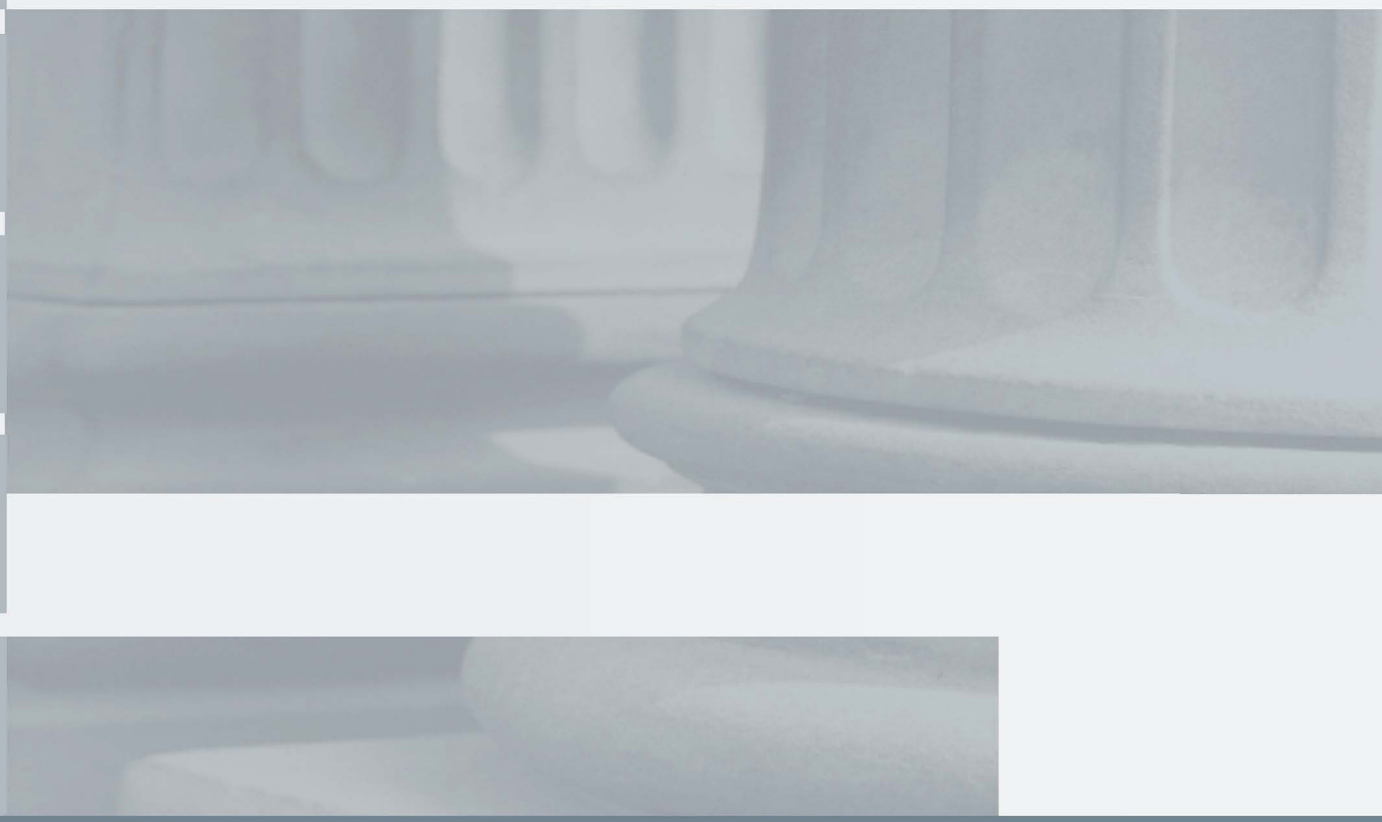
Criminal Trial Courts Bench Book



Judicial Commission of New South Wales

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 86, September 2026

Update 86 amends the *Criminal Trial Courts Bench Book* to incorporate recent case law.

