohibited drug on at least three occasions. Before you can return a verdict of guilty you must be satisfied that at least three of them have been proved and you must be unanimous about this. In other words, you must all be satisfied as to the same three occasions.**]**

2. **The occasions all occurred within a period of 30 consecutive days**

   The second matter is that you must be satisfied beyond reasonable doubt that each of the occasions occurred during a period of 30 consecutive days. The first occasion relied upon by the Crown is alleged to have occurred on [*date*] and the last occasion relied on by the Crown is alleged to have occurred on [*date*]. If you are satisfied of this, then you should have no difficulty in being satisfied that each of the occasions occurred during a period of 30 consecutive days.

   [*Alternatively, if there is an issue about the 30 days, refer to the evidence and submissions.*]

3. **The accused received a financial or material reward**

   The third matter the Crown must prove is that [*the accused*] supplied a prohibited drug on each occasion for financial or material reward. This means that in respect of each of the occasions you are satisfied occurred, you must be satisfied that [*the accused*] [*himself/herself*] received a financial or material reward. Here the Crown alleges that [*refer to evidence*].

   To summarise, before you can return a verdict of guilty on this charge you must be satisfied the Crown has proved beyond reasonable doubt that:

   1. [*the accused*] supplied [a/any] prohibited drug on three or more occasions

      [***where appropriate**, and you must each agree upon the same occasions in respect of at least three of them.*]

   2. the occasions all occurred within a period of 30 consecutive days, and
   3. in respect of each of the occasions you are satisfied occurred that [*the accused*] received a financial or material reward.

If you are not satisfied that the Crown has proved each of these matters beyond reasonable doubt then you must return a verdict of not guilty. However, if you decide

that this is the appropriate verdict in respect of this charge, but you are satisfied beyond reasonable doubt that [*the accused*] committed one or more individual acts of supplying a prohibited drug — whether or not within a period of 30 consecutive days and whether or not for financial or material reward — then while returning a verdict of not guilty of the charge you should also return a verdict, or verdicts, of guilty in respect of those individual supply prohibited drug offence(s). You should not take this as an invitation to compromise. Before you can return a verdict of either guilty or not guilty in respect of any offence you must all be satisfied beyond reasonable doubt that it is the correct verdict.

[*Explain further how the verdict is to be announced by the foreperson just prior to conclusion of summing up*.]

[5-6770] Notes

1. The Crown does not have to prove the accused actually received a financial or material reward as a result of the particular supplies: *Younan v R* [2018] NSWCCA 180 at [10]. It is sufficient if an inference is available from the evidence that the *purpose* of the relevant supplies was for financial or material reward: *Nguyen v R* [2018] NSWCCA 176 at [37]–[38]; *Younan v R* at [27]. In *Nguyen* the argument on appeal was that an offence against s 25A should be confined to acts of actual supply because the extended definition of supply in s 3(1) was constrained by the words "for financial or material reward" in s 25A(1). The court rejected that argument (see at [40]). The relevant reasoning is at [33]–[39]. The court concluded that provided a *purpose* of an accused in supplying the drugs (in the extended sense) is to obtain a financial or material reward, then an offence against s 25A was committed (so long as the other elements were proved). This construction was endorsed in the subsequent decision of *Younan* (see at [10] and [21]–[24]). RA Hulme J in *Younan* also said the interpretation of s 25A in *Nguyen* was supported by the Second Reading Speech: at [25]–[26].

[The next page is 1101]

Take/detain for advantage/ransom/serious indictable offence (kidnapping)

[5-6800] Introduction

The current forms of kidnapping offences are found in s 86 *Crimes Act* 1900 (renumbered from s 85A on 21 December 2001) and commenced operation on 14 December 2001. For offences prior to 14 December 2001 see s 90A *Crimes Act* (repealed).

Generally see *Davis v R* [2006] NSWCCA 392 for the history of the offence.

See also *Criminal Practice and Procedure NSW* at [8-s 86.1]ff; and *Criminal Law (NSW)* at [CA.86.20]ff.

The Crown must prove for an offence against s 86(1) or its aggravated or specially aggravated forms, that the "taking" or "detaining" was without consent. Section 86(5) creates a presumption that there is an absence of consent if the alleged victim is under the age of 16 subject to the exceptions listed in s 86(6). If the accused relies upon an honest and reasonable mistake of fact as to the age of the alleged victim he or she must meet an evidential burden to establish such a belief. If the evidential burden is satisfied, the onus shifts to the Crown to prove beyond reasonable doubt that the accused did not honestly, on reasonable grounds, hold the belief: *Ibrahim v R* [2014] NSWCCA 160 at [54].

The accused's knowledge of a lack of consent can be established by the Crown proving either that the accused actually knew the alleged victim did not consent or that the accused was reckless as to whether the alleged victim consented: *R v DMC* (2002) 137 A Crim R 246 at [41]–[42]; *Castle v R* (2016) 92 NSWLR 17 at [32], [66], [106]. Recklessness can be established in a manner similar to that explained in *Banditt v The Queen* (2005) 224 CLR 262 at [38] where the High Court referred to the expressions used in *R v Morgan* [1976] AC 182 and by Professor Smith (in JC Smith and BP Hogan, *Criminal Law*, LexisNexisUK, 2002 (10 ed)) when the High Court defined the concept of recklessness for the purpose of s 61R(1) (rep) *Crimes Act*: *Castle v R* at [48], [50].

The court in *Castle v R* defined recklessness for the purposes of s 86 as being limited to advertent recklessness. An accused is reckless either if he or she proceeds "willy-nilly", not caring whether the alleged victim consents or not, or, alternatively, where the accused is aware there is any possibility of a lack of consent but he or she proceeds regardless: *Castle v R* at [49]–[50]. Recklessness for the purposes of s 86 cannot be proved by establishing that the accused did not turn his or her mind to the question of consent in circumstances where the lack of consent would be obvious if the accused had considered it: *Castle v R* at [38]–[39], [47], [101]. The latter was described in *Castle v R* as inadvertent recklessness: *Castle v R* at [101], [106]–[109].

For simplicity, the suggested direction below is for an offence which involves the ingredients: "detaining" and "for advantage". It can be adapted for offences which involve "taking" and "holding to ransom", or "committing a serious indictable offence", or combinations of these ingredients (guidance is provided below). The ingredient "with the intention of committing a serious indictable offence" is only available for offences committed or alleged to have been committed on or after 24 September 2012: *Crimes Legislation Amendment Act* 2012.

[5-6810] Suggested direction — basic offence (s 86(1))

The accused is charged with the offence of detaining a person for advantage.

In order to prove that [*the accused*] is guilty of the offence, the Crown must prove beyond reasonable doubt each of the following essential facts (or ingredients):

1. that [*the accused*] detained [*the alleged victim*]
2. knowing that [*he/she*] was not consenting to that detention; and
3. [*the accused*] did so with the intention of obtaining an advantage by that detention.

1. The accused detained the alleged victim

The first matter for the Crown to prove is that [*the accused*] detained [*the alleged victim*]. To detain a person means to prevent that person from leaving should he or she wish to do so. It is an interference with the person's liberty. It is enough if [*the alleged victim*] was detained for only a very short time. [*Describe the evidence relied upon by the Crown to prove detention.*]

[*Where the allegation is "taking", add:*

Taking is a form of detention where the accused causes a person to accompany him or her so that the person is compelled to go where he or she did not want to go. It is not necessary for a taking that [*the alleged victim*] be moved from one place to another.

[*The trial judge should give consideration to whether on the evidence the jury need to be informed of the difference between taking and detaining and that taking is a form of detention (see Davis v R above).*]

[*Describe the evidence relied upon by the Crown to prove taking occurred.*]**]**

[*If appropriate, where there is an issue arising on the evidence as to whether the detention was a result of the conduct of the accused, add:*

[*The accused*] relies upon evidence that [*the alleged victim*] remained in [*the place of detainment*] for a reason other than any conduct on the part of [*the accused*].

[*Detail the evidence relied upon.*]

In such a case the Crown must prove beyond reasonable doubt that the conduct of the accused materially contributed to the detention of [*the alleged victim*]. It does not mean that [*the alleged victim*] remained only because of [*the accused's*] conduct. But the conduct alleged by the Crown must have been significant in the decision of [*the alleged victim*] to remain. That means that if there is a real possibility that [*the alleged victim*] remained in the [*place of detention*] for a reason that had no real or significant connection with the conduct of [*the accused*], the Crown will have failed to prove beyond reasonable doubt that [*the accused*] detained [*the alleged victim*] for the purpose of the offence and you must find the accused "*not guilty*".**]**

2. The accused knew the alleged victim did not consent to the detention

The next matter that the Crown must prove beyond reasonable doubt is that [*the accused*] knew that [*the alleged victim*] did not consent to being detained by [*the accused*]. Consent must be free and voluntary consent. Consent is not given if [*the alleged victim*] is detained by [*the accused*] as a result of force or threats.

[*If appropriate, add:*

Consent is not given if [*the alleged victim*] initially consents to being detained by [*the accused*] but later withdraws it, making that withdrawal known to [*the accused*] by [*his/her*] words or conduct.**]**

[*An absence of consent is presumed if the alleged victim is under 16 years of age. A direction as to honest and reasonable mistake by the accused as to the age of the alleged victim should be given if it is raised in the evidence*: see *Ibrahim v R* [2014] NSWCCA 160 at [54].]

[***If appropriate, add where the Crown relies upon recklessness and Castle v R [2016] 92 NSWLR 17 applies***:

The Crown can prove [*the accused*] knew [*the alleged victim*] did not consent to the detention by proving beyond reasonable doubt *either* that [*the accused*] actually knew [*the alleged victim*] did not consent to the detention *or* that [*he/she*] was reckless as to whether [*the alleged victim*] consented to the detention.

If [*the accused*] was reckless as to whether [*the alleged victim*] consented to the detention, then it is the law that [*the accused*] will be taken to know that [*the alleged victim*] did not consent to the detention.

The Crown will prove [*the accused*] was reckless by proving that [*the accused's*] state of mind was such that [*he/she*] realised the possibility that [*the alleged victim*] was not consenting but [*he/she*] detained [*the alleged victim*] regardless.

Alternatively, the Crown can prove [*the accused*] was reckless by proving that [*the accused*] could not care less whether [*the alleged victim*] consented to the detention or not but [*he/she*] detained [*the alleged victim*] regardless.

Let me repeat. If [*the accused*] was reckless then it is the law that [*the accused*] will be taken to know that [*the alleged victim*] did not consent to the detention.]

[*Describe the evidence relied upon by the Crown to prove that the alleged victim was not consenting and the accused knew of that fact.*]

3. The accused detained with the intention of obtaining an advantage

Finally, the Crown must prove that [*the accused*] detained [*the alleged victim*] with the intention of obtaining an advantage. It is not necessary that the advantage be actually achieved. It is sufficient if [*the accused*] had the intention of achieving an advantage by detaining [*the alleged victim*]. The advantage sought to be achieved need not be financial. Psychological or sexual gratification is enough to prove this ingredient of the offence. Here, the Crown allegation is that the advantage [*the accused*] intended to obtain by the detention was [*state the Crown allegation*]. The Crown must prove that the intention to obtain this advantage existed at some time during the period [*the alleged victim*] is detained. The intention need not exist for the whole of that period.

[*Describe the evidence relied upon by the Crown to prove intention.*]

[*Where the allegation is "holding the person to ransom":*

The Crown alleges that [*the accused*] detained [*the alleged victim*] with the intention of holding [*him/her*] to ransom. This means that the Crown has to prove beyond reasonable doubt that [*the accused*] intended to detain [*the alleged victim*] in order

to demand and obtain a sum of money for [*the alleged victim's*] release. It does not matter whether [*the accused*] in fact demanded money or whether [*he/she*] succeeded in obtaining any money.

[*Describe the evidence relied upon by the Crown to prove holding to ransom.*]**]**

[***Where the allegation is "with the intention of committing a serious indictable offence" - only available for offences alleged to have been committed on or after 24 September 2012:***

The Crown alleges that [*the accused*] detained [*the alleged victim*] with the intention of committing a serious indictable offence. This means that the Crown has to prove beyond reasonable doubt that [*the accused*] intended to detain [*the alleged victim*] in order to commit [*state the offence*]. It does not matter whether [*the accused*] in fact succeeded in committing the offence.

[*Describe the evidence relied upon by the Crown to prove the accused's intention of committing a serious indictable offence.*]]

Finding(s)

If you find that all three of these essential facts (or ingredients) have been proved by the Crown beyond reasonable doubt, then the verdict should be "*guilty*" as charged.

If you are not satisfied that the Crown has proved beyond reasonable doubt any of the three essential facts (or ingredients) making up the offence, then your verdict should be "*not guilty*".

[5-6820] Suggested direction — aggravated offence (s 86(2)), including alternative verdict for basic offence (s 86(4))

[*Adopt so much of the suggested direction for the basic offence as is appropriate before continuing.*]

The Crown also alleges that this offence was committed in what is called a "circumstance of aggravation". This means that in addition to the three essential facts (or ingredients) to be proved to make out the offence of detaining for advantage, there is a fourth essential fact (or ingredient) that the Crown is required to prove beyond reasonable doubt. It is that:

[*Select one of the following:*

1. the offence was committed in the company of another person [*or persons*].

   OR

2. actual bodily harm was occasioned to [*the alleged victim*] at the time of, or immediately before or after, the commission of the offence.**]**

4. The offence was committed in the company of another person

The Crown must prove beyond reasonable doubt that the offence was committed in the company of another person. If two or more persons are present, and share the same purpose to detain the alleged victim for advantage, they will be "in company", even if the alleged victim is unaware of the other person[*s*].

[*If it is in dispute as to whether the accused was in company, add:*

The Crown must prove that the coercive effect of the group operated, either to embolden or reassure [*the accused*] in committing the crime alleged, or to intimidate [*the alleged victim*] into submission. The perspective of [*the alleged victim*] (being confronted by the combined force or strength of two or more persons) is relevant, but does not solely decide the issue.

Participation in the common purpose without being physically present (for example, as being a look-out or previously encouraging [*the accused*] to commit the offence) is not enough.**]**

[*Describe the evidence relied upon by the Crown to prove the offence committed in the company of another person.*]

5. Actual bodily harm was occasioned to the alleged victim

The Crown must prove beyond reasonable doubt that actual bodily harm was occasioned to [*the alleged victim*] at the time of, or immediately before or after, the commission of the offence of detaining for advantage.

"Actual bodily harm" includes any hurt or injury which interferes with the health or comfort of a person. It need not be permanent, but must be more than transient or trifling. Bruises and scratches are typical examples of injuries that can amount to actual bodily harm.

[*If appropriate, add:*

If [*the alleged victim*] has been injured psychologically in a very serious way that can also amount to actual bodily harm.**]**

[*Describe the evidence relied upon by the Crown to prove that actual bodily harm was occasioned.*]

Finding(s)

If you find that all four of these essential facts (or ingredients) have been proved by the Crown beyond reasonable doubt then your verdict should be "*guilty*" as charged with the aggravated offence.

[*Alternative verdict — basic offence:*

If, however, you are not satisfied beyond reasonable doubt of the circumstance of aggravation that [*either*, the offence was committed in company or actual bodily harm was occasioned to [*the alleged victim*]], but you are satisfied that the Crown has proved the first three essential facts (or ingredients) making up the basic offence beyond reasonable doubt, then your verdict should be "*not guilty as charged, but guilty of detain for advantage*".

That verdict would mean that you are satisfied beyond reasonable doubt that [*the accused*] committed the basic offence of detaining for advantage, but you were not satisfied that the circumstance of aggravation has been proved beyond reasonable doubt.**]**

If you are not satisfied that the Crown has proved beyond reasonable doubt any of the three essential facts (or ingredients) making up the basic offence, then your verdict should be "*not guilty*".

[5-6830] Suggested direction — specially aggravated offence (s 86(3)), including alternative verdicts for aggravated offence and basic offence (s 86(4))

[*Adopt so much of the suggested direction for the basic offence as is appropriate before continuing.*]

The Crown also alleges that this offence was committed in what is called a "circumstance of special aggravation". This means that in addition to the three essential facts (or ingredients) making up the basic offence, there are a further two essential facts (or ingredients) that the Crown is required to prove beyond reasonable doubt. They are that:

1. the offence was committed in the company of another person [*or persons*].

   AND

2. actual bodily harm was occasioned to [*the alleged victim*] at the time of, or immediately before or after, the commission of the offence.

[*Directions for "in company" and "actual bodily harm" are to be found in the suggested direction at* [5-6820].]

Finding(s)

If you find that all five essential facts (or ingredients) have been proved by the Crown beyond reasonable doubt then your verdict should be "*guilty*" as charged with the specially aggravated offence.

[*Alternative verdict — aggravated offence:*

If, however, you are satisfied beyond reasonable doubt of only one of the circumstances of aggravation being either, the offence was committed in company or actual bodily harm was occasioned to [*the alleged victim*] and you are satisfied that the Crown has proved the first three essential facts (or ingredients) giving rise to the basic offence beyond reasonable doubt, then your verdict should be "*not guilty as charged, but guilty of aggravated detain for advantage*".

That verdict would mean that you are satisfied beyond reasonable doubt that the accused committed the basic offence of detaining for advantage with the addition of one of the circumstances of aggravation, but you were not satisfied that both of the circumstances of aggravation have been proved beyond reasonable doubt.]

[*Alternative verdict — basic offence:*

On the other hand, if you are satisfied beyond reasonable doubt that the Crown has proved only the three essential facts (or ingredients) making up the basic offence, but you are not satisfied that either of the circumstances of aggravation have been proved, then your verdict should be "*not guilty as charged, but guilty of detain for advantage*".

That verdict would mean that you are satisfied beyond reasonable doubt that the accused committed the basic offence of detaining for advantage but are not satisfied beyond reasonable doubt of either circumstance of aggravation.**]**

If you are not satisfied that the Crown has proved beyond reasonable doubt any of the three essential facts (or ingredients) making up the basic offence, then your verdict should be "*not guilty*".

[The next page is 1201]

Defences

para

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Alibi

[6-000] Suggested direction

The accused has tendered evidence intended to show that at the time the offence was being committed, [*he/she*] was somewhere else and therefore could not have committed the offence. This is what lawyers call an "alibi".

You will recall the evidence of [*accused/witness*] that the accused was … [*specify alibi evidence*]. When an accused person puts forward an alibi, the burden of proving the accused's guilt continues to rest on the Crown.

If the Crown fails to satisfy you beyond reasonable doubt that the alibi evidence should be rejected, then you must acquit the accused.

The Crown must disprove the alibi.

The Crown must establish beyond reasonable doubt that the accused was at [*the scene of the crime*] at the relevant time. The Crown cannot do so if there is any reasonable possibility that the accused was at [*somewhere else, according to the alibi evidence*] at that time, as asserted by the alibi evidence. The Crown must therefore remove or eliminate any reasonable possibility that the accused was at [*somewhere else, according to the alibi evidence*] at the relevant time, and also persuade you, on the evidence on which the Crown relies, that beyond reasonable doubt the accused was at [*the scene of the crime*] at that time. If the Crown fails to remove or eliminate that reasonable possibility, you must acquit the accused.

If the Crown satisfies you beyond reasonable doubt that the alibi evidence should be rejected, it does not follow that you must necessarily convict the accused. In other words, you must not assume that because the alibi fails that the accused is guilty. You must still be satisfied beyond reasonable doubt, upon the evidence as a whole, that the Crown has made out its case against the accused before you bring in a guilty verdict.

[6-010] Notes

1. Notice of an alibi must be given by the accused: *Criminal Procedure Act* 1986, s 150. The accused requires leave from the court to introduce alibi evidence if notice is not given within the prescribed period. A court should be slow to refuse a leave application under s 150(2) unless prejudice arises such as is incapable of being addressed without significant disruption of the trial: *R v Skondin* [2005] NSWCCA 417 at [47].

2. Cases concerned with whether the Crown should be permitted to call evidence in reply (seeking to rebut an alibi) include: *Killick v The Queen* (1981) 147 CLR 565; *Blewitt v The Queen* (1988) 62 ALJR 503; *R v Heuston* (1996) 90 A Crim R 213. For a recent English case, see: *R v Lesley* [1996] 1 Cr App R 39.

3. The above suggested direction is intended to be consistent with *R v Amyouni*, (unrep, 18/2/88, NSWCCA); *R v Steeden* (unrep 19/8/94, NSWCCA) and *R v Kanaan* [2005] NSWCCA 385 at [135].
4. For a case where an accused had served an alibi notice on the Crown but conceded through counsel at the trial that the contents of the notice were erroneous and did not give evidence at the trial, see: *R v Siulai* [2004] NSWCCA 152 where the appropriate directions to the jury in such circumstances were considered.