The following chapters have been revised:

Outline of trial procedure

- At **[1-015.40] Warnings and exculpatory evidence**, references to *Decision Restricted* [2026] NSWCCA 76, *Decision Restricted* [2025] NSWCCA 210 and *Proud v R (No 2)* [2016] NSWCCA 44 have been added regarding the appropriateness of giving a warning under s 165(1)(d) of the *Evidence Act 1995* where the evidence is favourable to the accused or does not advance the prosecution case. A reference to *Seo v R* [2025] NSWCCA 131 has been added regarding provision of the transcript to the jury, and references to *Douglas v R* [2026] NSWCCA 85 and *Hofer v The Queen* (2021) 274 CLR 351 regarding the conduct of the defence case and cross-examination of the accused have been added.
- At **[1-020] Addresses**, a reference to *R v Cranston (No 19)* (2022) 111 NSWLR 1, where the Court discussed defence addresses and the order in which they can occur where there are multiple accused, has been added. References to *Ombelli v R* [2026] NSWCCA 65, *TS v R* [2022] NSWCCA 222 and *MS v R* [2017] NSWCCA 252 have been added regarding Crown addresses where the accused is self-represented.

Closed court, suppression and non-publication orders

- The chapter at **[1-349]** ff has been revised and updated. References to *Godla v DPP (NSW)* [2022] NSWCA 193, *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 and *Council of the NSW Bar Association v EFA (a pseudonym)* [2021] NSWCA 339 have been added at **[1-354] Grounds for and content of suppression or non-publication orders**. The checklist for suppression orders has also been updated to refer to interim orders.

The jury

- The chapter at **[1-435]** ff, including the suggested directions at **[1-480] Written directions for the jury at the opening of a trial** and **[1-490] Suggested (oral) directions for the opening of the trial following empanelment**, has been revised and updated. The commentary in **[1-455] Excusing jurors** has been revised. **[1-540] Verdict juries** and **[1-545] Directed verdict juries** have been re-written and suggested procedures for the ballot process under s 55G of the *Jury Act 1977* have been inserted at **[1-540.10]** and **[1-545.10]** respectively.

Self-represented accused

- At **[1-810] Role of the trial judge**, references to *Ombelli v R* and *Zhang v R (No 4)* [2026] NSWCCA 8 have been added.
- **[1-820] Suggested information for accused before empanelment** has been revised and updated to refer to considerations involving the questioning of vulnerable witnesses and self-represented accused persons.
- At **[1-835] Notes**, references to *Ombelli v R*, *TS v R* and *MS v R*, regarding addresses by the Crown where the accused is self-represented, have been added.

Consciousness of guilt, lies and flight

- **[2-950] Introduction** has been updated to add references to *MM v R* [2023] NSWCCA 236 and *LH v R* [2024] NSWCCA 165.
- A new paragraph at **[2-954] Demeanour** provides commentary on use of demeanour as evidence of a consciousness of guilt.
- At **[2-955] Lies**, a reference to *Jha v R* [2026] NSWCCA 55, where the Court discussed the distinction between a witness giving an incorrect answer despite trying their best to answer truthfully, and a witness making a deliberate lie, has been added.
- At **[2-960] Suggested direction — lies used as evidence of a consciousness of guilt** and **[2-965] Flight**, a reference to *Xie v R* [2021] NSWCCA 1 has been added.

Election of accused not to give evidence or offer explanation

- The chapter at **[2-1000]** ff has been revised and updated. A reference to *Wood v R* [2012] NSWCCA 21 has been added at **[2-1000] Introduction** and a reference to *O'Grady v R* [2012] NSWCCA 62 added at **[2-1020] Failure to offer explanation** and **[2-1030] Weissensteiner comments**.

Expert evidence

- **[2-1100] Introduction** has been updated to add references to *R v Tang* (2006) 65 NSWLR 681, *Xie v R*, and *Camelo-Gomez v R* [2026] NSWCCA 63.

Onus and standard of proof

- **[3-603] Notes** has been updated to add a reference to *Lind v R* [2026] NSWCCA 41 regarding the application of the "extended jury unanimity" principle.
- At **[3-605]** a reference to *Elkerdi v R* [2026] NSWCCA 96 has been added regarding the requirement to give a *Liberato v The Queen* (1985) 159 CLR 507 direction and calibrating the direction where a co-accused gives evidence on which another co-accused relies.

Silence — evidence of

- At **[4-130] Notes**, a reference to *LH v R* has been added to confirm that the common law authorities on selective silence in the face of police questioning are no longer relevant.

Tendency, coincidence and background evidence

- At **[4-214] Standard of proof**, *MacGill v R* [2026] NSWCCA 102 has been added as an example of tendency evidence admitted in the context of drug supply offences.