[The next page is 1215]

Automatism — sane and insane

[6-050] Preliminary notes

1. Criminal responsibility does not attach to an act done in a state of automatism, that is, where the act is not done in consciousness of the nature of the act and in exercise of a choice to do an act of that nature: *Ryan v The Queen* (1967) 121 CLR 205 at 213; *R v Falconer* (1990) 171 CLR 30 at 39.

2. The general presumption that an accused has the mental capacity to act in such a way as to incur criminal responsibility includes a presumption that the relevant act was willed or voluntary, that is, if the accused was apparently conscious at the time: *R v Falconer* at 40.

3. Where an issue of voluntariness due to automatism arises (as to which, the accused bears an evidential burden of showing a reasonable possibility that the act was not willed: *R v Youssef* (1990) 50 A Crim R 1 at 3), consideration has to be given as to the aetiology of the automatism, since the manner in which the issue is left to the jury depends on the distinction drawn between sane and insane automatism.

4. Where there is some evidence of automatism which points to an aetiology other than a mental health or cognitive impairment, the Crown must prove beyond reasonable doubt, that the relevant act was a willed and voluntary one, that is, was not the result of a condition of automatism, otherwise the accused is entitled to an outright acquittal.

5. The relationship between voluntariness, intent and mental disease was considered by the High Court in *Hawkins v The Queen* (1994) 179 CLR 500.

6. As to the distinction between an underlying mental infirmity which is prone to recur, which deprives the accused of the capacity to control his or her act and which prevents him or her from appreciating its nature and quality (insane automatism); and a transient, non-recurrent mental malfunction caused by external factors (whether physical or psychological) which the mind of an ordinary person would be likely not to have withstood and which produces an incapacity to control his or her acts (sane automatism), see: *R v Falconer* at 30, 53.

7. Illustrations of sane automatism include —

   (a) the act of a sleepwalker: *R v Tolson* (1889) 23 QBD 168 at 187; *R v DB* [2022] NSWCCA 87 at [43];

   (b) post-traumatic loss of control due to head injury: *Bratty v Attorney-General (Northern Ireland)* (1963) AC 386 at 401 and 415; *Cooper v McKenna* (1960) Qd R 406;

   (c) an act done in a state of temporary or transient dissociation following severe emotional shock or psychological trauma, which was not prone to recur and which the mind of an ordinary person (of the accused's age and circumstances and of normal temperament and control) would be likely not to have withstood: *R v Falconer* at 56–57;

(d) an act done under the influence of an anaesthetic: *R v Sullivan* (1984) AC 156.

(e) some forms of epilepsy, depending on their aetiology: *R v Youssef*.

8. It will be a matter for the trial judge to determine whether there is evidence sufficient for the issue of automatism to be left to the jury and the basis on which it should be left: *R v Mcleod* (1991) 56 A Crim R 320. Commonly, it will be clear that the condition is referable exclusively to a mental health or cognitive impairment in which case only those defences should be left, as to which see **[6-200]**. It would be inappropriate in such a case to direct the jury as to sane automatism. In other cases, the reverse may be the position.

9. If the evidence is capable of demonstrating either form of automatism, then it must be left to the jury for them to decide whether the automatism was sane or insane in nature, and to consider it accordingly in relation to the issue to which it thereby becomes relevant: *R v Youssef* at 5–6. In such cases, a full direction will need to be given as to the distinction between the two strands of automatism and as to the evidential burden and standard of proof. Additionally, the special directions required under s 28 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 would need to be given, see **[6-280]**.

[6-060] Suggested direction

In order for an accused to be convicted of a crime, his or her act (giving rise to the unlawful conduct) must be voluntary.

Where an act (otherwise criminal) is done in a state of automatism, that is, without control or direction of the will of the accused over what is being done, then no crime is committed and the accused must be found "not guilty". Here automatism raises itself for your consideration because of the evidence … [*outline the evidence*].

Although the defence has raised this issue for you to consider, this does not mean that it is the accused who bears the onus of proving that [*his/her*] act was done in a state of automatism. It is for the Crown to prove beyond reasonable doubt that all of the ingredients of [*the offence*] were present, and one of these is the requirement that the act be voluntary.

It is therefore for the Crown to prove beyond reasonable doubt that the act of the accused was voluntary, that is, it is for the Crown to remove any reasonable doubt from your minds as to whether the accused was acting as an automaton, divested of the control and direction of [*his/her*] will over what [*he/she*] was doing.

[*Where the case involves sane automatism*] Automatism in this case does not involve any question of mental health impairment or cognitive impairment. It is concerned with involuntariness, which does not derive from any of those conditions.

To summarise, unless the Crown proves beyond reasonable doubt that the act of the accused was subject to the control and direction of [*his/her*] will, then [*he/she*] must be acquitted because no offence has been committed.

[*Where the case involves insane automatism*] If you conclude the Crown has proved beyond reasonable doubt that the act of the accused was voluntary, you must then

consider whether the accused had a mental health or cognitive impairment so as not to be responsible according to law. [*Follow with suggested direction under s 28 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 at [6-280]*].

[The next page is 1241]

Duress

[6-150] Introduction

Last reviewed: June 2023

It is for the judge to rule if there is evidence of duress to be left to the jury. Where duress is raised the onus is on the Crown to prove beyond reasonable doubt that the accused was not acting under duress.

When duress is raised in a Commonwealth matter, refer to note 9 at **[6-170]**.

[6-160] Suggested direction

Last reviewed: June 2023

In this case, the Crown has to prove beyond reasonable doubt that [*the accused*] was not acting under duress when [*outline relevant circumstances*]. It is not for [*the accused*] to prove that [*his/her*] actions were done under duress.

The law recognises that in some cases someone who commits what would otherwise be a crime should be excused for having done so. It recognises that we are human beings and that sometimes people really don't have a choice — their choices have been overborne by a serious threat to either them or their family. The law would prefer that no one commits a crime but the defence of duress is a concession to human frailty.

But it is important that you understand that it is not a concession to individual frailty. People cannot escape punishment if they give in to threats that are not serious. We expect people to act as reasonable human beings if they are threatened and also expect people to have the strength of character to be able to resist some threats. If there is some reasonable way to avoid the threat such as reporting the matter to the police then people are expected to do that and not give in to the threat and commit a crime.

There are three elements which make up duress. A person acts under duress, and therefore will not be held to be criminally responsible if that person's actions were performed:

- because of threats of death or really serious injury to [*himself/herself*] or a member of [*his/her*] family
- being threats of such a nature that a person:
  - of ordinary firmness and strength of will,
  - of the same maturity and sex as [*the accused*], and
  - in [*the accused's*] position,
- would have given in to them and committed the crime demanded of [*him/her*].

Those three elements are necessary before duress exists. If the Crown has proved beyond reasonable doubt that just one of the elements is missing then duress will be eliminated as an issue.

I will explain the three elements in some more detail.

1. Was [*the accused*] driven by [*the alleged threats*] to act as [*he/she*] did because [*the accused*] genuinely believed that if [*he/she*] did not act in this way, [*he/she/member of the accused's family etc*] would be killed or seriously injured?

   In considering this question, you will have to decide what threats [*if any*] were made and, if they were, what they led [*the accused*] to believe would happen. The threats may not be expressed, they may be implied. In this case [*describe circumstances*]. If [*the accused*] genuinely believed that there was an imminent danger of death or serious injury, it would not matter if that belief was, in fact, mistaken. What matters when you look at this question is what the accused believed would happen. Did [*he/she*] believe that [*he/she or his/her family*] would be killed or seriously injured if [*he/she*] did not do what [*he/she*] says was demanded of [*him/her*].

   [*Summarise submissions of the Crown and the accused in relation to question 1*].

2. Would those threats have forced a reasonable person to act as [*the accused*] did?

   This question is more complicated and requires you to look at the response of a reasonable person of ordinary firmness and strength of will, and of the same sex and maturity as [*the accused*], to the threats facing [*the accused*], and in the circumstances in which [*the accused*] found [*himself/herself*].

   When you come to consider this question, you must have regard not only to the nature of the threats, but also to any circumstances known to [*the accused*] concerning the person(s) making the threats, which may have affected a reasonable person's reaction to them, as well as the actual circumstances in which they were made. [*set out defence case*]

   This is something you examine in a sensible and common sense way. You have to recognise that it is one thing to consider what a reasonable person would do when you are sitting in a jury room with people around you and the ability to think through the alternatives in a relaxed way. But it is another thing for a reasonable person to think about how [*he/she*] would respond to threats in the circumstances the accused said [*he/she*] found themselves in.

   You place a reasonable person of ordinary firmness of mind and will, and of the same maturity and sex as [*the accused*], in [*the accused's*] position, that is, in the setting and circumstances in which [*the accused*] found [*himself/herself*] and you attribute to that reasonable person the knowledge [*the accused*] had of the person(s) offering the threats.

   You then ask yourselves whether, taking all those matters into account, the Crown has satisfied you, beyond reasonable doubt, that a reasonable person would not have yielded to the threats in the way [*the accused*] did.

   [*Summarise the submissions of the Crown and the accused in relation to question 2*].

3. Could [*the accused*] have rendered the threat ineffective [*for example, by going to the police and/or …*]?

   I said before that we would prefer that people did not commit crimes even in response to threats. If [*the accused*] had a choice between giving in to the threat

and rendering it ineffective then the law says the person should take the second option. Even when a person is faced with threats which [*he/she*] believes will be carried out unless they commit a crime, [*he/she*] is not acting under duress if [*he/she*] could have avoided the threats by doing something else, such as reporting the matter to police.

[*Summarise the Crown and defence submissions in relation to question 3*].

If the Crown has disproved any of these three elements beyond reasonable doubt, then the defence of duress has failed. If the Crown has failed to disprove any of them, then [*the accused*] is entitled to a verdict of "not guilty".

In short, the Crown will have succeeded in eliminating duress as an issue if it has proved beyond reasonable doubt any of these three things:

1. The accused was not forced to do what [*he/she*] did because of threats of death or really serious injury to [*himself/herself/a family member*],

   or

2. The threats were not of such a nature that a reasonable person with the attributes of [*the accused*] and who was in the position of [*the accused*] would have given in to them and done what [*he/she*] did,

   or

3. [*The accused*] could have rendered the threat ineffective by doing something else instead of doing what [*he/she*] did.

[6-170] Notes

Last reviewed: June 2023

1. In *R v Lawrence* [1980] 1 NSWLR 122, the Court of Criminal Appeal comprehensively dealt with the defence of duress, and trial judges are advised to re-read the judgments in that case before summing up in a trial where duress is raised. See also *R v Hurley and Murray* [1967] VR 526; *R v Abusafiah* (1991) 24 NSWLR 531 and *R v Pimentel* [1999] NSWCCA 401. The general principles concerning duress at common law were discussed at [28]–[29] and [32]–[36] in *Taiapa v The Queen* (2009) 240 CLR 95.
2. Duress of circumstances (that is, where a person is driven to commit a crime by force of circumstances) is considered in *R v Pommell* [1995] 2 Cr App Rep 607, and *R v Abdul-Hussain* [1999] Crim LR 570. See and compare **Necessity** at **[6-350]**.
3. Duress can extend to threats directed beyond the accused or an immediate member of the accused's family to someone for whom the accused might reasonably feel responsible. See, for example, *R v Conway* [1989] 88 Cr App Rep 159, where the threat was to a passenger in the accused's car; see also *R v Brandford* [2016] EWCA Crim 1794 at [32], [46].
4. "Battered woman syndrome" may be relevant to a defence of duress: *R v Runjanjic* (1991) 56 SASR 114.

5. It was held in *Rowan (a pseudonym) v R* [2022] VSCA 236 at [154]–[156] that a continuing or ever present threat which is subsisting at the time of the offence (as distinct from a specific threat in close temporal proximity to the offending) can be sufficient if, in all other respects, the defence of duress can be made out. The accused must have, due to the threat, lost their freedom to refrain from committing the charged offence.

6. Australian authorities suggest that duress may be available as a defence to attempted murder: *R v Goldman* [2004] VSC 291: cf *R v Gotts* [1992] 2 AC 412.

7. In *R v Bowen* [1996] 2 Cr App Rep 157, guidance is given as to the characteristics of the accused with which a reasonable person should be invested for the purposes of resolving question 2 in [6-160]. Examples are given such as youth, pregnancy, physical disability, recognised mental illness or psychiatric condition.

8. There is a limitation on the availability of the defence when a person is part of a criminal organisation or where they otherwise put themselves in a position where they may be coerced to commit criminal offences: *R v Hurley* [1967] VR 526 at 533; *Hasan* [2005] UKHL 22; *Nguyen v R* [2008] NSWCCA 22 at [40]; *R v Qaumi (No 63)* [2016] NSWSC 1216 at [30]–[35]; *R v Qaumi (No 64)* [2016] NSWSC 1269 at [40]–[43]. Note, however, that in *R v Qaumi (No 64)*, Hamill J observed that he considered that in *Nguyen v R* the court had overstated the nature of the limitation: *R v Qaumi (No 64)* at [42].

9. Although the cases use the expression "voluntariness" in relation to duress, that expression is not used in the same sense as that expression is used in automatism. If a case involves both duress and automatism, this distinction should be made clear to the jury.

Duress in Commonwealth cases

10. Section 10.2 of the *Criminal Code* (Cth) codifies the defence of duress for an accused charged with a Commonwealth offence. It is important when adapting the form of the direction in [6-160] for a Commonwealth offence, that regard is had to the precise terms of s 10.2 and also to s 13.3 of the Code. See *Mirzazadeh v R* [2016] NSWCCA 65 and *Oblach v R* (2005) 65 NSWLR 75 at [66]. As to the operation of s 13.3 see *The Queen v Khazaal* (2012) 217 CLR 96 at [74]–[78].

[The next page is 1255]

Defence of mental health impairment or cognitive impairment

[6-200] Introduction

The defence of mental health impairment and/or cognitive impairment, formerly the defence of mental illness, is provided in the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 ("the Act") which commenced on 27 March 2021 and replaced the *Mental Health (Forensic Provisions) Act* 1990 ("the 1990 Act").

For fitness to be tried, which is dealt with in Pt 4 of the Act, see **[4-300] Procedures for fitness to be tried (including special hearings)** which includes some general observations about some of the terms and concepts in the Act.

For the partial defence to murder of what used to be termed "substantial impairment by abnormality of mind" in s 23A of the *Crimes Act* 1900, see **[6-550] Substantial impairment by mental health impairment or cognitive impairment**.

The present chapter is concerned with the provisions of Pt 3 of the Act and what used to be referred to as the defence of mental illness and the special verdict of "not guilty by reason of mental illness" in Pt 4 of the 1990 Act. If the defence of mental health impairment and/or cognitive impairment in s 28 of the Act is established the special verdict that must be returned is "act proven but not criminally responsible": s 30.

The Attorney General, the Hon Mark Speakman, said in the Second Reading Speech for the Mental Health and Cognitive Impairment Forensic Provisions Bill 2020 that Pt 3 updated and legislated what was the common law test for the defence of mental illness and rewrote the special verdict. The defence provided in what became s 28 was said to "closely mirror" the common law M'Naghten's test "but with updated terms": NSW, Legislative Assembly, *Debates*, 3 June 2020, p 2351. Consequently, authorities concerned with the mental illness defence at common law, for example, *R v Porter* (1933) 55 CLR 182, have continued relevance.

See generally, *Criminal Practice and Procedure NSW* at [17-s 28]–[17-s 34] and accompanying annotations; *Criminal Law NSW* at [MHCI.28.20]–[MHCI.28.240]. See also "Introducing the new Mental Health and Cognitive Impairment Forensic Provisions Act 2020", The Hon Justice Mark Ierace, (2021) 33(2) *JOB* 15 and "Clinical issues with the Mental Health and Cognitive Impairment Forensic Provisions Act 2020", Dr Kerri Eagle and Anina Johnson, (2021) 33(7) *JOB* 67.

[6-210] Transitional provisions

Savings and transitional provisions are made in Sch 2 of the Act, including the extent to which the Act may apply to existing proceedings. Clause 5 provides that if a question has been raised prior to the commencement of the Act as to whether the accused was mentally ill at the time of commission of the offence, the 1990 Act continues to apply until a determination is made as to whether a special verdict should be entered (or the defence is no longer being raised). If it is determined that the special verdict of not

guilty by reason of mental illness would have been found, the court must instead find the special verdict of act proven but not criminally responsible. This is what occurred in *Masters v R* [2022] NSWCCA 228.

[6-220] Sequence of determination of issues

While it is theoretically necessary for the Crown to prove beyond reasonable doubt that the act (or omission) constituting the offence was a voluntary one, that is a matter that is presumed unless the accused discharges an evidentiary onus to indicate otherwise. If the issue is raised on the evidence it is then necessary for the Crown to prove beyond reasonable doubt that the act was a voluntary act of the accused: *The Queen v Falconer* (1990) 171 CLR 30 at 56, 63, 77. See **[4-350] Voluntary act of the accused** and **[6-050] Automatism — sane and insane**.

Where no issue is raised as to the voluntariness of the accused's act, it is only necessary for the Crown to prove the physical elements of the alleged crime before the impairment defence falls for determination. That is, consideration of whether the mental element has been proved is only necessary if it is determined that the defence has failed: *R v Tonga* [2021] NSWSC 1064 at [15]; *R v Siemek (No 1)* [2021] NSWSC 1292 at [16]; *R v Jawid* [2022] NSWSC 788 at [97]–[98]. The proposition is traced to *Hawkins v The Queen* (1994) 179 CLR 500 at 512–517 and *R v Minani* (2005) 63 NSWLR 490 at [32]–[33]. In *R v Jawid* at [99]–[106], Davies J provided reasons for concluding that the issue of criminal responsibility must be considered before any question of substantial impairment.

It was held in *Hawkins v The Queen* at 512–513, 517 that medical evidence going to a defence of mental illness cannot be taken into account in determining whether an act is voluntary but may be taken into account in determining whether the act was done with a specific intent. Having regard to the rationale for this as explained by the High Court (at 513), this would appear to apply to both the mental health and the cognitive impairment defences.

[6-230] The impairment defence

Section 28 of the Act provides for a "defence" of mental health impairment, cognitive impairment "or both".

While it is commonly referred to as a "defence", it is not something that may only be raised by the accused. There are cases in which the Crown has contended the special verdict should be returned whereas the accused contended there should be an acquittal as a result of sane automatism (absence of voluntariness) or in a murder trial there should be a verdict of guilty of manslaughter by reason of substantial impairment because of mental health or cognitive impairment. The former was the case in *R v DB* [2022] NSWCCA 87 and the latter was the case in *R v Jawid* [2022] NSWSC 788. In *R v Jawid*, Davies J applied *R v Ayoub* [1984] 2 NSWLR 511 and s 28(2) of the Act in holding that the Crown is entitled to raise the issue of criminal responsibility by contending that the accused has a mental health impairment and that despite s 141 of the *Evidence Act* 1995, the standard of proof is on the balance of probabilities.

As to the reference in s 28(1) to "or both", in their article referred to above, Eagle and Johnson observe (at 68) that mental health impairments and cognitive impairments

may overlap clinically and diagnostically and the reference in s 28 (and in the test for fitness in s 36) to both "avoids the need for clinicians and courts to make potentially artificial determination as to which disorder is contributing to the relevant impairment".

The terms, "mental health impairment" and "cognitive impairment" are defined in ss 4 and 5 of the Act respectively (and in identical terms in ss 4C and 23A of the *Crimes Act*). The definitions of mental health impairment and cognitive impairment each have three limbs set out conjunctively in s 4(1)(a)–(c) and s 5(1)(a)–(c).

The three subsections of s 4 comprise in subs (1) a definition of what is a mental health impairment; in subs (2) a non-exhaustive list of disorders from which a mental health impairment may arise; and in subs (3) an exclusion of two matters from solely giving rise to a mental health impairment (the temporary effect of ingesting a substance and a substance use disorder). Section 5 follows a similar structure in subss (1) and (2) but with terms and concepts relevant to cognitive impairment and without the exclusion of the temporary effect of ingesting a substance, or a substance use disorder.

It was held by a majority in *R v DB* at [43] that under the common law, the acts of a person who is asleep and engaging in somnambulistic activity are not willed acts. The accused was not legally responsible for them and would be entitled to an outright acquittal. It was further held (at [64]) that the Act did not alter this position in that there was no mental health impairment as defined in s 4: there was no disturbance of volition within s 4(1)(a) and the lack of volition while asleep was of no clinical significance for the purposes of s 4(1)(b).

It has been held in two single judge decisions that the onus of proof of the exclusion in s 4(3) is upon the Crown: *R v Miller* [2022] NSWSC 802 at [53]–[62] and *R v Sheridan* [2022] NSWSC 1669 at [20]–[26]. In the latter, the court rejected a proposition that the onus was upon the Crown to prove the matter beyond reasonable doubt and held that the standard of proof on the Crown was on the balance of probabilities. These matters appear to involve issues that were not considered and neither have the judgments been the subject of appellate review.

In *R v Miller* at [50]–[51], Cavanagh J held that an impairment by way of a substance induced disorder which existed at the time of the event which was temporary in nature, and which was caused solely by the ingestion of drugs without any underlying cause would be within the possible operation of s 4(3). He was not satisfied that the exception in s 4(3) could only apply where the accused was intoxicated by drugs at the time of committing the act or could never apply if s 4(2) is satisfied.

There are two limbs to the defence set out in s 28(1): *R v Siemek (No 1)* [2021] NSWSC 1292 at [84]–[86]. First, whether at the time of carrying out the act constituting the offence the accused had a mental health and/or cognitive impairment. Second, whether such impairment(s) had the effect that the accused did not know the nature and quality of the act or did not know that the act was wrong (that is, could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong). It is presumed that the accused did not have either such impairment until the contrary is proved, with such proof being on the balance of probabilities: s 28(2)–(3). Whether the accused did not know the nature and quality of the act involves an assessment of whether the accused knew the physical nature of what he/she was doing or the implications of it: *The King v Porter* (1933) 55 CLR 182 at 188; *Willgoss v The Queen* (1960) 105 CLR 295 at 300.

The definition within s 28(1)(b) of not knowing that the act was wrong meaning that the accused "could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong" adopts the formulation of Dixon J in *The King v Porter* at 189–190 which included his Honour saying that "wrong" meant "wrong having regard to the everyday standards of reasonable people". It was confirmed in *Stapleton v The Queen* (1952) 86 CLR 358 at 375 that the issue is whether the accused was able to reason as to what is right and wrong according to the ordinary standards adopted by reasonable people as opposed to knowing that the act was contrary to and punishable by law.

[6-240] Evidence

There was no legal requirement to adduce medical evidence to prove the former defence of mental illness: *Lucas v The Queen* (1970) 120 CLR 171 at 174. However, it was observed in *Tumanako v R* (1992) 64 A Crim R 149 at 160 that there may be a practical necessity to do so and Johnson J noted in *R v Siemek (No 1)* [2021] NSWSC 1292 at [92] that it may be more than a practical necessity to have expert medical evidence for that part of the definition of a mental health impairment that a disturbance of thought, mood, volition, perception or memory "would be regarded as significant for clinical diagnostic purposes". The same is likely the case about aspects of the definition of cognitive impairment. Juries (and judges sitting alone) are not bound to accept and act upon expert evidence but must not disregard it capriciously: *R v Hall* (1988) 36 A Crim R 368; *Goodridge v R* [2014] NSWCCA 37 at [116]. Unanimous medical evidence ought not be rejected unless there is evidence which can cast doubt upon it: *R v Tumanako* at 160–161; *Da-Pra v R* [2014] NSWCCA 211 at [337].

[6-250] Mandatory information for the jury

Section 29 provides that the judge must explain the matters listed in paragraphs (a) to (e) to the jury. They are the findings which may be made on the trial and their legal and practical consequences: s 29(a)–(b). Section 29(d) adds this includes that if the special verdict is returned, the accused may be ordered to be released by the Mental Health Review Tribunal only if the Tribunal is satisfied the safety of the accused and members of the public will not be seriously endangered. Section 29(c) provides the jury is to be informed about the composition of the Mental Health Review Tribunal and its functions in respect to forensic patients. Paragraph (e) provides the jury be told that it should not be influenced in the return of a verdict by the consequences of a special verdict. The provision of such instruction to a jury appears to have derived from *R v Hilder* (1997) 97 A Crim R 70 at 81. The Attorney General indicated in his Second Reading Speech stakeholders had asked that this requirement be retained so that a jury is not deterred from returning a special verdict out of concern about indeterminate detention: NSW, Legislative Assembly, *Debates*, 3 June 2020, at 2352.

The Mental Health Review Tribunal is constituted under Ch 6 of the *Mental Health Act* 2007 (provisions relating to membership of the Tribunal are found in Sch 5.) The functions of the Tribunal in relation to forensic patients who have been the subject of a verdict of act proven but not criminally responsible are contained in Pt 5 of the Act. Information included in the suggested direction at **[6-280]** for compliance with s 29 of the Act has been drawn from these sources.

[6-260] Fast track determination where parties in agreement as to outcome

Section 31 of the Act provides for a streamlined procedure enabling a court to enter a special verdict at any time in the proceedings, even before a jury is empanelled. It is necessary that the defendant is legally represented and that the parties agree that the proposed evidence establishes the defence in s 28. If the court is satisfied the defence is established the special verdict may be entered. There is no requirement that a trial be convened, that the defendant elect to be tried by judge alone, or that the judge comply with the requirements for such a trial under ss 132 and 133 of the *Criminal Procedure Act* 1986. It remains necessary for a judge to provide reasons for the outcome as a necessary function of judicial proceedings. See *R v Sands* [2021] NSWSC 1325 at [3]–[4]; *R v Jackson* [2021] NSWSC 1404 at [7]–[13].

[6-270] Verdict and orders

If the defence of mental health or cognitive impairment has been established, the jury must return the special verdict of act proven but not criminally responsible: s 30. Section 32 provides that if the special verdict is entered, there is no requirement for the special verdict to be entered also in respect of an offence available as an alternative.

The orders a court may make upon the return of a special verdict are set out in s 33(1). They include an order for the unconditional or conditional release of the person from custody but before making such an order the court must be satisfied that the safety of the person or any member of the public will not be seriously endangered: s 33(3).

The court may request a report by a forensic psychiatrist, or a person of a class prescribed by the regulations as to the condition of the person and whether their release is likely to seriously endanger the safety of themself or any member of the public: s 33(2). Clause 4 of the *Mental Health and Cognitive Impairment Forensic Provisions Regulation* 2021 prescribes for the purposes of s 33(2) a person who is a registered psychologist who has, in the opinion of the court, appropriate experience or training in forensic psychology or neuro-psychology. Section 30L of the *Crimes (Sentencing Procedure) Act* 1999 enables a victim impact statement to be provided to the court following the return of a special verdict at a trial or special hearing (and a verdict at a special hearing that on the limited evidence available an accused person committed an offence). This has been described as a "significant" and "important" reform: *R v Siemek (No 2)* [2021] NSWSC 1293 at [3], [6]–[7]. Any victim impact statement must be provided to the Mental Health Review Tribunal: s 30N(3). Section 30M provides that a court may seek submissions by the "designated carer or principal care provider" (as defined in the *Mental Health Act* 2007) of an accused person after the return of such a verdict. It is suggested that an inquiry be made as to whether any of these provisions should be applied before the court finalises a matter by making orders pursuant to s 33 of the Act. There must be a referral of the person to the Mental Health Review Tribunal if a special verdict is returned unless an order is made for the person's unconditional release: s 34.

[6-280] Suggested direction

It is recommended that the jury be assisted by the provision of a document setting out the elements of the offence the Crown is required to prove together with the elements of the defence raised. A document setting out the composition and relevant functions of the Mental Health Review Tribunal in respect to forensic patients may also assist.

The suggested direction assumes the jury have been directed as to all of the elements of the offence the Crown is required to prove. It is based upon the more commonly encountered case in which there is no dispute that the accused committed the physical act constituting the offence and that the defence raised is one of mental health rather than cognitive impairment. The direction may be readily adapted if the case at hand is otherwise. A suggested substitution of an explanation of "cognitive impairment" to use in lieu of "mental health impairment" appears below.

If there is an issue as to whether the accused's act was voluntary, the following direction should be preceded by a direction as to that, see **[4-350] Voluntary act of the accused**. If an issue of automatism arises as the basis of an assertion of involuntariness, see also **[6-050] Automatism — sane and insane**.

If you are satisfied beyond reasonable doubt the accused committed the physical act that constitutes the offence, namely [*specify*], which the accused concedes, **[where appropriate add:** and that it was a voluntary act in the sense I have described**]** then you must decide whether it has been established that a special verdict of "act proven but not criminally responsible" should be returned. Whether or not the mental element of the offence that I have described, namely [*specify*] has been proved is irrelevant for the moment. The return of the special verdict which I am about to explain does not depend upon that mental element having been proved.

So, if you are satisfied the accused committed the act of [*specify*], the question then is did [*he/she*] have a mental health impairment which had the effect that [*he/she*]:

(a) did not know the nature and quality of the act, or

(b) did not know that the act was wrong.

If that has been proved, then you would return the "special verdict" which is "act proven but not criminally responsible".

I will explain these concepts shortly but will first explain some important matters concerning what I will call this impairment issue.

First, unless there is some evidence to the contrary, the law presumes that an accused did not have a mental health impairment that had one of the effects upon him that I have mentioned.

Second, you are concerned with the mental health of the accused at the time of committing the act that constitutes the offence. There is evidence of the state of [*his/her*] mental health before and after but it is only relevant to the extent to which it assists in a determination of what the accused's mental health condition was at the time of committing that act.

The third matter is that proof of this impairment issue is necessary only to the standard of the balance of probabilities. That stands in contrast to the requirement that the Crown prove the guilt of the accused to the standard of beyond reasonable doubt. I will say more about this in a moment.

I will now speak about the elements of the impairment issue itself. As I have said, it involves two matters: whether the accused had a mental health impairment at the time of carrying out the act constituting the offence and if so, whether this impairment had a certain effect upon the accused.

1. Mental health impairment

A person has a mental health impairment if each of the following three matters have been proved:

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory; and

(b) the disturbance would be regarded as significant for clinical diagnostic purposes; and

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

[*It will often not be necessary to refer to every aspect of (a) and (c); only to those which have been specifically raised by the evidence.*]

[*Discuss each of these three matters in turn by referring to the evidence and the submissions of the parties.*]

[Where appropriate add: A person does not have a mental health impairment if the person has an impairment caused solely by either:

(a) the temporary effect of ingesting a substance, or

(b) a substance use disorder.

[*Discuss either or both matters by reference to the evidence and the submissions of the parties.*]**]**

2. The effect of the impairment upon the accused

If you are satisfied that the accused had a mental health impairment at the time of carrying out the act constituting the offence, it is also necessary that this impairment had one or the other of the following effects:

(a) the accused did not know the nature and quality of the act, or

(b) the accused did not know that the act was wrong (that is, the accused could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

As to the first of those matters, a person does not know the nature and quality of an act if they do not know of the physical nature of what they are doing, or do not know of the implications of doing that act.

The second matter is not concerned with whether the accused knew that the act was wrong in the sense of being something that was contrary to the law and punishable as a consequence. It is concerned with whether the accused was able to understand the difference between right and wrong as ordinary reasonable people are able to understand. This second matter will have been established if you are satisfied that the accused could not reason with a moderate degree of sense and composure about whether the act was wrong.

[*Discuss either or both matters by reference to the evidence and the submissions of the parties.*]

Standard of proof

I have mentioned that you have to decide on "the balance of probabilities" whether the accused had a mental health impairment that had a certain effect upon [*him/her*]

as I have described. That means you have to decide this issue on the basis of what is more probable than not. This is a different standard or level of proof than beyond reasonable doubt which applies to what the Crown must prove in order to establish that the accused is guilty of the offence charged. The issue you are concerned with here is whether the accused had a mental health impairment which had one or other of the effects of [*refer to the text of 2[a] or [b] above*] upon [*him/her*]. It is only necessary for you to be satisfied that it is more probable that [*he/she*] did than that [*he/she*] did not. It does not matter how slightly it might be more probable, only that it is more probable by some degree.

Special verdict

If you are satisfied on the balance of probabilities that at the time the accused carried out the act of [*specify*] [*he/she*] had a mental health impairment that had the effect upon [*him/her*] as I have described, then you must return what is referred to as the "special verdict" which is "act proven but not criminally responsible".

Explanation of the effect of the special verdict

[*required to be given pursuant to s 29 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020*].

You may be interested to know what happens when a jury returns the special verdict, and this is information that the law says you must be given.

If your verdict is "not guilty", the accused walks from the court a free person and the criminal process comes to an end. If your verdict is "guilty", the court will determine the appropriate punishment to impose upon the accused.

However, if you return the special verdict of "act proven but not criminally responsible", neither of those things happens. Instead, the law provides for a process of review, to determine whether the accused poses a risk to him/herself or to others, and whether he/she should be released into the community or detained and treated.

If the court is satisfied that the safety of the accused and members of the community will not be seriously endangered by the accused's release into the community, he/she can be released, either unconditionally, or with conditions, such as a requirement that the accused accept medical treatment, or live at a particular place. If the court concludes that it is not appropriate to release the accused into the community at present, the court can order his/her detention until it is safe to release him/her. Detention can be in a prison, or a secure hospital or some similar facility, and it would continue until a Tribunal, called the Mental Health Review Tribunal, decided that the accused could be released.

The Mental Health Review Tribunal is a special body with expertise in this area. It has Members rather than judges, but the Members of the Tribunal are all people with special qualifications and expertise. They include judges or senior lawyers, but also medical and other professionals, such as psychologists and psychiatrists.

The Tribunal will review the accused's situation regularly and will not order the release of the accused until it is satisfied the safety of the accused or any member of the public would not be seriously endangered. Until that time, the accused would be held in a secure place, where medical treatment can be provided.

When you are considering the verdict(s) that you will return, it is useful for you to know what will happen if the verdict should be that of "act proven but not criminally responsible". Giving you this information is not, however, an invitation to decide the case based upon what you think is the best outcome for the accused or the community. You must, consistent with the oath or affirmation you took on the very first day of the trial, return a verdict based only upon the evidence placed before you.

Upon determination of the impairment issue

You will be satisfied that the special verdict should be returned if you are satisfied on the balance of probabilities that at the time of carrying out the act of [*specify*] the accused had a mental health impairment that had the effect that the accused did not know the nature and quality of the act or did not know that the act was wrong.

In that case, provided you are satisfied beyond reasonable doubt that the accused carried out that act **[where appropriate add:** and that it was a voluntary act**]** your verdict will be: "act proven but not criminally responsible".

If you are not satisfied on the balance of probabilities that this special verdict should be returned, then you must consider whether the Crown has proved the guilt of the accused by proving beyond reasonable doubt each of the essential elements of the offence that I have explained to you. .

[6-290] Suggested direction — cognitive impairment

The suggested direction for mental health impairment may be readily adapted for a case involving an issue of cognitive impairment (or both). The following is suggested for substitution of that part of the direction concerned with the nature of the impairment.

Cognitive impairment

A person has a cognitive impairment if each of the following three matters have been proved:

(a) the person has an ongoing impairment in adaptive functioning; and

(b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory; and

(c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind.

[*It will often not be necessary to refer to every aspect of (b) and (c); only to those which have been specifically raised by the evidence.*]

[*Discuss each of these three matters in turn by referring to the evidence and the submissions of the parties.*]

[The next page is 1275]

Necessity

[6-350] Introduction

Last reviewed: June 2023

The common law defence of necessity operates where circumstances (natural or human threats) bear upon the accused, inducing the accused to break the law to avoid even more dire consequences. There is, thus, some overlapping with the defence of duress. In *R v Loughnan* [1981] VR 443 at [448] it was held that the elements of the defence were that —

(i) the criminal act must have been done in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he or she was bound to protect;

(ii) the accused must honestly have believed on reasonable grounds that he or she was placed in a situation of imminent peril; and

(iii) the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.

The imminence and seriousness of the threat, and the question of whether there were any possible alternative courses of action available, should be treated as important factual considerations relevant to the accused's belief and the reasonableness and proportionality of the response, rather than technical legal conditions for the existence of necessity: *R v Rogers* (1996) 86 A Crim R 542 at 545–548. The availability of realistic alternative courses of action is a question of fact and not to be resolved by reference to whether the accused believed that to be the position: *Veira v Cook* [2021] NSWCA 302 at [46]. The defence relates to a response which "could not otherwise be avoided" and was the accused's "only reasonable alternative": *Veira v Cook* at [48].

In *R v Cairns* [1999] 2 Crim App Rep 137, it was held that an accused will have a defence of necessity if —

(i) the commission of the crime was necessary, or reasonably believed to have been necessary, for the purpose of avoiding or preventing death or serious injury to himself or herself, or another;

(ii) that necessity was the *sine qua non* of the commission of the crime; and

(iii) the commission of the crime, viewed objectively, was reasonable and proportionate, having regard to the evil to be avoided or prevented.

The defence of necessity involves two questions that must be addressed: first, was the accused's conduct in truth a response to a threat of death or serious injury; and second, if so, did the accused act honestly believing, on reasonable grounds, that it was necessary to do so to avoid the threatened death or serious injury: *Veira v Cook* at [24]. The defence does not extend to excuse criminal conduct undertaken otherwise than in response to an imminent threat of death or serious injury; it is insufficient if the accused merely believed the harm sought to be avoided was "not less than" any harm involved in the criminal conduct: *Veira v Cook* at [40]–[43].

The accused bears the evidentiary onus of establishing a basis for a defence of necessity and, thereafter, the Crown bears the onus of negativing the defence beyond reasonable doubt: *R v Rogers* at 547. The suggested direction for **Duress [6-150]** may conveniently be adapted to the case in which the defence of necessity is raised.

[The next page is 1285]

Provocation/extreme provocation

[6-400] Introduction

Provocation, or as it is now known "extreme provocation", operates to reduce a charge of murder to manslaughter: s 23(1) *Crimes Act* 1900. Although provocation is often described as a "partial defence", where the evidence raises the issue, the prosecution must prove beyond reasonable doubt that the killing was not in response to extreme provocation: s 23(7) *Crimes Act* (previously s 23(4)) and see the discussion in *Lindsay v The Queen* (2015) 255 CLR 272 at [15].

The *Crimes Amendment (Provocation) Act* 2014 (explained below at **[6-440]**) substantially altered the law by completely substituting s 23 *Crimes Act* and creating a partial defence of "extreme provocation". That substitution does not apply to the trial of a person for murder allegedly committed before 13 June 2014: s 23(9).

[6-410] Leaving provocation/extreme provocation to the jury

It is a question of law for the judge whether there is material in the evidence which sufficiently raises the issue of provocation for the jury's consideration: *Lindsay v The Queen* (2015) 255 CLR 272 at [16]. The question is whether on the version of the events most favourable to the accused, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked: *Lindsay v The Queen* at [26]. There is limited scope for the judge in deciding the question of law and he or she needs to exercise caution before declining to leave provocation to the jury: *Stingel v The Queen* (1990) 171 CLR 312 at 334; *Lindsay v The Queen* at [27].

[6-420] Suggested direction — provocation — murder allegedly committed before 13 June 2014

The final issue which the Crown must establish in order to prove that [*the accused*] is guilty of murder is that [*the accused*] was not acting under provocation when [*he/she*] killed [*the deceased*]. It is not for [*the accused*] to prove that [*he/she*] was acting under provocation but for the Crown to prove beyond reasonable doubt that [*he/she*] was not.

If the Crown satisfies you beyond reasonable doubt that all the other elements of murder have been established beyond reasonable doubt and [*the accused*] was not provoked to do what [*he/she*] did, the appropriate verdict is "guilty of murder". If, however, the Crown does not satisfy you that [*he/she*] was not provoked, [*the accused*] will be "not guilty of murder" but "guilty" of the less serious offence of manslaughter (that is, manslaughter by provocation).

How then do you determine whether [*the accused*] was (or may have been) provoked to do what [*he/she*] did?

The law provides that an [*act/omission*] causing death is an act [*done/omitted*] under provocation where —

1. The [*act/omission*] is the result of a loss of self-control on the part of [*the accused*] that was induced by any conduct of [*the deceased*] (including grossly insulting words or gestures) towards or affecting [*the accused*]; and
2. That conduct of [*the deceased*] was such that it could have induced an ordinary person in the position of [*the accused*] to have so far lost self-control as to

have formed an intent to kill, or to inflict grievous bodily harm upon, [*the deceased*], whether the conduct of [*the deceased*] occurred immediately before the [*act/omission*] causing death, or at any previous time.

… [*where raised, intoxication must be taken into account when considering question one, but not when considering question two*].

Question One

The first question is — "Could [*the deceased's*] conduct, that is, the things [*he/she*] did or said, or both, have induced (that is, caused) [*the accused*] to lose [*his/her*] self-control?".

[Where applicable

The conduct or words of [*the deceased*], which allegedly induced the loss of self-control on the part of [*the accused*], need not have occurred immediately before the act causing death but may have occurred at any previous time. It may be a course of conduct over a period of time, even years, or may include a course of conduct over a period of time together with other conduct immediately before the act causing death.]