Maintain unlawful sexual relationship with a child

- The chapter at **[5-710] Suggested procedure before empanelling jury and formally arraigning accused** has been amended to include reference to *Nolan v R* [2024] NSWCCA 140 and a new note has been added at **[5-730]** to include *Grant v R* [2024] NSWCCA 78.

Conspiracy

- The chapter at **[5-5300]** ff has been revised and updated to provide additional commentary and cases, including on ss 57 and 87 of the *Evidence Act*, *Obeid v*

The King [2026] HCA 1 regarding the elements of the offence of conspiracy, and *DPP (Cth) v Kola* (2024) 279 CLR 104 regarding directions to the jury on the admissibility of the conduct of co-conspirators in the absence of the accused.

Supply of prohibited drugs

- At **[5-6700.80] Drug exhibits**, an updated flowchart detailing the procedures for analysis of substances in the custody of NSW police has been added.

Summing-up format

- At **[7-040] Notes**, a reference to *Elkerdi v R* has been added regarding judicial comment on the facts of a case. A reference to *Douglas v R* has been added regarding jury directions where the accused is cross-examined on defence counsel's failure to put certain matters to prosecution witnesses.

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 2026

[1-005.10] Trial court's jurisdiction

Last reviewed: September 2026

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 self-represented 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).

[1-005.20] 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. This has never been thought incompatible with the "one jury, one indictment" principle, which is preserved within the scheme of the *Criminal Procedure Act*: *McNamara v The King* [2023] HCA 36 at [28]–[30].

The DPP may present an ex officio indictment where the Local Court judge 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 Crown can seek to amend or substitute the indictment at any time with leave of the court or the consent of the accused: s 20(1), (3); see *Criminal Practice and Procedure NSW* [2-s 21.1]ff; *Criminal Law (NSW)* at [CPA.21.20]ff. A court itself can order the amendment of a defective indictment at any time if it can be amended without injustice: s 21(1), (4); even as late as the judge's summing up: *Ozgen v R* [2021] NSWCCA 252 at [47]. However, it is unlikely this would apply after a jury has returned its verdict: *Bigatton v R* [2024] NSWCCA 23 at [165]; *Tonari v R* [2013] NSWCCA 232 at [63]; see *R v MAJW* [2007] NSWCCA 145 at [29]–[39].

The court's jurisdiction to amend depends on whether the impugned indictment contains a mere defect which can be remedied without procedural unfairness to the accused, or a fundamental failure which renders the indictment a nullity: see *Tonari v R* at [85]. An indictment will not be a nullity if however misparticularised, it discloses an offence known to law: *Boujaoude v R* (2008) 72 NSWLR 85 at [45]. Even an inadequately described offence will not render it unknown to law such that jurisdiction is lost and amendment provisions cannot operate: *Area Concrete Pumping Pty Ltd v Inspector Childs* [2012] NSWCA 208 at [49]. Where an offence is clearly indicated but the indictment contains a slip or clumsiness which upon strict analysis results in an ingredient of the offence not being the subject of a proper averment, it would seem to be a fit case for amendment, if justice is not to be defeated: *Broome v Chenoweth* (1946) 73 CLR 583 at 601.

Examples of mere defects (which may be amended under s 21) include:

- Failing to include words that gave definitional meaning but did not create the offence of publishing the name of a child subject to Children's Court proceedings, and which were necessarily implied: *Burton v R* [2025] NSWCCA 89.
- Failing to specify fully the circumstances of aggravation in aggravated sexual assault counts: *Tonari v R*.
- Failing to include words "without her consent" in sexual assault counts: *Kahatapitiye v R* [2004] WASCA 189.
- Describing an offence of accessory after the fact to robbery, instead of attempted robbery: *Chanthaboury v R* [2007] NSWCCA 290.
- Alleging an offence of drug supply not less than a commercial quantity, when the quantity specified was far below commercial quantity: *Boujaoude v R*.
- Failing to allege relevant mental elements by not including reference to the accused's "knowledge" or "reckless disregard" for offences of obtaining money by false statement (*Crimes Act*, s 178BB (rep)): *Doja v R* [2009] NSWCCA 303 at [159].
- "Imperfectly formulat[ing]" the charge of attempted murder: *Park v R* [2010] NSWCCA 151.

Examples of fundamental failures that render the indictment a nullity (which deprive the court of jurisdiction to amend under s 21) include:

- Disclosing an offence in the summonses not known to law, as the omissions were so great that it is not apparent which of the multiple offences under the relevant act was intended to be charged: *Attorney General of NSW v Built NSW Pty Ltd* [2013] NSWCCA 299.
- Where the indictment has been signed by a person who is not authorised under s 126 of the *Criminal Procedure Act*: *R v Janceski* (2005) 64 NSWLR 10.

[1-005.30] 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 there is more than one charge, the accused is asked to plead to each individually as each charge is read out: s 192(2); *Decision Restricted* [2025] NSWCCA 61 at [70]. 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].

Where multiple accused are before the court, they can be arraigned individually or together, and on different occasions, 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].

[1-005.40] 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. Supreme Court Practice Note SC GEN 22 sets out the correct procedure in respect of pronunciation of names and forms of address.

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

[1-005.50] Use of generative artificial intelligence

Judicial officers and parties should familiarise themselves with the Practice Notes and Judicial Guidelines for the use of generative artificial intelligence in the preparation and conduct of trials: see Supreme Court Practice Note SC GEN 23 and Judicial Guidelines and District Court General Practice Note 2 which adopts SC GEN 23 and the Guidelines.

[1-005.60] Judge-alone trials

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

[1-005.70] 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 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 delays in 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: *Evidence Act 1995*, s 192A.

(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).

Section 306I 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].

[1-005.80] 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, "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 2025

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.

[1-010.10] Empanelling the jury

Last reviewed: September 2026

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: *Jury Act*, s 38.

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. A person may make a request to be excused verbally or in writing, even if the sheriff has previously determined not to excuse the person for that cause: s 38(2)(b), (3). 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: *Jury Act*, s 41. This is a challenge against the processes of the sheriff in selecting the panel.

If the accused was arraigned pre-trial pursuant to s 130(2) they must be re-arraigned on the indictment before the jury panel (s 130(3)(b); *DS v R* [2012] NSWCCA 159 at [63]) but only in relation to offences to which the accused pleads "not guilty": s 130(4); *Decision Restricted* [2025] NSWCCA 61 at [67]. This reflects long-standing authority that no reference should be made before the jury to any count the accused pleaded guilty to: *Decision Restricted* [2025] NSWCCA 61 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: *Jury Act*, s 37(8). 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: *Jury Act*, s 38(3). 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: *Jury Act*, s 48. 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: *Jury Act*, s 44. 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 associate. There is a pause as the prospective juror stands 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: *Jury Act*, s 72A. 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: *Jury Act*, s 72A(5). 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 no 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: *Jury Act*, s 157.

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.

[1-010.20] 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.

[1-010.30] 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; and
- 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 the 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: June 2024

[1-015.10] 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].

[1-015.20] 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]**.

[1-015.30] 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 **[3-100].**

(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].

It may assist juror comprehension for the judge to give integrated directions — that is, directions tailored to the particular evidence presented in the case — rather than general stand-alone directions, about the matters the jury are required to consider.

[1-015.40] Warnings and exculpatory evidence

Last reviewed: September 2026

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. A warning under s 165(1)(d) will not usually be appropriate where the evidence is favourable to the accused or does not advance the prosecution case. That is because there will generally be "good reasons" pursuant to s 165(3) not to give the direction: *Decision Restricted* [2026] NSWCCA 76; *Decision Restricted* [2025] NSWCCA 210 at [334]; *Proud v R (No 2)* [2016] NSWCCA 44 at [73].

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: *R v FDP* (2008) 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.

[1-015.50] 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.

[1-015.60] Transcript

Last reviewed: September 2026

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] NSWCCA 329 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]**.

The judge has responsibility to ensure that the copy of the transcript to be handed to the jury does not contain any material arising from applications or discussion that took place in the absence of the jury: *Seo v R* [2025] NSWCCA 131 at [66]. In long trials consideration should be given to providing the final version of the transcript to the jury on a USB drive.

[1-015.70] 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 was intended to 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.

[1-015.80] Defence case

Last reviewed: September 2026

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].

Cross-examination of an accused by the Crown about defence counsel's failure to put particular matters to a prosecution witness (in purported breach of the rule in *Browne v Dunn*) to suggest the accused's evidence was a recent invention, is likely to depart from the "standards of a trial to which an accused is entitled and the standards of fairness which must attend it": *Hofer v The Queen* (2021) 274 CLR 351 at [42]; *Douglas v R* [2026] NSWCCA 85 at [8]; *R v Birks* (1990) 19 NSWLR 677 at 691.