There must be a causal connection between the conduct of [*the deceased*] and the loss of self-control by [*the accused*]. In deciding whether there was such a connection, you must consider the gravity of the alleged provocation so far as [*the accused*] is concerned. There are relevant matters raised in this case by the evidence.

You must appreciate that conduct which might not be insulting or hurtful to one person may be extremely hurtful to another because of that person's age, sex, race, ethnic or cultural background, physical features, personal attributes, personal relationships or past history [*refer to the special characteristics of the accused raised by the evidence*].

You view the words or conduct of [*the deceased*] as a whole taking account of any history or conflict between [*the deceased*] and [*the accused*]. Particular acts or words considered separately may not be provocative. However, when considered in combination, or cumulatively, may be enough to cause [*the accused*] to lose [*his/her*] self-control.

That is quite different from a deliberate act of vengeance, hatred or revenge, and likewise quite different from a consideration of whether in the light of [*his/her*] conduct [*the deceased*] got what [*he/she*] deserved.

If you are satisfied beyond reasonable doubt that the answer to that question is "No", then the Crown has negatived provocation and providing you are satisfied beyond reasonable doubt as to all the elements of murder to which I have earlier referred, the appropriate verdict is "guilty of murder".

Question Two

If, however, the answer is "Yes", then you must turn to the second question, which is — "Could the conduct of [*the deceased*] have induced an ordinary person in the position of [*the accused*] to have so far lost self-control as to have formed an intent to kill, or inflict grievous bodily harm on [*the deceased*]?".

An "ordinary person" is simply one who has the minimum powers of self-control expected of an ordinary citizen who is sober, of the same age and level of maturity as [*the accused*].

When one speaks of the effect of provocation on an ordinary person in the position of [*the accused*], that phrase means an ordinary person who has been provoked to the same degree of severity and for the same reason as [*the accused*].

In the present case, this translates to a person with the minimum powers of self-control of an ordinary person, as described earlier [*refer to the special characteristics of the accused raised by the evidence as referred to above*].

This question requires you to take full account of the sting of the provocation actually experienced by [*the accused*], but eliminates from your consideration an extraordinary response by [*the accused*].

You should understand that when you are deciding this question you are considering the possible reaction of an ordinary person in the position of [*the accused*], not [*his/her*] probable reaction.

If the answer to this second question is "No", the Crown has negatived provocation and all the other elements of murder have been established beyond reasonable doubt, the appropriate verdict is "guilty of murder".

If the answer is "Yes", the Crown has failed to negative provocation and the appropriate verdict is "not guilty of murder but guilty of manslaughter".

[6-430] Notes — provocation before 13 June 2014

1. Provocation requires a reaction by the accused to the conduct of the deceased (including grossly insulting words or gestures) which occurs in his or her sight or hearing. The provocative incident must be one which directly involves the accused and the deceased, although the actual element of provocation may not be directed intentionally or specifically against the accused: *R v Quartly* (1986) 11 NSWLR 332 at 338; *R v Davis* (1998) 100 A Crim R 573.
2. Some apparently innocuous words and conduct on the part of the deceased in the presence of the accused could, when considered in the light of the whole history of their relationship (including matters not occurring in the presence of the accused) amount to provocation: *R v R* (1981) 28 SASR 321; *Moffa v The Queen* (1977) 138 CLR 601 at 616; *R v Peisley* (1990) 54 A Crim R 42.
3. Any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an assessment of the gravity of a particular wrongful act or insult: *Stingel v The Queen* (1990) 171 CLR 312 at 326. In *Green v The Queen* (1997) 191 CLR 334, the trial judge left provocation to the jury but erroneously excluded evidence of past sexual abuse of the accused which was relevant to the gravity of the provocation.
4. What the law is concerned with is whether the killing was done whilst the accused was in an emotional state which the jury is prepared to accept as a loss of self-control: *R v Chhay* (1994) 72 A Crim R 1. The loss of self-control may be due to fear, anger or resentment, but must be present at the time of the killing. Conduct giving rise to a sense of grievance or revenge will not suffice: *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 167; *R v Croft* [1981] 1 NSWLR 126 at 140. The conduct of the deceased may occur immediately before the act or omission causing death or at any previous time: s 23(2)(b) (repealed) *Crimes Act* 1900. There is

no requirement that the killing immediately follow upon the provocative act or conduct of the deceased. The loss of self-control can develop after a lengthy period of abuse, and without the necessity for a specific triggering incident: *R v Chhay*.

5. The ordinary person is a person of the same age and maturity as the accused subject only to the qualification that "the extent of the power of self-control of [the] hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused": *Stingel v The Queen* (1990) 171 CLR 312 at 327. Sexual preference, racial background and physical disability, while relevant to the assessment of the gravity of the conduct said to constitute provocation, are not to be imputed to the ordinary person: *Stingel v The Queen*; *Baraghith v The Queen* (1991) 54 A Crim R 240 at 327. The ordinary person is to be assumed to have been sober and unaffected by drugs: *R v Cooke* (1985) 16 A Crim R 304. An accused's depression is not taken into account for the purposes of the ordinary person: *Ziha v R* [2013] NSWCCA 27 at [78].
6. The meaning of the expression "an ordinary person" and "a person placed in the position of the accused" in s 23(2)(a) and (b) (repealed) *Crimes Act* were considered by the High Court in *Green v The Queen* (1997) 191 CLR 334.
7. As to continuance of provocation covering two incidents, see: *Masciantonio v The Queen* (1995) 183 CLR 58.

[6-440] Extreme provocation — applicable from 13 June 2014

The *Crimes Amendment (Provocation) Act* 2014 repealed s 23 *Crimes Act* 1900 and substituted what is described as "extreme provocation". The amendments do not apply to an accused on trial for a murder that was allegedly committed before the commencement of the Act: s 23(9). The amending Act commenced on 13 June 2014 (s 2; 2014 (354) LW 13.6.14).

These legislative changes were introduced following the Legislative Council's Select Committee on the Partial Defence of Provocation which "unanimously recommended retaining but significantly restricting the partial defence … to ensure that it could not be used in cases where the provocation claimed was infidelity, leaving a relationship or a non-violent sexual advance" (Second Reading Speech, *Hansard*, Legislative Council, 5 March 2014, p 27034).

Section 23(2) provides an act is done in response to extreme provocation if and only if:

(a) the accused acted in response to conduct of the deceased towards or affecting the accused; and

(b) the conduct of the deceased is a serious indictable offence (punishable by 5 years imprisonment or more); and

(c) the deceased's conduct caused the accused to lose self-control; and

(d) the deceased's conduct could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.

Section 23(2)(c) retains a loss of self-control as a central element of provocation. However, under s 23(2)(d), the loss of self-control is measured according to the objective test of the "ordinary person", and the previous test ("could have induced an ordinary person in the position of the accused …") has been removed.

Section 23(3) excludes conduct from being provocative if the conduct was a non-violent sexual advance to the accused, or the accused incited the conduct in order to provide an excuse to use violence against the deceased.

The provocative conduct does not need to occur immediately before the act causing death: s 23(4).

Section 23(5) excludes evidence of self-induced intoxication from being taken into account in determining whether the accused acted in response to extreme provocation. Self-induced intoxication could previously be relevant to whether the accused personally lost self-control, but the removal of "in the position of the accused" is said to make this irrelevant at all stages of the test (see Second Reading Speech, above, p 27036).

Section 23(7) makes clear that extreme provocation is an issue that the Crown must negative: "If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation".

[6-442] Suggested direction — extreme provocation — murder allegedly committed on or after 13 June 2014

The final issue which the Crown must establish in order to prove that [*the accused*] is guilty of murder is that [*the accused*] was not acting under what is known as "extreme provocation" when [*he/she*] killed [*the deceased*]. It is not for [*the accused*] to prove that [*he/she*] was acting under extreme provocation. The onus is on the Crown to prove beyond reasonable doubt that [*the accused's*] [*act/omission*] which caused death was not done in response to extreme provocation from [*the deceased*].

If the Crown satisfies you beyond reasonable doubt that all the other elements of murder have been established beyond reasonable doubt, and that [*the accused*] was not extremely provoked to do what [*he/she*] did, the appropriate verdict is "guilty of murder". But if the Crown fails to satisfy you beyond reasonable doubt that [*the accused*] was not extremely provoked, the appropriate verdict is "not guilty of murder" but "guilty" of the less serious offence of manslaughter. In other words, the Crown must disprove beyond reasonable doubt that [*the accused*] was extremely provoked.

In order for you to decide this issue I need to explain further the law of extreme provocation. It is your task to apply this law to the evidence in the case. An [*act/omission*] causing death is an act [*done/omitted*] in response to extreme provocation if:

1. The act of [*the accused*] that caused death was [*done/omitted*] in response to conduct of [*the deceased*] towards or affecting [*the accused*]; and
2. The conduct of [*the deceased*] was a serious indictable offence; and
3. The conduct of [*the deceased*] caused [*the accused*] to lose self-control; and
4. The conduct of [*the deceased*] could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on [*the deceased*].

I will explain each of these components or elements of extreme provocation in turn.

1. The act of [the accused] was done in response to conduct of [the deceased] towards or affecting [him/her]

The act of [*the accused*] that caused death must be [*done/omitted*] in response to conduct of [*the deceased*] which is directed towards or affecting [*the accused*]. [*The accused*] says that [*he/she*] acted in response to conduct of [*the deceased*] towards or affecting [*him/her*].

[*Refer to the evidence relied upon by the parties on this issue.*]

If you are satisfied beyond reasonable doubt that [*the accused*] did not act in response to conduct of [*the deceased*] the Crown has disproved provocation and providing you are satisfied beyond reasonable doubt as to all the elements of murder to which I have earlier referred, the appropriate verdict is "guilty of murder". If, however, you are not satisfied that the Crown has done so you must consider the next element of extreme provocation.

2. The conduct of [the deceased] was a serious indictable offence

The conduct of [*the deceased*] must have amounted to a serious offence. [*The accused*] says that [*the deceased's*] conduct constituted the offence of [*specify offence*]. I direct you as a matter of law that the offence of [*specify offence*] is a "serious offence".

The issue for you to decide is whether the Crown has proved beyond reasonable doubt that the conduct of [*the deceased*] did not amount to an offence of [*description of crime*]. In deciding this issue you must have careful regard to the ingredients of the offence of [*description of crime*].

The crime of [*description of crime*] comprises the following ingredients:

[*Set out the ingredients of the serious indictable offence.*

If this issue is in dispute it will be necessary for the judge to explain each ingredient and the competing submissions of the parties about the evidence for or against each ingredient of the serious indictable offence.]

If the Crown proves to you beyond reasonable doubt that any or all of the ingredients of [*description of crime*] did not occur on the evidence then the Crown will have proved the conduct of [*the deceased*] did not constitute a serious offence.

If you are satisfied that the Crown has proved beyond reasonable doubt that the conduct of [*the deceased*] did not constitute the serious offence of [*description of crime*] then the Crown will have disproved extreme provocation and providing you are satisfied beyond reasonable doubt as to all the elements of murder to which I have earlier referred, the appropriate verdict is "guilty of murder". But if you take the view that the Crown has not done so then you must consider the next element of extreme provocation.

3. The conduct of [the deceased] caused [the accused] to lose self-control

The next issue is whether [*the deceased's*] conduct caused [*the accused*] to lose [*his/her*] self-control.

[*The following may be added from scenarios in s 23 but only where relevant:*

Conduct of [*the deceased*] cannot constitute extreme provocation if the conduct was only a non-violent sexual advance to [*the accused*].

Conduct of [*the deceased*] cannot constitute extreme provocation if [*the accused*] incited the conduct in order to provide an excuse to use violence against [*the deceased*].]

There must be a connection between the conduct of [*the deceased*] and the loss of self-control by [*the accused*]. In deciding whether there is such a connection, you can take into account all the surrounding circumstances and the conduct comprising the serious offence committed by [*the deceased*].

What the law is concerned with here is whether the act causing death was done whilst [*the accused*] was in an emotional state which you are prepared to accept as a loss of self-control. That is quite different from a deliberate act of vengeance, hatred or revenge, and quite different from a consideration of whether in the light of [*his/her*] conduct [*the deceased*] got what [*he/she*] deserved.

In considering whether [*the accused*] lost self-control, you may take into account [*his/her*] personal attributes. You must appreciate that conduct which might not be insulting or hurtful to one person may be extremely hurtful to another because of that person's age, sex, race, ethnic or cultural background, physical features, personal attributes, personal relationships or past history.

[*Refer to the evidence of special characteristics of the accused raised by the evidence.*]

[*Where the extreme provocation is based on a course of conduct on the part of the deceased or cumulative provocation the following may be added:*

The conduct of [*the deceased*], which allegedly causes the loss of self-control on the part of [*the accused*], need not have occurred immediately before the act causing death but may have occurred at any previous time. It may be a course of conduct over a period of time, even years, or may include a course of conduct over a period of time together with other conduct immediately before the act causing death.

You view the conduct of [*the deceased*] as a whole taking account of any history or conflict between [*the deceased*] and [*the accused*]. Conduct of [*the deceased*] considered separately, or in isolation, may not be provocative. However, when considered together or in combination, or cumulatively, it may be enough to cause [*the accused*] to lose [*his/her*] self-control.]

If you are satisfied the Crown has proved beyond reasonable doubt that the conduct of [*the deceased*] did not cause [*the accused*] to lose self-control then the Crown will have disproved provocation and providing you are satisfied beyond reasonable doubt as to all the elements of murder to which I have earlier referred, the appropriate verdict is "guilty of murder". But if you take the view that the Crown has not done so then you must consider the next element of extreme provocation.

4. The conduct of [the deceased] could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on [the deceased]

The final issue for you to decide is: "Could the conduct of [*the deceased*] have caused an ordinary person to have so far lost self-control as to have formed an intent to kill or inflict grievous bodily harm on [*the deceased*]?"

An "ordinary person" is simply one who has the minimum powers of self-control expected of an ordinary citizen who is sober, of the same age and level of maturity as [*the accused*].

You must eliminate or remove from your consideration the other personal attributes of [*the accused*] and any extraordinary response to [*the deceased's*] conduct by [*the accused*]. You must decide whether an ordinary person could have lost self-control as a result of [*the deceased's*] conduct such as to form an intention to kill or inflict grievous bodily harm on [*the deceased*].

You should understand that when you are deciding this question you are considering the possible reaction of an ordinary person, not [*his/her*] probable reaction.

You must put aside any particular predisposition you yourself might have to the conduct of [*the deceased*]. This is a purely objective question: "Could an ordinary person have lost their self-control to the extent of intending to kill or inflict grievous bodily harm on [*the deceased*]?"

If the Crown satisfies you beyond reasonable doubt that the conduct of [*the deceased*] could not have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on [*the deceased*] then the Crown will have disproved provocation and if all the other elements of murder have been established beyond reasonable doubt, the appropriate verdict is "guilty of murder".

If, however, the Crown has failed to do so it has also failed to disprove provocation and the appropriate verdict is "not guilty of murder but guilty of manslaughter".

[**If applicable — disregard [*the accused's*] self-induced intoxication**

In deciding the issue of extreme provocation you are to disregard [*the accused's*] intoxication. The law provides that evidence of the self-induced intoxication of [*the accused*] cannot be taken into account in respect of any of these elements of extreme provocation. This means that when you are deciding whether the Crown has proved beyond reasonable doubt that [*the accused*] was not extremely provoked you must completely disregard the intoxication of [*the accused*].]

[*To explain the issue properly it may be helpful to set out the evidence concerning [the accused's] intoxication.*]

[6-444] Notes — extreme provocation

1. Section 23(2)(c) *Crimes Act* 1900 retains a loss of self-control as a central element of provocation. However, under s 23(2)(d), the loss of self-control is measured according to the objective test of the "ordinary person". The suggested direction defines the "ordinary person" based on the approach of the High Court in *Stingel v The Queen* (1990) 171 CLR 312 at 327. The ordinary person is one who has the minimum powers of self-control expected of an ordinary citizen who is sober, of the same age and level of maturity as the accused. Johnson J said, in obiter dictum in *R v Turnbull (No 25)* [2016] NSWSC 831 at [90], that there "is force in the view" that an accused's age (in the sense of immaturity) remains a part of the ordinary person test.
2. Section 23(2)(c) retains a loss of self-control as a central element of provocation. However, under s 23(2)(d), the loss of self-control is measured according to

the objective test of the "ordinary person" but has removed the expression "in the position of the accused". Johnson J noted in *R v Turnbull (No 25)* in obiter dictum at [88]: "It is clear that the removal of the words 'in the position of the accused', as part of the 2014 amendments to s 23, operate to narrow significantly the 'ordinary person' test for the purpose of extreme provocation". It was held at [90]: "The attributes of the Accused, which could be taken into account in the past by operation of the words 'in the position of the accused', should now be placed to one side".

3. Section 23(3) excludes conduct from being provocative if the conduct was a non-violent sexual advance to the accused, or the accused incited the conduct in order to provide an excuse to use violence against the deceased. The provocative conduct does not need to occur immediately before the act causing death: s 23(4).

4. Section 23(5) excludes evidence of self-induced intoxication from being taken into account in determining whether the accused acted in response to extreme provocation. Self-induced intoxication could previously be relevant to whether the accused personally lost self-control, but the removal of "in the position of the accused" is said to make this irrelevant at all stages of the test (see **[6-440]**, Second Reading Speech, Crimes Amendment (Provocation) Bill 2014 at p 27036).

5. Section 23(7) makes clear that extreme provocation is an issue that the Crown must negative: "If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation".

[The next page is 1297]

Self-defence

[6-450] Introduction

Last reviewed: September 2023

Part 11 *Crimes Act* 1900 contains a statutory form of self-defence. It was inserted by the *Crimes Amendment (Self-defence) Act* 2001. The amending Act applies to offences committed before or after its commencement, other than offences in which proceedings were instituted before commencement: s 423 *Crimes Act*; see also *R v Taylor* [2002] NSWSC 610.

The declared purposes of the amending Act were to "codify" the law with respect to self-defence and to repeal the *Home Invasion (Occupants Protection) Act* 1998 and the *Workplace (Occupants Protection) Act* 2001.

Section 418(1) provides that a person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence. Section 418(2) sets out the circumstances where self-defence is available. The questions to be asked by the jury under s 418(2) are succinctly set out in *R v Katarzynski* [2002] NSWSC 613 at [22]–[23] which was approved in *Abdallah v R* [2016] NSWCCA 34 at [61]. Section 419 provides that the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

[6-452] Raising/leaving self-defence

Last reviewed: September 2023

In order for self-defence to be raised or left to the jury there must be evidence capable of supporting a reasonable doubt in the mind of the tribunal of fact as to whether the prosecution has excluded self-defence: *Colosimo v DPP* [2006] NSWCA 293 at [19]. It is not essential that there be evidence from the accused as to the accused's beliefs and perceptions: *Colosimo v DPP* at [19]; but it must be raised fairly on the evidence: *Mencarious v R* [2008] NSWCCA 237 at [61], [78], [90]; *Douglas v R* [2005] NSWCCA 419 at [99]–[101]. A tactical decision not to raise self-defence does not of itself foreclose the obligation of the trial judge, in appropriate circumstances, to leave the issue to the jury: *Flanagan v R* [2013] NSWCCA 320 at [76].

[6-455] Essential components of self-defence direction

Last reviewed: September 2023

A direction for self-defence in cases other than murder must contain the following essential components:

1. The law recognises the right of a person to act in self-defence from an attack or threatened attack.
2. It is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that the accused's act was not done in self-defence.

3. The Crown may do this by proving beyond reasonable doubt either:
   (a) the accused did not believe at the time of the act that it was necessary to do what they did in order to defend themselves; *or*
   (b) the accused's act was not a reasonable response in the circumstances as they perceived them.
4. In determining the issue of whether the accused personally believed that their conduct was necessary for self-defence, the jury must consider the circumstances as the accused perceived them to be at the time.
5. If the jury is not satisfied beyond reasonable doubt that the accused did not personally believe that their conduct was necessary for self-defence, it must then decide whether the Crown has proved beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as perceived by them. If the Crown fails to do so it will have failed to eliminate self-defence.
6. If the Crown fails to prove either numbers 3(a) or (b), it will have failed to eliminate self-defence. If it proves one or the other, it will have succeeded.

A direction for self-defence in cases of murder must contain all the above numbers 1–5 essential components. The difference is that they are applied to the facts in a sequential way to accommodate the offence of manslaughter by excessive self-defence.

1. The jury is instructed as to numbers 1–2 above. It must first specifically consider self-defence on the charge of murder. The jury must be instructed in terms of number 3(a) above — that if the Crown has not proved beyond reasonable doubt that the accused did not believe that it was necessary to do what they did then the appropriate verdict is one of "not guilty of murder".
2. Number 3(b) above is then considered, that is, whether the accused's act was not a reasonable response in the circumstances as they perceived them.
3. If the jury finds that the Crown has failed to prove beyond reasonable doubt that the accused's act was not a reasonable response in the circumstances as they perceived them, the Crown will have completely failed to eliminate self-defence. In that situation the jury is instructed to also return a verdict of "not guilty of manslaughter".
4. However a verdict "not guilty of murder but guilty of manslaughter" can be returned if the Crown prove beyond reasonable doubt that the conduct of the accused was not a reasonable response in the circumstances as the accused perceived them because the particular use of force by the accused was excessive or otherwise unreasonable. Such a verdict can be returned providing the jury is satisfied beyond reasonable doubt of the other elements.

   See also the discussion of *Hadchiti v The Queen* (2016) 93 NSWLR 671 and *Moore v R* [2016] NSWCCA 185 at **[3-603] Notes**. Both cases were concerned with appropriate directions for self-defence in question trails.

[6-460] Suggested direction self defence — cases other than murder

Last reviewed: September 2023

I come now to what has been referred to during the course of the trial as "self-defence".

As you might expect, the law recognises the right of a person to act in self-defence from an attack or threatened attack [*even to the point of killing*].

This right arises where two circumstances exist. The first is that the person believes that their … [*specify act, for example, stabbing*] was necessary in order to defend themselves. The second is that what [*the accused*] did was a reasonable response in the circumstances as they perceived them.

Although "self-defence" is referred to as a defence, it is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that [*the accused's*] … [*specify act, for example, stabbing*] was not done by [*the accused*] in self-defence. It may do this by proving beyond reasonable doubt either:

1. that [*the accused*] did not believe at the time of the [*specify act, for example, stabbing*] that it was necessary to do what they did in order to defend themselves, *or*
2. the [*specify conduct, for example, stabbing*] by [*the accused*] was not a reasonable response in the circumstances as they perceived them.

For the Crown to eliminate self-defence as an issue, it must prove beyond reasonable doubt one or the other of these matters. It does not have to prove both of them. If you decide that the Crown has failed to prove both of them then the appropriate verdict is one of "not guilty".

As to whether [*the accused*] may have believed that their conduct was necessary for self-defence, you must consider the circumstances as [*the accused*] perceived them to be at the time of that conduct. You must take into consideration any extraordinary attribute of [*the accused*] which bears on their perception of those circumstances and which had a bearing on any such belief they may have formed. … [*deal with evidence as to intoxication, mental state etc of the accused*].

It is their perception which must be considered and not what someone else might have perceived. The matter should not be looked at with the benefit of hindsight, but in the realisation that calm reflection cannot always be expected in a situation such as [*the accused*] found themselves to be in. In hindsight, it might be thought that the accused was mistaken in believing that it was necessary to do what they did but that does not matter.

If the Crown establishes beyond reasonable doubt that [*the accused*] did not personally believe that their conduct was necessary for their defence, then the Crown will have succeeded in eliminating self-defence.

If the Crown has failed to prove beyond reasonable doubt the first aspect, then you should consider whether, the Crown has nevertheless proved beyond reasonable doubt that the conduct of [*the accused*] was not a reasonable response to the circumstances as perceived by [*the accused*].

The issue for you to consider is, having regard to the circumstances as they were perceived by [*the accused*], whether their response was unreasonable or excessive. Whether it was or was not a reasonable one in those circumstances is a matter for your judgment. It is not a matter of whether [*the accused*] thought their response was reasonable; it is a matter for you to consider whether it was or was not. In considering

this question you should consider all aspects of [*the accused's*] response including the nature, degree and means by which, force was used by them. The critical question is: has the Crown proved beyond reasonable doubt that it was not a reasonable response?

The Crown will only succeed in relation to this second part of self-defence if it satisfies you beyond reasonable doubt that the conduct of [*the accused*] was not a reasonable response in the circumstances as [*the accused*] perceived them to be at the time of the conduct in question.

… [*It may be necessary to give directions on such matters as arise on the evidence relating to, for example, the imminence of a threatened attack or the availability of other remedies to the accused, such as retreat. It should, however, be made emphatically clear to the jury that it is the accused's perception of the circumstances which must be considered.*]

To summarise, there are two parts to self-defence and in relation to both of them the Crown bears the burden of proof. It is not for the accused to prove that they were acting in self-defence. It is for the Crown to prove that they were not. This involves you considering two questions:

1. Has the Crown proved beyond reasonable doubt that the accused did not believe at the time of the [*specify act, for example, stabbing*] that it was necessary to do what they did in order to defend themselves?
2. Has the Crown proved beyond reasonable doubt that the [*specify conduct, for example, stabbing*] by [*the accused*] was not a reasonable response in the circumstances as they perceived them?

If the answer to one or both of those questions is "Yes", then the Crown will have succeeded in proving that the accused was not acting in self-defence.

If the answer to both of those questions is "No", then the Crown will have failed to eliminate self-defence and the accused must be found not guilty.

[6-465] Suggested direction self defence — murder cases

Last reviewed: September 2023

I come now to what has been referred to during the course of the trial as "self-defence".

As you might expect, the law recognises the right of a person to act in self-defence from an attack or threatened attack even to the point of killing.

This right arises where two circumstances exist. The first is that the person believes that their … [*specify act, for example, stabbing*] was necessary in order to defend themselves. The second is that what [*the accused*] did was a reasonable response in the circumstances as they perceived them.

Although "self-defence" is referred to as a defence, on a charge of murder it is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that [*the accused's*] … [*specify act, for example, stabbing*] was not done by [*the accused*] in

self-defence. It may do this by proving beyond reasonable doubt that [*the accused*] did not believe at the time of the [*specify act, for example, stabbing*] that it was necessary to do what they did in order to defend themselves.

If you decide that the Crown has failed to prove that the accused did not have such a belief, then the appropriate verdict is one of "not guilty of murder". If that is the case it will be necessary for you to consider manslaughter. I shall return to that.

As to whether [*the accused*] may have personally believed that their conduct was necessary for self-defence, you must consider the circumstances as [*the accused*] perceived them to be at the time of that conduct. You must take into consideration any extraordinary attribute of [*the accused*] which bears on their perception of those circumstances and which had a bearing on any such belief they may have formed … [*deal with evidence as to intoxication, mental state, etc, of the accused*].

It is their perception which must be considered and not what someone else might have perceived. The matter should not be looked at with the benefit of hindsight, but in the realisation that calm reflection cannot always be expected in a situation such as [*the accused*] found themselves to be in. In hindsight, it might be thought that the accused was mistaken in believing that it was necessary to do what they did but that does not matter.

If the Crown establishes beyond reasonable doubt that [*the accused*] did not personally believe that their conduct was necessary for their defence, then the Crown will have succeeded in eliminating self-defence. Provided all of the other essential elements have been proved, you should find the accused "guilty of murder".

On the other hand, if you are not satisfied that the Crown has proved beyond reasonable doubt the first aspect of self-defence you must find the accused "not guilty of murder". You will then have to consider the second aspect of self-defence; namely, whether the Crown has satisfied you beyond reasonable doubt that the conduct of [*the accused*] was not a reasonable response to the circumstances as perceived by [*the accused*].

The issue for you to consider is, having regard to the circumstances as they were perceived by [*the accused*], whether their response was unreasonable or excessive. Whether it was or was not a reasonable one in those circumstances is a matter for your judgment. It is not a matter of whether [*the accused*] thought their response was reasonable; it is a matter for you to consider whether it was or was not. In considering this question you should consider all aspects of [*the accused's*] response including the nature, degree and means by which force was used by them. The critical question is: has the Crown proved beyond reasonable doubt that it was not a reasonable response?

The Crown will only succeed if it satisfies you beyond reasonable doubt that the conduct of [*the accused*] was not a reasonable response in the circumstances as [*the accused*] perceived them to be at the time of the conduct in question. If you are satisfied of that, and provided you are satisfied beyond reasonable doubt of the other elements, your verdict should be "not guilty of murder but guilty of manslaughter".

… [*It may still be necessary to give directions on such matters as arise on the evidence relating to, for example, the imminence of a threatened attack or the availability of other remedies to the accused, such as retreat. It should, however, be made emphatically clear to the jury that it is the accused's perception of the circumstances which must be considered.*]

To summarise, there are two parts to self-defence and in relation to both of them the Crown bears the burden of proof. It is not for the accused to prove that they were acting in self-defence. It is for the Crown to prove that they were not. This involves two questions:

1. Has the Crown proved beyond reasonable doubt that the accused did not believe at the time of the [*specify act, for example, stabbing*] that it was necessary to do what they did in order to defend themselves?
2. Has the Crown proved beyond reasonable doubt that the [s*pecify conduct, for example, stabbing*] by [*the accused*] was not a reasonable response in the circumstances as they perceived them?

If the answer to the first question is "Yes", then, provided all of the other elements have been proved, your verdict should be "guilty of murder".

If the answer to the first question is "No", but the answer to the second question is "Yes", provided all of the other elements have been proved, your verdict should be "not guilty of murder but guilty of manslaughter".

If the answers to the first and second questions are both "No", then your verdicts should be "not guilty of murder" and "not guilty of manslaughter".

[6-470] Suggested directions where intoxication is raised

Last reviewed: September 2023

The jury must be directed that they must take into account the accused's self induced intoxication when considering whether the accused might have believed that it was necessary to act as they did in self-defence and when considering the circumstances as the accused perceived them: *R v Katarzynski* [2002] NSWSC 613 at [28]. However, the accused's self induced intoxication is not taken into account when assessing whether the accused's response to those circumstances was reasonable: *R v Katarzynski* at [28].

The following directions at **[6-480]** and **[6-490]** relating intoxication to self-defence may be appropriately adapted to the case. In a murder case, the adaptation should maintain the distinction in the relevance of the first limb as to whether the accused is guilty of murder and of the second limb as to whether the accused is guilty of manslaughter.

[6-480] Suggested written direction — intoxication

Last reviewed: September 2023

[*The accused's*] intoxicated state —

1. must be taken into account in determining whether [the accused] believed that their conduct was necessary to defend themselves;
2. must be taken into account in determining the circumstances as [*the accused*] perceived them to be;
3. must not be taken into account in determining whether their response to those circumstances was reasonable.

[6-490] Suggested oral direction — intoxication

Last reviewed: September 2023

You should fully understand that the law provides (in substance) that a person who genuinely thought that they were in danger, even if they were wrong about that perception because … [*specify, for example, their perception was affected by alcohol*], may still be regarded as having acted in lawful self-defence provided that the person's response was reasonable, based on the circumstances as they perceived them to be.

You need to look at the case through the eyes of [*the accused*] in its context, [*taking into account their intoxicated state*] and by reference to the actual situation in which they found themselves, and as they perceived it to be.

So you determine what [*the accused*] [*in their intoxicated state*] actually perceived was the danger they faced, and then determine whether what they did in response to that danger was reasonable. In determining whether what they did was reasonable, you stand back and consider the response from an objective viewpoint, disregarding any effects of alcohol upon them.

You are considering what would have been a reasonable response by a sober person in the circumstances as [*the accused*] drunkenly perceived them.

[The next page is 1311]

Substantial impairment because of mental health impairment or cognitive impairment

[6-550] Introduction

Section 23A *Crimes Act* 1900 provides a partial defence to murder of substantial impairment because of mental health impairment or cognitive impairment. It was previously termed substantial impairment by abnormality of mind but was amended with effect from 27 March 2021 by the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

There is no transitional provision in the legislation about the homicides to which the new version of the partial defence applies. There is authority, however, that it does not apply to proceedings commenced before the legislation did: see *R v Papanicolaou (No 4)* [2021] NSWSC 1698 at [36]–[46]. There is also authority that it does not apply to homicides alleged to have been committed before the commencement date of the legislation: see *R v Tran* [2022] NSWSC 1377 at [10]–[16].

"Mental health impairment" and "cognitive impairment" are defined in ss 4C and 23A(8) respectively of the *Crimes Act*. They are in identical terms to the definitions in ss 4 and 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act*.

Section 23A makes explicit in the opening words of subs (1) ("A person who would otherwise be guilty of murder …") that the partial defence only arises where all other issues on a charge of murder, such as self-defence and provocation, have been resolved in favour of the Crown. This includes a defence of mental health impairment or cognitive impairment or both under s 28 of the *Mental Health and Cognitive Impairment Forensic Provisions Act*: *R v Jawid* [2022] NSWSC 788 at [106] (Davies J).

Section 23A(3) provides that the effects of "self-induced intoxication", as defined in s 428A *Crimes Act*, are to be disregarded for the purpose of determining whether the accused, by reason of this section, is not liable to be convicted of murder. *R v Gosling* [2002] NSWCCA 351 at [25] and *Zaro v R* [2009] NSWCCA 219 at [34]–[37] are examples where a judge was required to give a direction that self-induced intoxication at the time of the offence was to be disregarded by the jury.

It is not enough that the accused suffers from a "substantial impairment because of mental health or cognitive impairment". Section 23A(1)(b) expressly requires that the impairment must have been so substantial as to warrant liability for murder being reduced to manslaughter. Section 23A(2) provides that opinion evidence on this issue is inadmissible.

The burden of proof is upon the accused in both provisions, and in both cases the Crown is entitled to raise mental illness if the accused raises substantial impairment, to be proved on the balance of probabilities, and vice versa: *R v Ayoub* [1984] 2 NSWLR 511; *R v Jawid* at [91]–[92].

Section 151 *Criminal Procedure Act* 1986 requires notice to be given of the intention to raise a defence of substantial impairment and also deals with the stage at which evidence in rebuttal may be given in the Crown's case. This section refers only to "substantial mental impairment" but it is defined in s 151(6) to mean a contention that

the accused is not liable to be convicted of murder by virtue of s 23A of the *Crimes Act*. Accordingly, it is a reference to substantial impairment because of mental health impairment or cognitive impairment.

[6-570] Suggested written direction

It is noted that in contrast to the defence in s 28 of the *Mental Health and Cognitive Impairment Forensic Provisions Act*, the partial defence in s 23A of the *Crimes Act* is limited to either mental health impairment or cognitive impairment and not "both".

The following suggested written direction is for the more common case in which a mental health impairment is in issue. It may be readily adapted in the event the case concerns a cognitive impairment.

The partial defence of "substantial impairment because of a mental health impairment" will succeed if the accused has established more probably than not, both that:

1. at the time of the act causing death, [*his/her*] capacity either to:
   (i) understand events, or
   (ii) judge whether [*his/her*] actions were right or wrong, or
   (iii) control [*himself/herself*]

   was substantially impaired by a mental health impairment, and
2. the impairment was so substantial as to warrant [*his/her*] liability for murder being reduced to manslaughter.

As to the first matter, the issue is whether the accused's capacity to function in one or other of the three ways was substantially impaired, not whether [*he/she*] simply chose not to function in that way.

A person has a mental health impairment if each of the following three matters have been proved:

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory; and

(b) the disturbance would be regarded as significant for clinical diagnostic purposes; and

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

[Delete unnecessary elements of (a) and (c).]

[Where appropriate: A person does not have a mental health impairment if the person has an impairment caused solely by either:

(a) the temporary effect of ingesting a substance, or

(b) a substance use disorder.

"Impaired" has its ordinary meaning and requires proof of a capacity less or lower than the normal range.

"Substantial" also has its ordinary meaning of being "of substance" and "not slight or insignificant".

As to the second matter, the issue as to whether an impairment was so substantial as to warrant liability for murder being reduced to manslaughter calls for a value judgment applying community standards.**]**

[Where appropriate s 23A(3) — self-induced intoxication:

The effect of self-induced intoxication from drugs and/or alcohol at the time of the act(s) causing the death are to be disregarded in the assessment of both of these matters at 1 and 2 above.**]**

If the accused has not established the partial defence of substantial impairment because of mental health impairment, the appropriate verdict is one of "guilty of murder".

If the accused has established the partial defence of substantial impairment by abnormality of mind, you must find [*him/her*] "not guilty of murder but guilty of manslaughter".**]**

[6-580] Suggested oral direction

The following suggested direction is directed to a case involving mental health impairment but the term cognitive impairment and its meaning may be readily substituted.

I next come to what has been shortly referred to during the trial as "substantial impairment". This only arises for your consideration if you are satisfied beyond reasonable doubt that the Crown has established all of the essential ingredients of the crime of murder **[where appropriate:** including negating (disproving) the issue of self defence and/or provocation and/or that you are not satisfied on the balance of probabilities the accused is not criminally responsible because of a mental health impairment, a cognitive impairment, or both**]**. If that is the case, you next have to come to this question of substantial impairment.

The law provides that a person who would otherwise be guilty of murder is not to be convicted of that offence, but is to be convicted of the offence of manslaughter, if at the time of the act causing the death concerned [*his/her*] capacity either to understand events, or to judge whether [*his/her*] actions were right or wrong, or to control [*himself/herself*], was substantially impaired because of a mental health impairment; and furthermore, that that impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

It is called a "defence to murder" because it is for the accused to raise it and to prove it. To do so, however, [*he/she*] is not put to the strict standard of proof beyond reasonable doubt which is required of the Crown. The standard of proof on the accused is on the balance of probabilities. This means that if, at the end of your deliberations, you are of the view that it is more likely than not that what the accused claims in respect of this defence is so, then [*he/she*] has succeeded. It is called a "partial defence" because, if it does succeed, then the appropriate verdict is "not guilty of murder but guilty of manslaughter".

[Where appropriate, add:

Rationale

Before turning to a more detailed discussion of the ingredients of this partial defence, I should first briefly explain the reasons why Parliament has provided for it. Persons

charged with committing a crime, if convicted, are to be punished for it. One of the most important factors in determining what punishment should be imposed for the crime of which he or she is convicted is whether there are matters in mitigation which would serve to reduce the extent of the blame which should attach to that crime.

Although both involve the death of a human being, the crime of murder is a more serious crime than the crime of manslaughter, and hence manslaughter is punished less severely than murder. This is so for a number of reasons, one of which is that the culpability of a person who commits the crime of manslaughter is less than that of a person who commits the crime of murder.

A person who, because of a mental health impairment has an impaired capacity either to understand events; to judge whether his or her actions were right or wrong; or to control himself or herself, is less responsible, according to the standards prevailing in our community, than a person who has full capacity in those respects.

With reference to the capacity to understand events, it is important that you should consider the accused's perception of events. These include [*his/her*] perception of physical acts and matters, the surrounding circumstances, what [*he/she*] was doing and its effects.

Accordingly, Parliament has provided for this defence which requires not only that the accused prove that [*his/her*] capacity was so impaired, but also requires that you, as the jury representing the community and applying the standards which you regard as current in the community, are satisfied that the impairment was so substantial that the liability of the accused to punishment should be reduced from that which would follow from a conviction of murder, to that which would follow from a conviction of manslaughter. Because the onus is on the accused in respect of these matters, as an exception to the general rule that the onus of proof is on the Crown, the standard of proof is the lesser standard of "on the balance of probabilities" rather than the higher standard of "proof beyond reasonable doubt" required of the Crown.**]**

Substantial impairment

Turning now to what is involved in this partial defence, there two matters which the accused must prove. The first matter is that at the time of the … [*specify act, for example, stabbing, shooting etc*] causing the death charged, [*his/her*] capacity either to understand events, or to judge whether [*his/her*] actions were right or wrong or to control [*himself/herself*] was substantially impaired because of a mental health impairment.

A person has a mental health impairment if each of the following three matters have been proved:

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory; and

(b) the disturbance would be regarded as significant for clinical diagnostic purposes; and

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

[*It will often not be necessary to refer to every aspect of (a) and (c); only to those which have been specifically raised by the evidence.*]

[*Discuss each of these three matters in turn by referring to the evidence and the submissions of the parties.*]

[Where appropriate: A person does not have a mental health impairment if the person has an impairment caused solely by either:

(a) the temporary effect of ingesting a substance, or

(b) a substance use disorder.

[*Discuss either or both matters by reference to the evidence and the submissions of the parties.*]**]**.

"Impaired" has its ordinary meaning and requires proof of a capacity less or lower than the normal range.

"Substantial" also has its ordinary meaning of being "of substance" and "not slight or insignificant".

In determining whether the accused has established that it is more likely than not that at the time of the act [*specify*] [*his/her*] capacity to understand events, to judge whether [*his/her*] actions were right or wrong, or to control [*him/herself*] was substantially impaired by a mental health impairment, you will need to carefully consider the evidence of the psychiatrists (or other expert witnesses). These are areas in which psychiatrists … [*etc, specify*] have particular expertise and experience.

You are not bound, however, to accept their evidence. You are entitled to act on other evidence in the case if you think that there is other evidence which conflicts with or undermines the basis upon which the psychiatrists expressed their opinions.

On the other hand, you would obviously pay careful and close attention to what the opinion evidence is as to these matters because of the experience and expertise which these witnesses have in this field.

You would only decline to act on the evidence of the psychiatrists [*and psychologists*] if you think that there is other evidence which outweighs the psychiatric evidence, or if you think that the facts differ from those on which the psychiatrists based their opinions, or if you think that the reasons expressed by the psychiatrists for their opinions (even having regard to their expertise) do not support their conclusion … [*a different direction would need to be given if, as often happens, the psychiatric or psychological evidence reaches different conclusions*].

Substantial impairment such as to warrant liability for murder being reduced to manslaughter

The second matter which the accused must prove is whether the substantial impairment relied upon by the accused was so substantial as to warrant [his/her] liability for murder being reduced to manslaughter.

This will only arise for consideration if the accused has satisfied you as to the first matter that there was a substantial impairment as I have described.

In deciding this second matter you must apply the standards which you regard as prevailing in our community (bearing in mind that manslaughter is regarded as a less serious crime than murder, and that the community places less blame and

condemnation upon a person guilty of manslaughter than of murder). In answering this question, you should approach the matter in a broad common sense way, applying (as I have said) the standards of the community which you are here to represent.

The question you should ask yourself is — "Has the accused satisfied you in the circumstances of this case that any impairment to [*his/her*] capacity (if you find that it is likely to have existed) was such that [he/she] should not be condemned or blamed as a murderer, and that rather, [*he/she*] should be treated as having been guilty of manslaughter?".

[Where appropriate s 23A(3) — self-induced intoxication:

The effect of self-induced intoxication from drugs and/or alcohol at the time of the act(s) causing the death are to be disregarded in the assessment of both matters that the accused is required to prove. You must consider both of them on the assumption that the accused was not affected by intoxication from drugs and/or alcohol.**]**

To summarise then, if, on the one hand, you have been satisfied by the Crown beyond reasonable doubt of all of the necessary matters which it has to establish in order to justify a conviction of murder, and also that the accused, on the other hand, has satisfied you that it is more likely than not that this partial defence is made out, the appropriate verdict is "not guilty of murder but guilty of manslaughter".

If, however, you have been satisfied by the Crown beyond reasonable doubt of all that it must prove to justify a conviction for murder, but the accused has failed to satisfy you that it is more likely than not that this partial defence has been made out, the appropriate verdict is one of "guilty of murder".

[The next page is 1401]

Summing-up format

para

Summing-up format

Suggested outline of summing-up (for use as an aide memoire) ..... [7-000]
Suggested direction — summing-up (commencement) ..... [7-020]
Suggested direction — final directions ..... [7-030]
Notes .....[7-040]

[The next page is 1405]

Summing-up format

[7-000] Suggested outline of summing-up

Last reviewed: September 2023

Prior to final addresses, it is prudent for the judge to raise with counsel, in the absence of the jury, the specific legal issues which in their submissions have arisen in the trial and which need to be the subject of specific reference in the summing-up. The task of drafting the summing-up is the responsibility of the trial judge. It cannot be delegated to the parties: *Hamilton (a pseudonym) v R* [2020] NSWCCA 80 at [83]–[84]; [97]. Of course, the trial judge is entitled to have the detailed assistance of the parties with regard to correctly explaining to the jury the law, the evidence, and the matters in dispute.

The following summing-up format is suggested purely as a guide and is not intended to be exhaustive:

1. Burden and standard of proof.
2. Where there is more than one count, each count is to be considered separately.
3. Where there is more than one defendant, each case is to be considered separately.
4. Legal elements of each count (a direction of law). It is not the function of a trial judge to expound to the jury the principles of law going beyond those which the jurors need to understand to resolve the issues that arise for decisions in the case: *The Queen v Chai* [2002] HCA 12. For example, in sexual assault cases it is unnecessary and unhelpful to direct the jury upon elements of consent not relevant to the issues in the case: *R v Mueller* (2005) 62 NSWLR 476 at [4] and [42]. Consideration needs to be given to any alternative verdicts: see **Alternative verdicts and alternative counts** at **[2-210]**.
5. It is generally not good practice to read legislation to a jury: *Pengilley v R* [2006] NSWCCA 163 at [41]; *R v Micalizzi* [2004] NSWCCA 406 at [36]. Where it is necessary to refer to a legal principle derived from statute, it is the effect of the provision, so far as it is relevant to the issue before the jury, that should be conveyed.
6. Any general matters of law which require direction — for assistance in this regard, reference might be conveniently made to the chapters in the Bench Book under the various headings in "Trial Instructions". This will operate as a check list, although it is not suggested that it would be exhaustive.
7. How the Crown seeks to make out its case — this will involve an outline of the nature of the Crown case, by reference to the various counts. Where necessary, the Crown case against separate accused(s) should be distinguished.
8. Defences — this will involve an outline of the defence or defences raised by the accused, distinguishing where necessary between individual accused.
9. Evidence — here reference should be made to the relevant evidence, relating it, where possible, to the legal issues which arise under the particular counts and the defences raised. It will be necessary, of course, to distinguish between direct and circumstantial evidence. A legal direction on circumstantial evidence will already have been given.

10. Summarise arguments of counsel again relating them, if possible, to particular counts and defences and legal issues.
11. Recap any matters where essential.
12. In the absence of the jury, seek submissions from counsel in relation to any factual or legal issues which they contend were not appropriately dealt with in the summing-up. In *DJF v R* [2011] NSWCCA 6, Giles JA, with whom RA Hulme J agreed, said that even outlining a matter on which further directions are sought should be done in the absence of the jury: at [16].
13. As to the use by the judge of written directions: see **The jury** at **[1-535]**. Written directions (including question trails) do not replace the need to give oral directions: *Trevascus v R* (2021) 104 NSWLR 571 at [65]. Where written directions are provided, the trial judge is required to give oral directions which, as a minimum, oblige the trial judge to read out and explain the written directions. This allows the judge and counsel to gauge the jury's reaction to the directions and detect whether the jurors are paying attention and appreciate the gravamen and purpose of the document: *Cook (a pseudonym) v R* [2022] NSWCCA 282 at [55]–[58].

[7-020] Suggested direction — summing-up (commencement)

Last reviewed: September 2023

The following is based upon the assumption that there is more than one accused.

Members of the jury, the accused stand before you upon an indictment which is in the following terms … [*read the indictment*].

Each accused has pleaded "not guilty" to that charge. It becomes your duty and your responsibility, therefore, to consider whether each accused is "guilty" or "not guilty" of the charge and to return your verdict(s) according to the evidence which you have heard.

I take this opportunity of reminding you that, at this stage, at all times you are free to ask any questions about these legal directions I am giving you if you have any difficulty with them. You can ask any questions that you wish, as often as you like, in relation to both the legal directions and any questions of fact.

I propose to commence this summing-up with a number of general directions which, to some extent, repeat those I gave you when the trial began. However, it is important I give them again, not only to remind you of what I said earlier but also to place those directions in the context of the trial which has now taken place.

What I said earlier was, in a sense, an explanation to you of the part you were expected to play in the trial, and a warning to you that it was necessary for you to participate in the determination of the factual issues from the outset.

I remind you that you are bound to accept those principles of law which I give to you and to apply them to the facts of the case as you find them to be. The facts of the case and the verdicts you give are for you, and you alone, because you alone are the judges of the facts.

I am the judge of the law, but you are quite correctly called the judges of the facts. I have nothing to do with those facts or your decisions in relation to them. I have nothing to do with what you accept as truthful, or what evidence you decide to reject as untruthful;

nor indeed what weight you might give to any one particular part of the evidence given or what inferences you draw from that evidence. Aside perhaps from pointing out that something appears not to be in dispute, I do not intend to express any opinion about any matters of fact. If you think I have expressed an opinion about something that is in dispute, or if you think I have tried to give you a hint about what I think, then you will be mistaken. I do not intend to do any such thing.

It is for you to assess the various witnesses and decide whether they are telling the truth. You have seen each of the witnesses as they have given their evidence. It is a matter for you entirely as to whether you accept that evidence.

Your ultimate decision as to what evidence you accept and what evidence you reject may be based on all manner of things, including what the witness has had to say; the manner in which they said it; and the general impression which they made upon you when giving evidence.

In relation to accepting the evidence of witnesses, you are not obliged to accept the whole of the evidence of any one witness. You may, if you think fit, accept part and reject part of the same witness' evidence. The fact you do not accept a portion of a witness' evidence does not mean you must necessarily reject the whole of their evidence. You could accept the remainder of their evidence if you think it is worthy of acceptance,

You have heard addresses from counsel for the Crown and counsel for the accused. You will consider the submissions they have made in their addresses and give those the submissions such weight as you think fit. In no sense are those submissions evidence in the case.

I shall, of course, endeavour (during the summing-up) to focus attention upon those parts of the evidence which seem to me to be the areas in respect of which counsel have devoted most of their attention. Of course, it is necessary for you in deliberating to consider all of the evidence and not only the evidence to which I or counsel have referred.

You are brought here from various walks of life and you represent a cross section of the community — a cross section of its wisdom and its sense of justice. You are expected to use your individual qualities of reasoning; your experience; and your understanding of people and human affairs.

In particular, and I cannot stress this too strongly, you are expected to use your common sense and your ability to judge your fellow citizens, so that you bring to the jury room (during the course of your deliberations) your own experience of human affairs, which must necessarily be as varied as there are twelve of you. It is that concentration of your own experience and your own individual abilities, wisdom and common sense which is, of course, the critical foundation of the whole jury system which has lasted in this State for almost two hundred years (and in many other democratic countries for far longer than that).

You have very important matters to decide in this case — important not only to the accused but also to the whole community. The privilege which you have of sitting in judgment upon your fellow citizens is one which carries with it corresponding duties and obligations. You must, as a jury, act impartially, dispassionately and fearlessly. You must not let sympathy or emotion sway your judgment.

Let me now say something to you about the onus of proof. This is a criminal trial and the burden of proving the guilt of the accused is on the Crown. That onus rests on the Crown in respect of every element of the charge. There is no onus of proof on the accused at all. It is not for the accused to prove their innocence but for the Crown to prove their guilt beyond reasonable doubt. This does not mean the Crown has to prove every single fact in the case beyond reasonable doubt but, at the risk of repetition, it does mean the Crown must prove every element of the charge/s beyond reasonable doubt.

It is, and always has been, a critical part of our system of justice that persons tried in this court are presumed to be innocent, unless and until they are proved guilty beyond reasonable doubt. This is known as the "presumption of innocence". The expression "beyond reasonable doubt" is an ancient one. It is not one that is explained by trial judges except to say that it is very different to the standard of proof in civil cases. In civil cases, matters need only be proved on the balance of probabilities, that is it is only necessary to prove something is more probable than not. The standard of proof in a criminal trial is higher. It is beyond reasonable doubt.

In a criminal trial there is only one ultimate issue. Has the Crown proved the guilt of the accused beyond reasonable doubt? If the answer is "Yes", the appropriate verdict is "Guilty". If the answer is "No", the verdict must be "Not guilty".

[Commonwealth offences — where unanimity is required:

Under our system of law, your verdict [on each count], whether it be "guilty" or "not guilty", must be unanimous. As this is a prosecution for a Commonwealth offence, majority verdicts are not recognised. That is not to say that each of you must agree upon the same reasons for your verdict. You may individually rely upon different parts of the evidence or place a different emphasis upon parts of the evidence. However, by whatever route you each arrive at your decision, that final decision of either "guilty" or "not guilty" [in relation to each charge] must be the decision of all of you, unanimously, before it can become your verdict.**]**

[State offences — where majority verdicts available:

Under our system of law, your verdict [on each count], whether it be "guilty" or "not guilty" must be unanimous. That is not to say that each of you must agree upon the same reasons for your verdict. You may individually rely upon different parts of the evidence or place a different emphasis upon parts of the evidence. However, by whatever route you each arrive at your decision, that final decision of either "guilty" or "not guilty" [in relation to each charge] must be the decision of all of you, unanimously, before it can become your verdict.

As you may know, the law permits me, in certain circumstances, to accept a verdict which is not unanimous. Those circumstances may not arise at all, so that when you retire I must ask you to reach a verdict upon which each one of you agree. Should, however, the circumstances arise when it is possible for me to accept a verdict which is not unanimous, I will give you a further direction.]

[The question whether there should be reference to majority verdicts has been considered. See Note 8 at [7-040] below.]

[7-030] Suggested direction — final directions

Last reviewed: September 2023

Except for two matters, I have now completed all I have to say to you before asking you to retire to consider your verdict(s).

First, if at any stage of your deliberations you would like me to repeat or further explain any of the directions of law I have given you, please do not hesitate to ask. It is fundamental that you should understand the principles which you are required to apply. If you have any doubt about those principles, then you are not only entitled to ask for further assistance, but you should ask for it. All you have to do is to write a note setting out the assistance you would like and give it to the court/sheriff's officer who will deliver it to me. Upon receiving such a request, I shall discuss the matter with counsel, and the court will then reassemble for the purpose of seeking to assist you.

I must stress that your deliberations are confidential so please do not include anything that would disclose the content of your discussions, including any voting patterns.

[**Where the jury do not have transcript**] Secondly, all of the evidence has been recorded. Although you will not have the advantage of having a transcript of that evidence for your perusal, if you wish, at any stage of your deliberations, to have any part of that evidence checked or read back to you, then that can be arranged. You need only let one of the court/sheriff's officers know and the court will reassemble for that purpose.

[**Where the jury have transcript**] Secondly, you have available to you the transcript of the evidence but if you experience any difficulty locating a particular passage that you are interested in, let me know by way of a note and I should be able to assist. I also remind you that whilst every effort is made to ensure the transcript is accurate, it is possible there may be errors. So if you have any doubt about whether something has been correctly transcribed, please let me know and I will endeavour to assist.

Return of verdict(s)

I shall now tell you what will happen when you return with your verdict(s). You will take your places in the jury box. Your foreperson will be asked to stand. My associate will then direct questions to [*him/her/them*]. They will be … [*refer here to so much of the procedure and the questions which the foreperson will be asked as is appropriate to the particular case*].

[*In trials involving multiple counts or accused, it may be worth suggesting that the foreperson have the verdicts written down to assist him/her/them.*]

Before I ask you to retire, I will ask counsel if there is anything they wish to raise.

[*Ask counsel in turn. It may be expected that if there is a matter that is uncontroversial, counsel may announce the subject matter and it may be dealt with in the presence of the jury. Otherwise the jury should be asked to leave while the matter is discussed.*]

[*If there is nothing raised, or after further directions have been given as a result of counsel's submissions, proceed as follows:*]

I now ask that you retire to consider your verdict(s). The exhibits will be sent to you shortly.

[*It is wise to have counsel check that all is in order and nothing extraneous is with the exhibits before they go to the jury room.*]

[7-040] Notes

Last reviewed: September 2023

1. **Section 161 *Criminal Procedure Act* 1986**

   The above suggested directions are given upon the basis that the judge intends to summarise the evidence during the course of the summing-up. However, s 161 *Criminal Procedure Act* provides that the judge need not summarise the evidence if of the opinion that, in all of the circumstances of the trial, a summary is not necessary. In the case of a short trial with narrow issues and other relevant factors, the trial judge may decide in the exercise of his or her discretion not to summarise the evidence: *R v DH* [2000] NSWCCA 360; *Alharbi v R* [2020] NSWCCA 130 at [73]–[77].

   Importantly, s 161 does not relieve the judge of the obligation to put the defence case accurately and fairly to the jury and instruct the jury about how the law applies to that case: *Wong v R* [2009] NSWCCA 101 at [141]; *AS v R* [2010] NSWCCA 218 at [21]; *Condon v R* (unrep, 9/10/95, NSWCCA). This does not require that it be done at length but it needs to be sufficient to highlight the evidence most relevant to the defence case: *Alharbi v R* at [75], [77], [82]. When putting the defence case to the jury, it must be made clear that the onus of proof remains on the prosecution: *Wong v R* at [141].

2. **Desirability of the judge raising the identification of the relevant legal issues with counsel at the conclusion of the evidence**

   (a) At the conclusion of the summing-up, it should be the invariable practice of the trial judge to enquire of counsel, in the absence of the jury whether he or she has overlooked any directions of law and appropriate warnings which should have been given to the jury as well as hearing submissions on the correctness or otherwise of directions of law which have in fact been given. If this practice is sedulously followed, it should go a long way to avoid the recurring cost, inconvenience and personal distress associated with a new trial: *R v Roberts* (2001) 53 NSWLR 138 at [67]. Notwithstanding counsel may take a position with respect to particular directions and request that no direction be given, as occurred in *DC v R* [2019] NSWCCA 234 where the trial judge was asked not to give a direction about lies, the obligation to ensure the accused receives a fair trial may require the judge to do so: *DC v R* at [148]ff. In such cases this should be raised with the parties first: at [149].

   (b) The responsibility of counsel to assist the trial judge in this regard was stressed in *R v Roberts* at [57], *R v Mostyn* [2004] NSWCCA 97 at [54]–[56] and *R v Gulliford* [2004] NSWCCA 338 at [182]–[184].

   (c) In *R v Micalizzi* [2004] NSWCCA 406 at [60], the view was expressed that, generally speaking, counsel appearing for either party is required to formulate the direction, warning or comment required by the trial judge, where counsel believes that what the trial judge has said to the jury is insufficient to ensure a fair trial for the accused or the Crown.

3. **Essential elements of a summing-up**

Generally, the summing-up should be as concise as possible so the jury is not "wearied beyond the capacity of concentration": *Alharbi v R* at [78]. In *R v Williams* (unrep, 10/10/90, NSWCCA), the court said that a summing-up:

> … should involve no more and no less than a clear and manageable explanation of the issues which are left to the jurors in the particular case before them. There is no need to venture beyond a clear statement of the relevant legal principles as they affect the particular case and against which they are to apply their decisions on the factual questions which arise.

See also *The Queen v Chai* [2002] HCA 12 at [18]. In *Haile v R* (2022) 109 NSWLR 288 at [117], Bellew J summarised a trial judge's obligations when summing-up to the jury as follows:

(i) although there is considerable leeway in the manner in which a summing-up can be structured, it remains essential for a trial judge to summarise, fairly and adequately, the competing cases of the Crown and the accused;

(ii) the requirement to summarise the cases fairly and adequately does not oblige the trial judge to remind the jury [of] every argument advanced by counsel;

(iii) it is the case which the accused makes that the jury must be given to understand, and it is not sufficient for a trial judge to simply say to the jury that they should give consideration to the arguments which have been put by counsel;

(iv) a trial judge must hold an even balance between the Crown case and the accused's case, and fairly direct the jury's consideration to the matters raised by the accused in his defence, the detail of which will depend on the circumstances of the particular case;

(v) generally speaking, a trial judge should not put matters to the jury in the summing-up which have not been put by the Crown, but which nevertheless advance the Crown case, because such an approach has the capacity to amount to a denial of natural justice because of the absence of opportunity for the accused to respond;

(vi) the task of restoring the credit of a Crown witness, or of destroying the credit of the accused, should always be left to the Crown Prosecutor. When such a task is undertaken by a trial judge, there is a risk of losing the appearance of impartiality which is expected.

4. **Alternative charges and arguments not put**

A judge has a special judicial obligation to leave manslaughter to the jury where it is an available verdict: *James v The Queen* (2014) 253 CLR 475 at [23]. A judge is obliged to instruct the jury on any defence or partial defence where there is material raising it regardless of the tactical decisions of counsel as part of ensuring a fair trial. However, it is wrong to equate this obligation with leaving alternative verdicts: *James v The Queen* at [33]. The test is what justice to the accused requires: *James v The Queen* at [34]; *The Queen v Keenan* (2009) 236 CLR 397 at 438. If neither party relies on an included offence then the judge may conclude that it is not a real issue in the trial: *James v The Queen* at [37].

See the discussion in **Alternative verdicts and alternative counts** at **[2-210]**.

If the judge advances an argument in support of the Crown case that was not put by the Crown this can occasion a significant forensic unfairness to the accused where his counsel is unable to address the jury on the new point: *R v Robinson* [2006] NSWCCA 192 at [137]–[149] where Johnson J set out the relevant principles.

5. **Requirements of fairness**

On the other hand if a judge refers to the evidence on a crucial issue, fairness requires that there be reference to the competing versions, and the competing considerations, including the inferences arising: *Cleland v The Queen* (1982) 151 CLR 1 per Gibbs CJ at 10; *Domican v The Queen* (1992) 173 CLR 555 at 560–561; *R v Zorad* (1990) 19 NSWLR 91 at 105; *El-Jalkh v R* [2009] NSWCCA 139 at [147]; *RR v R* [2011] NSWCCA 235 at [85]; *Buckley v R* [2012] NSWCCA 85 at [9]–[14]. It is therefore essential, if a summing-up is to be fair and balanced, that the defence case be put to the jury: *Abdel-Hady v R* [2011] NSWCCA 196 at [134]ff.

The defence case must be fairly and accurately put during the summing-up so that the jury can properly consider the issues raised. If that opportunity is not given, then there has been a miscarriage of justice: *Wong v R* [2009] NSWCCA 101 at [133]; *AS v R* [2010] NSWCCA 218 at [21]; *R v Malone* (unrep, 20/4/94, NSWCCA); *R v Meher* [2004] NSWCCA 355 at [76]. This extends to explaining any basis upon which the jury might properly return a verdict in the accused's favour: *Castle v The Queen* (2016) 259 CLR 449 at [59]. Reference to the defence case encompasses any challenge to the prosecution evidence and submissions: *Dixon v R* [2017] NSWCCA 299 at [14].

6. **Circumstances in which judge may express his or her view of the facts**

In *McKell v The Queen* (2019) 264 CLR 307 the plurality reiterated that a trial judge's discretion to comment on the facts should be exercised with circumspection and that comments conveying a trial judge's opinion of the proper determination of any disputed factual issue to be determined by the jury should not be made: at [3], [5], [47]–[50]; *The Queen v Abdirahman-Khalif* (2020) 271 CLR 265 at [77]; *Haile v R* at [118]. However, there are circumstances where judicial comment is necessary to maintain the balance of fairness between the parties by, for example, correcting errors in a closing address: at [53]–[54]. *Lai v R* [2019] NSWCCA 305 is an example of a case where the trial judge crossed the line of permissible comment by conveying his opinion of disputed facts which created a substantial risk the jury might actually be persuaded of the accused's guilt: [109]. *Haile v R* is another example. In that case, the trial judge drew repeated comparisons between the evidence given by a principal Crown witness and the accused, in effect suggesting to the jury that they had to choose between the two: see [42]–[48], [54], [99]–[103]. Repeatedly asking the question "Why would she lie?", in conjunction with expressing personal views about aspects of the defence case, compounded the unfairness of the summing-up which the Court of Criminal Appeal concluded lacked balance: at [120]–[127].

7. **Directions where counsel overlooks/breaches the rule in *Browne v Dunn***

A trial court must always endeavour to demonstrate flexibility in its response to a breach of the rule in *Browne v Dunn*, which is to be determined by the

particular circumstances of the case and the course of the proceedings: *Khamis v R* [2010] NSWCCA 179 at [42]; *MWJ v The Queen* [2005] HCA 74 at [18]. A non-exhaustive list of possible responses by a court to a breach of the rule appears in *Khamis v R* at [43]–[46] including that if the accused's evidence is allowed and there has been a breach of the rule the trial judge may fashion appropriate and careful directions to the jury: see also *RWB v R* [2010] NSWCCA 147 at [101], [116].

In general, it is dangerous for a trial judge to give a jury direction critical of the failure of counsel to put a proposition to a witness (in accordance with the rule in *Browne v Dunn* (1893) 6 R 67): *RWB v R* at [101]; *Llewellyn v R* [2011] NSWCCA 66 at [98]. If any direction is given, it is important for the jury also to be told that there may often be reasons, of which the jury are unaware, why such a thing was not done: *R v Banic* [2004] NSWCCA 322 at [23] and *R v Liristis* [2004] NSWCCA 287 at [59]–[89]. It is unfair to suggest to a jury that the only inference that they should draw is that the witness failed to include the contentious matter in his or her statement or instructions: *RWB v R* at [101], [116]. In some cases it is necessary to instruct the jury that oversights by counsel occur: *Llewellyn v R* at [98].

8. **Brief reference to majority verdicts in summing-up**

The suggested direction makes a brief reference to a majority verdict.

A brief reference to majority verdicts in the summing-up has been held not to undermine the direction that a unanimous verdict is required: *Ingham v R* [2011] NSWCCA 88 at [25]. However, if any reference is made in the summing-up it must not give the jury an indication of the time when a majority verdict will be accepted by the court: *Hunt v R* [2011] NSWCCA 152 at [27]. McClellan CJ at CL in *Ingham v R* at [25], said that a brief reference to a majority verdict in the summing-up has the "advantages referred to by the Victorian Court of Appeal" [in *R v Muto* [1996] 1 VR 336 at 339] which "are equally applicable to criminal trials in NSW". The advantages referred to in *Muto* include: being frank with the jury from the start; not pretending that majority verdicts are not possible; not confusing the jury with premature and largely irrelevant information about the effect of the majority verdict section; making clear that their verdict should be unanimous; and finally, to put the possibility of a majority verdict out of their minds. Macfarlan JA in *Doklu v R* [2010] NSWCCA 309 at [79] was inclined to the view that "it is better not to mention the possibility unless there is a reason to do so" but this approach was not taken or endorsed in *Ingham v R*: see brief reference to *Doklu v R* at [87]. Apart from Victoria, a brief reference to majority verdicts is made in England and Wales (*The Consolidated Criminal Practice Direction — Criminal Procedure Rules* at VI.26Q.1) and *Archbold* (2022) at 4-509, p 585. As to the position in other States and Territories, see discussion in *Ingham v R* [2011] at [69]–[81].

If after the summing-up the jury indicate that it cannot agree: see **Prospect of disagreement** at **[8-050]**ff.

[The next page is 1451]

Return of the Jury

para

Return of the Jury

Unanswered questions or requests by the jury .....[8-000]

Further directions may be given after jury has indicated it has reached a verdict but before delivery of verdict .....[8-010]

Recommended steps — Commonwealth offences requiring unanimity .....[8-020]

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Prospect of Disagreement

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Suggested (Black) direction — Commonwealth offences — or State offences where a majority verdict is unavailable because of insufficient jurors — unanimity required ..... [8-060]

Suggested direction before preconditions of s 55F(2) met — State offences — majority verdict(s) available .....[8-070]

Notes .....[8-080]

Suggested direction after preconditions of s 55F(2) met — State offences — majority verdict(s) available ..... [8-090]

Notes .....[8-100]

[The next page is 1455]

Return of the jury

[8-000] Unanswered questions or requests by the jury

If the jury asks a question indicating that further directions of law are required, the trial judge should ensure that no verdict is taken before that question is answered: see *R v TAB* [2002] NSWCCA 274 at [72]; *R v Hickey* (2002) 137 A Crim R 62 at [47]; *Nguyen & Ors v R* [2007] NSWCCA 363 at [120]–[128].

All communications between the jury and the trial judge should be disclosed to counsel for both parties, except for matters pertaining to the jury's deliberations: *Ngati v R* [2008] NSWCCA 3 at [33]; *Burrell v R* (2007) 190 A Crim R 148 at [261]–[265]; *Yuill* (1994) 77 A Crim R 314 at 324. Such disclosure allows counsel to make submissions about the manner in which the question should be answered: *Nguyen & Ors v R*, above, at [127]. Voting figures should not be disclosed: *Ngati* at [34].

[8-010] Further directions may be given after jury has indicated it has reached a verdict but before delivery of verdict

In circumstances where the jury has sent a message to the judge that it has reached a verdict, it is nevertheless open to the judge to invite them to deliberate further with corrected, amended or supplementary directions: see *R v Campbell* [2004] NSWCCA 314 at [42].

[8-020] Recommended steps — Commonwealth offences requiring unanimity

Last reviewed: June 2023

After receiving a message that the jury is ready to deliver the results of its deliberation, direct the reassembly of the court, ensuring that the accused is available. The accused should always be brought in before, rather than after, the jury. It is not essential to await the attendance of counsel who have chosen to depart the court area of their own volition, and it is not desirable to undertake to counsel that you will communicate with him or her. Remember that the jury, at this stage, will probably have been confined to the jury room for many hours and their convenience and comfort should be given every consideration. Also remember there may well be other members of the public waiting.

1. Re-enter the court

Direct that the accused be brought into the court. In appropriate cases, ensure that general security is in order. Direct the jury to enter (it is not necessary to call the roll of the jury).

2. Court officer asks foreperson to rise

3. Enquires of foreperson —

Clerk of Arraigns or judge then inquires of the foreperson — "Have you agreed on your verdict(s)?"

Upon receipt of an affirmative answer, the Clerk of Arraigns then questions the foreperson — "How say you, is the accused guilty or not?"; or "How say you, on the first count, is the accused guilty or not?"

The question is then repeated, corresponding to the number of counts committed to the jury. In the case of multiple defendants, the question is — "How say you, is the first accused [*name accused, for example, John Smith*] guilty or not?"

The question is then repeated for each of the other accused. In the case of multiple defendants and multiple counts the question is — "How say you, on the first count, is the first accused [*name accused, for example, John Smith*] guilty or not?"

The question on the first count is then repeated for each of the other accused. The question is then posed on the second count for each of the accused.

Note: It is critical to receive a distinct verdict in respect of each accused on each separate count. Also, in cases where an alternative or lesser charge is available if there is a verdict of "not guilty" on the substantive charge, it must not be forgotten to put forward the alternative charge and take a verdict on it.

After the foreperson has announced the verdict(s), the associate or judge then interrogates the whole jury as follows.

4. Receipt of verdict —

If a verdict of "guilty" — "Your foreperson has said that the (first) accused is guilty of the (first) count as charged (or not guilty as charged but guilty of the alternative charge of …). So says your foreperson, so say you all?"

The above should then be repeated in respect of all accused.

If a verdict of "not guilty", follow the above with the substitution of "not guilty" for "guilty".

Note: Questions as to the basis of the verdict

Although the trial judge has power to question the jury as to the basis of their verdict(s), that power should not be exercised save in exceptional circumstances: *R v Isaacs* (1997) 41 NSWLR 374 at 377; 379–380. The High Court has said — "The course of seeking such elucidation is fraught with danger and the discretion to seek it should be exercised sparingly and with care": *Mourani v Jeldi Manufacturing Pty Ltd* (1983) 57 ALJR 825 at 826. This approach is consistent with the well established principle that a jury should not be asked to disclose their reasoning process, nor are they bound to disclose it if asked: *Mourani v Jeldi Manufacturing Pty Ltd* at 826.

To this must be added the observation by the High Court in *Kingswell v The Queen* (1985) 159 CLR 264 at 283 that "… there is strong support for the view that a jury, once it has returned a verdict, has discharged its duties and has no further function to perform." Thus, a trial judge would need convincing circumstances before he or she would question the jury as to the basis of a verdict(s). It is acknowledged, however, that difficulties will arise where, for example, a jury returns a verdict which logically cannot stand with another verdict. Examples include the case where the jury has returned verdicts of "guilty" for both an attempt to commit an offence and the completed offence: *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.

5. Discharge of jury

Upon delivery of the verdict, s 55E *Jury Act* 1977 requires the immediate discharge of the jury. This is usually done by expressing the appreciation of the court for the jury's service to the community, telling them that they are discharged from further service and informing them (if necessary) of the provision for payment of their jury fees.

The judge has discretion, after a lengthy trial, to excuse the jurors from being selected for jury service for a specified period then ensuing: s 39(1) *Jury Act* 1977. Sometimes there are members of the jury who do not wish to be so excused, in which case they should be given the opportunity to serve further. The comment is therefore suggested —

> On the other hand, there may be some among you who do not wish to be so excused but prefer to be available to serve if called upon. For this reason, I suggest that those who do not wish to be so excused give their names to the sheriff's officer when you retire and the appropriate action will be taken.

(The trial judge is required by s 39(2) to notify the Sheriff of any direction given under s 39(1)). Section 55E(2) expressly provides that any members of the jury may remain in court as ordinary members of the public after being discharged.

6. Verdict of "Not Guilty"

Upon receipt of a verdict of "not guilty" on the only charge, or if more than one, all charges, the trial judge should then enquire of the Crown Prosecutor if there is any reason why the accused should be further detained. If the answer is in the negative, the accused should be discharged immediately from custody and allowed to depart, should they so wish, even before the jury is formally discharged. If the answer is in the affirmative, then the reason must be sought. Should the accused be in custody as a result only of a refusal of bail, it is open to the judge to entertain a bail application (assuming jurisdiction), but it may be undesirable to entertain the application in the absence of the file and witnesses relevant to "bail refused" matter(s).

7. Verdict of "Guilty"

A conviction only occurs when the court does some act which indicates that it has determined guilt, or, which is the same thing, that it has accepted that the accused is criminally responsible for the offence in question, for example, by the imposition of punishment; discharging a prisoner on his or her own recognisance; by release on parole; or even, perhaps, adjourning proceedings for sentence hearing: *Maxwell v The Queen* (1995) 184 CLR 501 at 531.

A conviction may be recorded by formally calling up the prisoner for sentence, the address of which is known as the "*allocutus*" and is in the following terms —

> You have been found guilty by the jury of the charge of … [*specify charge*]. Is there anything you wish to say before sentence is passed?

At common law, the allocutus was a necessary part of a trial where the accused had been convicted of treason or a felony: *R v Rear* [1965] 2 QB 290 at 292.

The *allocutus* gives the accused the opportunity of raising any legal matter against conviction and in the absence of there being any such legal matter or any realistic possibility of the application of s 10 *Crimes (Sentencing Procedure) Act* 1999 or s 19B *Crimes Act* 1914 (Cth), allowing the entry of a judgment of conviction (which is recorded on the back of the indictment), thus publicly and formally recording a conviction, so as to put the matter beyond doubt.

In the absence of such formality, difficult and important questions can arise as to whether, and if so, when, the accused has been convicted. Of particular importance, for example, may be "the day of conviction" within the meaning of s 30 *Proceeds of Crime*

Act 1987 (Cth). This question was discussed in *Della Patrona v Director of Public Prosecutions (Cth) [No 2]* (1995) 38 NSWLR 257. However, that case must now be considered in the light of the various judgments of the High Court in *Maxwell v The Queen* (1995) 184 CLR 501.

The question of whether there has been a conviction is also of importance for the purposes of a plea of "*autrefois acquit*" or "*autrefois convict*". Although the use of the allocutus has, in recent years, fallen somewhat into disuse, recent cases demonstrate the advisability of returning to its regular use to avoid unnecessary disputes regarding whether, and if so, when, the accused has been convicted both with regard to verdicts of guilty, as well as pleas of guilty.

On the question of whether there has been a conviction or not, see *DPP (Cth) v Webb* [1999] NSWSC 405 and *R v Holton* [2002] NSWSC 775.

Alternatively, the judge should expressly indicate (publicly and formally) that the accused is convicted and make the appropriate entry on the back of the indictment. Indeed, in every case, whether the *allocutus* is given or not, the conviction should be recorded on the back on the indictment.

[8-030] Recommended steps — State offences where majority verdict(s) available

When the jury have reached a verdict they should send a message to that effect but should *not* say what the verdict is or whether it is unanimous or by majority. After receiving a message that the jury is ready to deliver the results of its deliberation, direct the reassembly of the court, ensuring that the accused is available. The accused should always be brought in before, rather than after, the jury. It is not essential to await the attendance of counsel who have chosen to depart the court area of their own volition, and it is not desirable to undertake to counsel that you will communicate with him or her. Remember that the jury, at this stage, will probably have been confined to the jury room for many hours and their convenience and comfort should be given every consideration. Also remember there may well be other members of the public waiting.

1. Re-enter the court

Direct that the accused be brought into the court. In appropriate cases, ensure that general security is in order. Direct the jury to enter (it is not necessary to call the roll of the jury).

2. Court officer asks foreperson to rise

3. Enquiries of foreperson

Clerk of Arraigns or judge then enquires of the foreperson — "Have you agreed on your verdict(s) according to law, that is, according to the directions that were given?" [The foreperson should simply answer "yes" without saying whether the verdict is unanimous or by majority.] Upon receipt of an affirmative answer, the Clerk of Arraigns then questions the foreperson — "How say you, is the accused guilty or not?"; or "How say you, on the first count, is the accused guilty or not?"

The question is then repeated, corresponding to the number of counts committed, to the jury. In the case of multiple defendants, the question is — "How say you, is the first accused [*name accused, for example, John Smith*] guilty or not?"

The question is then repeated for each of the other accused. In the case of multiple defendants and multiple counts the question is — "How say you, on the first count, is the first accused [*name accused, for example, John Smith*] guilty or not?"

The question on the first count is then repeated for each of the other accused. The question is then posed on the second count for each of the accused.

Note: It is critical to receive a distinct verdict in respect of each accused on each separate count. Also, in cases where an alternative or lesser charge is available if there is a verdict of "not guilty" on the substantive charge, it must not be forgotten to put forward the alternative charge and take a verdict on it.

After the foreperson has announced the verdict(s), the associate or judge then interrogates the whole jury as follows.

4. Receipt of verdict — majority verdict scenario

If a verdict of "guilty" — "Your foreperson has said that the (first) accused is guilty of the (first) count as charged (or not guilty as charged but guilty of the alternative charge of …)."

The above should then be repeated in respect of all accused.

If a verdict of "not guilty", follow the above with the substitution of "not guilty" for "guilty".

Notes

1. Section 55F of the *Jury Act* 1977 is silent as to whether the trial judge should ask the jury whether the verdict is unanimous or by majority unlike the position in England and Wales (s 17(3), *Juries Act* 1974 (UK); *R v Pigg* [1983] 1 WLR 6; *R v Millward* [1998] EWCA Crim 1203) and Ireland (s 25(2), *Criminal Justice Act* 1984).
2. In Victoria, the recommended course is that if there has been a majority verdict direction, the jury should be asked whether the verdict is "of not less than 11 [or as the case may be] of you": *R v Muto & Eastey* [1996] 1 VR 336 at 344.

[The next page is 1469]

Prospect of disagreement

[8-050] Introduction

Last reviewed: September 2023

It is a fundamental principle that the jury must be free to deliberate without any pressure being brought to bear upon them: *Black v The Queen* (1993) 179 CLR 44 at 50. In *Black v The Queen* at 51, the High Court formulated model directions which must be carefully followed. The directions set out below have adopted that formulation but with variations required for the purpose of trials to which the majority verdict provisions inserted in the *Jury Act* 1977 in 2006 apply (see Note 6 at **[8-100]** below).

The consequences of failing to follow the guidance followed in *Black v The Queen*, above, was highlighted in *Timbery v R* [2007] NSWCCA 355, where it was held that a miscarriage of justice was occasioned when the trial judge urged the jury to reach a verdict and indicated that it would be "just terrible" if the jury had to be discharged without verdict after a trial of four weeks. The words used were "emotive" and the trial judge failed to clearly indicate that each juror had a duty to give a verdict according to the evidence: at [122].

The trial judge in *Burrell v R* [2009] NSWCCA 163 received a note from a juror which stated that any continued deliberations would serve no purpose and that other jury members were pressuring him or her into agreeing with them. The judge gave directions in accordance with the model direction formulated in *Black v The Queen*: *Burrell v R* [2007] NSWCCA 65 at [301]–[302]. The Court of Criminal Appeal held that the directions were "appropriately formulated": *Burrell v R* [2009] NSWCCA 163 at [224].

The judge's direction in *Isika v R* [2015] NSWCCA 304 (extracted at [6]) given in response to a question from the jury "[w]hat happens if we cannot agree?" contravened *Black v The Queen*. The direction referred to the time and cost of trials and also "arguably implied that jury members would not be performing their duties if they did not agree on verdicts": *Isika v R* at [15].

[8-060] Suggested (*Black*) direction — Commonwealth offences — or State offences where a majority verdict is unavailable because of insufficient jurors — unanimity required

Last reviewed: December 2023

You have informed me that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has either sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have, and may convince you that your original opinion was wrong.

That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

[If appropriate add additional directions approved in *R v Tangye* (unrep, 10/4/1997, NSWCCA)

I remind you that your verdict — whether it be "guilty" or "not guilty" — must be a unanimous one.

All 12 of you must, in the end, agree upon that verdict. It may be that the particular paths which lead each of you to that unanimous decision are not quite the same, but, nevertheless, your verdict of "guilty" or "not guilty" must be the verdict of you all. In other words, provided that you all agree that a particular verdict should be given, it does not matter that you do not agree as to why that particular verdict should be given.**]**

As I have said, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be discharged.

So, in the light of what I have said, I ask you to retire again and see whether you can reach a verdict.

In cases in which majority verdicts cannot be returned, if there is still no likelihood of agreement, then, and only then, following *R v Tangye* (unrep, 10/4/1997, NSWCCA), and in accordance with s 56 *Jury Act* 1977, one or more jurors (usually the foreperson) must be examined on oath or affirmation to establish that fact before the jury can be discharged. This process is done in the presence of all jurors.

The juror (foreperson) must be informed that nothing should be said which would disclose the voting figures or the reasons for the absence of agreement.

After ascertaining the fact that agreement had not so far been reached, an inquiry may be made, if thought to be appropriate, as to whether there is any further assistance which could be given — by way of explaining the law to be applied or the factual issues to be decided — which might bring about an agreement. If the answer is still in the negative, the jury must then be discharged.

A suggested script for this process is as follows:

(1) Have you all agreed upon your verdict/s? Yes or no?

(2) (If no) Is there anything I can do that would assist you to reach a unanimous verdict/s, for example repeating or further explaining any direction of law, reminding you of any of the evidence (if the jury has not got a copy of the trial transcript)? Yes or no?

(3) (If no) In your opinion is it likely the jury would reach a unanimous verdict/s if given more time to deliberate? Yes or no?

A majority verdict cannot be taken from a jury consisting of less than 11 persons: s 55F(1) *Jury Act* 1977. Where a jury consists of 10 persons or less, s 56(3) permits the court to discharge the jury if it finds, after examination on oath of one or more of the jurors, that it is unlikely the jurors will reach a unanimous verdict.

[8-070] Suggested direction before preconditions of s 55F(2) met — State offences — majority verdict(s) available

Last reviewed: December 2023

Suggested perseverance direction before the preconditions of s 55F(2) Jury Act 1977 are satisfied

You have informed me that you have not been able to reach a verdict so far.

[If the possibility of a majority verdict was not referred to in the course of the trial and summing-up, the following direction does not arise and is not necessary.

The circumstances in which I may take a verdict which is not unanimous have not yet arisen and may not arise at all. You should understand that your verdict of guilty or not guilty must be unanimous.**]**

As the judge in this trial, I have the power in certain circumstances to discharge you from giving a verdict, but I may only do so if and when I am satisfied that there is no likelihood of you arriving at a verdict after further deliberation.

Experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has either sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong.

That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

[If appropriate, add additional directions approved in *R v Tangye* (unrep, 10/4/1997, NSWCCA):

I remind you that your verdict — whether it be "guilty" or "not guilty" — must be a unanimous one.

All 12 of you must, in the end, agree upon that verdict. It may be that the particular paths which lead each of you to that unanimous decision are not quite the same, but, nevertheless, your verdict of "guilty" or "not guilty" must be the verdict of you all. In other words, provided that you all agree that a particular verdict should be given, it does not matter that you do not agree as to why that particular verdict should be given.**]**

As I have said, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict.

So, in the light of what I have said, I ask you to retire again and see whether you can reach a verdict.

[8-080] Notes

Last reviewed: December 2023

1. A trial judge should be careful not to undermine the effect of a direction in accordance with *Black v The Queen* (1993) 179 CLR 44 direction by making reference to a specific time when a majority verdict can be taken: *RJS v R* [2007] NSWCCA 241 at [22]; *Ingham v R* [2011] NSWCCA 88 at [84] (d)–(e). The above direction is in similar terms to that endorsed in *R v Muto* [1996] 1 VR 336 at 341–344, (affirmed in *R v Di Mauro* (2001) 3 VR 62 at [13]–[14]) and *Ingham v R* at [85] (b). No enquiry of the jury as to whether it is likely a majority verdict will be reached (for the purpose of discharge under s 56(2)) should be made by the judge until such time as a majority verdict is capable of being taken: *Hunt v R* [2011] NSWCCA 152 at [25], (see further **Notes** at **[8-100]**). The court said in *Hunt v R* at [33]:

   > [W]hen a *Black* direction is given in response to an indication by the jury that it is deadlocked or otherwise unable to reach a unanimous verdict, it would be prudent that, generally speaking, no subsequent direction should be given which does other than continue to exhort the jury to strive for a unanimous verdict prior to the expiry of a minimum 8 hours of deliberation (and if necessary, a greater period having regard to the nature and complexity of the issues in the case) and that this is so notwithstanding that the jury may continue prior to the expiry of that period to advise the court that it is unable to reach a unanimous decision.

   The jury should be encouraged to continue deliberations without being advised that the time for accepting a majority verdict is imminent: *R v VST* [2003] VSCA 35 at [38]; *RJS v R* at [23].

[8-090] Suggested direction after preconditions of s 55F(2) met — State offences — majority verdict(s) available

Last reviewed: December 2023

The two preconditions of s 55F for the availability of majority verdicts are:

(a) that the jury has deliberated for a period of time that the court considers reasonable having regard to the nature and complexity of the proceedings (not less than eight hours), and

(b) that the court is satisfied, after examination on oath of one or more jurors, that the jury is unlikely to reach a unanimous verdict.

A majority verdict direction *cannot* be given until the court has "strictly observed" and "properly determined" these two "essential preconditions": *RJS v R* [2007] NSWCCA 241 at [19]; *AGW v R* [2008] NSWCCA 81; *Hanna v R* (2008) 73 NSWLR 390 at [72];

KE v R [2021] NSWCCA 119 at [101]. Failure to address the two pre-conditions will mean the trial is not conducted according to law: *AGW v R* at [27]; *Hanna v R* at [72]; *Hunt v R* [2011] NSWCCA 152 at [25].

The first pre-condition in s 55F(2)(a) is not fulfilled simply by acting upon the lapse of the minimum period of eight hours: *AGW v R* at [23]; *Hanna v R* at [71]; *Hunt v R* at [24]–[26]. Relevant considerations to guide whether eight hours is adequate include the complexity of the disputed issues, the number of counts, the number of contentious witnesses, the volume of evidence, and if the jury was provided with the trial transcript, how much and when: *AGW v R* at [23].

After receipt of a note from the jury indicating a continued inability to agree upon a unanimous verdict (after having been given a *Black* direction), the procedural steps are:

1. In the absence of the jury, hear submissions, make a determination and provide reasons as to whether the jurors have deliberated for a period of time (not less than 8 hours) that is reasonable having regard to the nature and complexity of the trial (s 55F(2)(a)).
2. Have the jury return to the court room whereupon the judge will examine one or more jurors (usually just the foreperson) on oath/affirmation to confirm the jury are unable to reach a unanimous verdict and is unlikely to do so with further deliberation. (It is prudent to preface the question by indicating that no disclosure should be made of the jury's deliberation or of voting numbers.)
3. Declare that the court is satisfied of the fact the jury is unlikely to reach a unanimous verdict after further deliberation (s 55F(2)(b)).

Suggested perseverance direction and majority verdict direction *after* the preconditions of s 55F(2) *Jury Act* 1977 are satisfied and the time for taking a majority verdict has arrived

You have informed me that you have not been able to reach a verdict so far.

The circumstances have arisen in which I may take a majority verdict. I direct you that, should you continue to be unable to reach a unanimous verdict you may return a verdict of 11 [*or 10 where there are 11 jurors*] of you as the verdict of the jury in this case. However, it is preferable that your verdict be unanimous and you should continue to strive to reach a unanimous verdict.

I will repeat some of what I have previously told you.

As the judge in this trial, I have the power in certain circumstances to discharge you from giving a verdict, but I may only do so if and when I am satisfied that there is no likelihood of you arriving at a verdict after further deliberation.

Experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong.

That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

As I have said, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict.

You should continue your deliberations with a view to reaching a unanimous verdict. However, if that becomes impossible but you are able to reach a verdict by agreement of 11 of you [or 10 where there are 11 jurors] you may return such a majority verdict in this case, that is to say a verdict of 11 out of 12 of you [or 10 where there are 11 jurors]. These alternative ways are the only ways in which you may return a verdict according to law.

So, in the light of what I have said, I ask you to retire again and see whether you can reach a verdict in this trial.

[8-100] Notes

Last reviewed: December 2023

1. This direction does *not* obviate the need to first give the jury a perseverance direction or *Black v The Queen* (1993) 179 CLR 44 at 50 direction (as set out above in **[8-070]**) without reference to the fact or the circumstances in which the jury may return a majority verdict. In *Hanna v R* (2008) NSWLR 390, defence counsel asked for a *Black* direction without reference to the possibility of a majority verdict (see [44]) after the foreperson indicated the jury was having difficulty agreeing. The judge rejected the request and gave the jury the majority verdict direction above without making clear findings concerning the two "essential preconditions" under s 55F(2) *Jury Act* 1977: at [7], [45].
2. New South Wales legislation is silent as to how the minimum eight-hour period is to be calculated. In the absence of a statutory definition for "deliberation" two considerations may guide the application of the term: (i) whether the jury is sequestered in the same location and (ii) whether the jury is able to conduct discussions about the case at hand: *BR v R* (2014) 86 NSWLR 456 at [19]–[20]. Discrete and substantial breaks from the performance of the jury's task such as retirement overnight, taking lunch away from the jury room and sitting in court listening to further directions should not be included in the eight-hour calculation: *BR v R* at [21]–[22], [41], [44]. There were disparate views in *BR v R* as to whether travel time between the jury room and the courtroom should be included: [23]–[24]; cf [45], [36]. Nor could it be said with certainty whether deliberations ceased or continued, and for how long, while lunch breaks were taken within the

jury room. Consequently, either the whole of the break or none of it should be included: [42], see also [23], [31]. Because it is not possible to inquire into what actually occurs in the privacy of the jury room, it would be prudent to avoid acting immediately after eight hours have elapsed if there is "any ambiguity about any component of the minimum period": *BR v R* at [24]; *AGW v R* [2008] NSWCCA 81 at [24]–[25]. The court should refrain from taking a majority verdict soon after the estimated expiry of eight hours where there is any ambiguity about a component part of that minimum span of time: *AGW v R* at [23]; *Hunt v R* at [24]; *BR v R* at [24], [47]. It is useful to keep a running record of deliberation times with the court officer advising the judge's associate of commencement and conclusion times for each day's deliberations if the jury are not brought into court at those times; subtracting a generous allowance for periods during each day in which the jury might not have been deliberating.

3. The Victorian practice (endorsed in *R v VST* (2003) 6 VR 569) of recalling the jury once the minimum statutory period had elapsed to see if the jury had reached a unanimous verdict was questioned in *RJS v R* [2007] NSWCCA 241 at [24]. Spigelman CJ said at [26]:

> In many cases, the trial judge may well decide to await a further indication from the jury that it is unlikely that the jurors will reach a unanimous verdict. That is not to say that after the passage of a further lengthy period of time, a matter to be determined by the trial judge, some kind of inquiry to the jury would constitute legal error. This is a matter with respect to which the practice should develop in accordance with the experience of the implementation of the majority verdict system over time. It does not require any definitive guidance from this Court.

4. In *R v Muto* [1996] 1 VR 336 at 343, it was contemplated that a judge who considers that the time for taking a majority verdict has arrived will nevertheless tell the jury that it is still preferable that they should endeavour to reach a unanimous verdict but, if they cannot all agree, a majority verdict may be taken. This position was affirmed in *R v Di Mauro* (2001) 3 VR 62 at [6]–[7].

5. In *AB v R* [2023] NSWCCA 165 the trial judge did not obtain explicit evidence from the jury foreperson as to the second precondition in s 55F(2)(b). Beech-Jones CJ at CL said at [60] it would have been preferable if the foreperson had been asked a specific question directed to the likelihood or unlikelihood of the jury reaching a unanimous verdict if further deliberations took place, but in the circumstances of the particular case it was open to the judge to be satisfied that the requirement of s 55F(2)(b) was met. Submissions on whether a reasonable time has expired should be invited and the judge's reasons must make explicit the factors considered and how the decision it was reasonable to invite a majority verdict was reached. The reasons do not need to be complex or lengthy, but require clarity: *KE v R* at [98]; *RJS v R* at [25].

6. The terms of s 56 *Jury Act* 1977 with respect to the discharge of a jury in cases where a majority verdict is available (juries of 11 or 12 persons) should be noted:

> (1) Where a jury in criminal proceedings has retired, and the jury consists of 11 or 12 persons, the court in which the proceedings are being tried may discharge the jury if it finds, after examination on oath of one or more of the jurors, that it is unlikely that the jurors will reach a unanimous or a majority verdict under section 55F.

> (2) Where a jury in criminal proceedings has retired, and the jury consists of 11 or 12 persons, the court in which the proceedings are being tried may not discharge the jury under this section if it finds, after examination on oath of one or more of the jurors, that it is likely that the jurors will reach a majority verdict under section 55F.

No enquiry of the jury for the purpose of s 56(2) (that is, examination on oath of one or more of the jurors, that it is likely that the jurors will reach a majority verdict under s 55F) should be made until the point had been reached at which a majority verdict is capable of being taken: *Hunt v R* [2011] NSWCCA 152 at [26]. See the observations in *O'Brien v R* [2019] NSWCCA 187 at [53]–[64], concerning the interplay between s 56 and s 55F(2), and the complications that may arise in cases where the jury has indicated an inability to reach a verdict before the eight hour period required by s 55F(2) has expired.

In *Haile v R* [2022] NSWCCA 71, the trial judge purported to give a *Black* direction before the preconditions in s 55F(2) of the *Jury Act* for receiving a majority verdict were satisfied. It was held (at [143], [202]–[206]) that the trial judge's omission of the statement, "I have the power to discharge you from giving a verdict, but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation," was erroneous. The suggested directions above (at **[8-070]** and **[8-090]**) include a reference to the power to discharge the jury (as required by *Black*) but in a modified form to avoid misstatement as to when this power may be exercised. The modification has been included to take account of s 56 of the *Jury Act* (the effect of which was not addressed in *Haile v R*).

7. Section 68B *Jury Act* 1977 provides it is an offence for a juror to disclose deliberations including voting numbers except with the consent, or at the request, of the judge. Jury votes or voting patterns are irrelevant and should not be disclosed: *Smith v The Queen* (2015) 255 CLR 161 at [32], [53].

   It is highly desirable that judges inform juries, before retirement, that they should not disclose to the judge their votes or voting patterns in order to minimise such a disclosure occurring before verdict: *Smith v The Queen* at [32]; *R v Burrell* [2009] NSWCCA 163 at [217]. Disclosure of voting numbers is not necessary to enable the jury to perform its role in reaching a verdict or for the judge to form a view on whether to ask the jury to consider a majority verdict: *Smith v The Queen* at [48]–[49]. The judge must, however, disclose to counsel the precise terms of a question asked by a jury where it relates to a relevant issue before the court and both counsel should be given an opportunity to make submissions: *Smith v The Queen* at [58].

   In *Hawi v R* [2014] NSWCCA 83 at [457]–[460], it was held that the judge was not required to disclose the full contents of jury notes which revealed specifics about the jury's deliberations. The judge's summary to counsel of the notes was sufficient.

[The next page is 1501]

Miscellaneous

para

Non-publication paper .....[10-530]

[The next page is 1671]

[10-530] Non-publication paper

The paper which previously appeared here by Mr N Bruni, High Court Lawyer DPP (NSW), "Non-publication and suppression orders", has been archived following the enactment of the Court Suppression and Non-publication Orders Act 2010. It is now available online through JIRS and the Judicial Commission's public website. (August 2011)

[The next page is 1701]

Criminal Code (Cth)

para

***Criminal Code Act* 1995 (Cth) and Schedule thereto entitled the Criminal Code**

Introduction ..... [11-000]
Case references .....[11-010]

[The next page is 1707]

Criminal Code Act 1995 (Cth) and Schedule thereto entitled the Criminal Code

[11-000] Introduction

The following notes are generally confined to sections of the Criminal Code in respect of which there are relevant case references. They are based on the assumption that the judge will have an up to date copy of the Criminal Code before him or her. References to "The Code" in this chapter are to the Criminal Code, as amended.

Judges may also find assistance from the following publication:

> Attorney General's Department, "The Commonwealth Criminal Code: A Guide for Practitioners", available url: https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners (March 2002) (accessed February 2022).

[11-010] Case references

In order to place certain of the case references in context, relevant sections of the Code are printed below in italics.

1	**Chapter 1 — Codification**
1.1	***Codification***
	The only offences against laws of the Commonwealth are those offences created by, or under the authority of, this Code or any other Act.
3	**Part 2.2 — The Elements of an Offence**
3.1	***Elements***
	(1) An offence consists of physical elements and fault elements.
	(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
	(3) The law that creates the offence may provide different fault elements for different physical elements.
3.2	***Establishing guilt in respect of offences***
	In order for a person to be found guilty of committing an offence the following must be proved:
	(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;
	(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.
5	**Fault elements**
5.1	***Fault elements***
	(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
	(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.
5.2	***Intention***
	(1) A person has intention with respect to conduct if he or she means to engage in that conduct.
	(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
	(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5 Fault elements

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

Case references

In *R v Saengsai-Or* [2004] NSWCCA 108 at [72], it was held that the physical element of the offence created by s 233B(1)(b) of the *Customs Act* 1901 (Cth) (importation of prohibited imports), as the section was at the date of the offence, was one of conduct. In respect of this physical element, which consisted only of conduct, the provisions of s 5.6(1) applied and intention was the sole fault element.

However, by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2)* 2004 No 127, s 233B(1) was amended, effective from 28 September 2004 to read, relevantly:

> Special provisions with respect to narcotic goods
>
> (1) A person commits an offence if:
>
> (a) the person: …
>
> (iii) imports goods into Australia; and …
>
> (b) the goods are a prohibited import to which this section applies.

The principles enunciated in *Saengsai-Or* are therefore only relevant to offences committed prior to 28 September 2004.

In light of the above amendment, it would appear that the provisions of s 5.6(1) of the Code apply to require the Crown to prove intention (as the fault element) by the accused to import goods into Australia.

As to the goods being a prohibited import (being a physical element that consists of a circumstance or a result), s 5.6(2) would require the Crown to prove recklessness as the fault element, that is, that the accused was reckless with respect to that circumstance or result.

In *Hann v DPP (Cth)* (2004) 144 A Crim R 534, the Supreme Court of South Australia dealt with a charge under s 233BAB(5) of the *Customs Act* 1901, which relevantly provides:

> A person is guilty of an offence against this subsection if:
>
> (a) the person intentionally imported goods; and
>
> (b) the goods were tier 2 goods and the person was reckless as to that fact; and
>
> (c) their importation:
>
> (i) was prohibited under this Act absolutely; or
>
> (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.

The appellant imported four video discs from Bangkok. One of the discs was found to contain child pornography, which are tier 2 goods within the meaning of subs 5(b). The appellant was found guilty of importing prohibited goods and being "reckless to that fact" within the meaning of subs 5.

The appeal was dismissed and the grounds for such dismissal are conveniently set out in the headnote as follows:

(1) In order to establish recklessness under the *Criminal Code* (Cth), s 5.4, knowledge of a risk of harm or illegality must be established and that risk must be substantial. Conscious awareness of risk is required; it is not sufficient to show that the risk is obvious or well-known.

(2) In order to prove that the appellant was "reckless", it was necessary for the Crown to establish beyond reasonable doubt that the appellant was aware, at the time of importation, of the substantial risk that the video disc contained child pornography and that it was unjustifiable to take that risk.

(3) It could be concluded beyond reasonable doubt that the appellant was aware that there was a risk that the bundle of four video discs contained child pornography. The risk existed because the appellant made no inquiry as to the content of the discs. He purchased the video discs in an unregulated market from a street vendor in Bangkok. To purchase pornographic material in such circumstances carried the obvious risk that the pornography might be other than adult pornography and might include child pornography. The risk was not remote or fanciful. It was a substantial risk.

Note: In a helpful comment by Ian Leader-Elliott (a consultant to the Commonwealth Attorney General's Department) on the above two cases (see (2005) 29 *Criminal Law Journal* 55), the learned author suggests that it is permissible for courts

to make explicit reference to "A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers", February 2004, when interpreting the Code provisions (see s 15AB of the *Acts Interpretation Act* 1901 (Cth), "Use of extrinsic material in the interpretation of an Act"). The above guide is available url: <www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_2004_A_guide_to_framing_Commonwealth_offences>.

9 Circumstances involving mistake or ignorance

9.2 Mistake of fact (strict liability)

It was held in *Chief Executive Officer of Customs v El Sayed* [2003] NSWSC 1092 at [23] that s 9.2 of the Code (mistake of fact (strict liability)):

> essentially mirrors the common law defence of mistake, and applies when the defendant is under a mistaken but reasonable belief about certain facts which, if true, would render his conduct non-criminal. As is the case under the common law, the defendant bears the onus of proving this defence upon the balance of probabilities.

11 Part 2.4 — Extensions of criminal responsibility

11.2 Complicity and Common Purpose

In *R v Salcedo* [2004] NSWCCA 430 at [26] the Crown conceded that s 11.2 of the Code did not allow for the common law doctrine of joint criminal enterprise.

11.3 Innocent Agency

A recent case involving innocent agency in relation to an offence under the *Customs Act* 1901, s 233B(1)(b), is *R v Kaldor* (2004) 150 A Crim R 271 at [28]–[44].

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