Where there are a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a line of questioning directed to impugning the accused's credit, unless there are clear indications of recent invention. Where such cross-examination has occurred, the trial judge must warn the jury about any assumption made by the cross-examiner, draw attention to the possible reasons why the matter has not been put, and direct the jury as to whether any inferences are available: *Hofer v The Queen* at [34]–[37].

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.

[1-015.90] 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.

[1-015.100] 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: *Jury Act*, 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 2026

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.

Where there are multiple accused, the convention is generally that counsel for the accused cross-examine in the order in which they appear on the indictment and then address the jury in the reverse order, however, it can be varied by agreement between the parties or settled by the trial judge based on the issues in the trial: *R v Cranston (No 19)* (2022) 111 NSWLR 1.

[1-020.10] Crown address

Last reviewed: September 2026

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.

While there may be a practice that the Crown will not address where the accused is self-represented (see *R v Zorad* (1990) 19 NSWLR 91), there is no rule that prohibits the Crown from doing so. 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. The proper exercise of that discretion requires consideration of whether allowing a final Crown address would result in an unfair trial: *Ombelli v R* [2026] NSWCCA 65 at [158]; *TS v R* [2022] NSWCCA 222 at [102]; *MS v R* [2017] NSWCCA 252 at [72]; see further **[1-835]**.

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: June 2024

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: April 2025

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 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.

The jury is, subject to a contrary order of the court, permitted to separate at any time either before or after the jury retires to consider its verdict: *Jury Act,* s 54.

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

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.

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

[1-030.10] 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: *Jury Act*, s 55E.

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 concerning jury deliberations.

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: April 2026

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 considers it is 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 lie: *R v Belghar* at [110]–[111]; *R v Qaumi* at [24]–[25]; *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 [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, 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 [61]–[63].

Reasons for verdict

In trials involving complex engineering, scientific or medical issues, the interests of justice may be enhanced by the giving of reasons. However, reasons remain but one factor to be considered in determining the interests of justice and the weight given to this factor 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, media publicity surrounding the proceedings or 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 [17]–[21]. 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 [74]–[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 [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 factual issues 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 [82], [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 the issue of 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].

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

Last reviewed: April 2026

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* [2022] NSWCCA 219 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* at [12], [23]–[24].

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: April 2026

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); *Gardiner v R* [2023] NSWCCA 89 at [92]–[94]; *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 [142]; *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].

Judges sitting in judge-alone trials should ensure all the essential legal elements of the offence are set out in their reasons, *even if* they are not in dispute: *Schoffel v R*

[2023] NSWCCA 88 at [79]. In *Schoffel v R*, the trial judge's judgment did not outline all the elements of robbery, including the taking of property with an intention to deprive the complainant of it permanently: at [71].

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: *Gardiner v R* 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 that would be given in a jury trial: *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: see *Toohey v R* at [9]–[12] (where the trial judge gave reasons four months after finding the offence proved). 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: *Gardiner v R* 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]–[13]; *R v Lailna* [2023] NSWSC 48 at [24].

[1-065] Procedural fairness

Last reviewed: April 2026

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 *Gardiner v R* [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: *Gardiner v R* 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: *Gardiner v R* at [156]–[160].

A judge should not sit silent throughout the trial without raising issues and technical problems until delivering judgment: *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: April 2026

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: April 2026

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: April 2026

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 **[1-382]**–**[1-385]**
- support persons, at **[1-398]**–**[1-400]**
- pre-recorded interviews, at **[1-390]**–**[1-392]**
- evidence given via audio visual link, at **[1-380].**

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 The Queen* (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 Co 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 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 Local Court judge 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) 256 CLR 375 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.

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).

[The next page is 45]

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: *R v FDP* (2008) 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

Last reviewed: July 2026

The powers of a court to make 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) 269 CLR 403: see *Sentencing Bench Book* at **[9-220] 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-publication 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".

[1-349.10] Common law and suppression and non-publication orders

Last reviewed: September 2026

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].

In order to give effect to a suppression order, it may be necessary for the court to be closed, for example, during the reception of any evidence, submissions or discussions that identify or might tend to identify the suppressed information: *R v Walker (No 1 — Suppression and related orders)* [2025] NSWSC 298 at [27].

[1-350] The principle of open justice

Last reviewed: September 2026

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". The words "a primary objective" indicate that there may be other primary objectives which should be taken into account: *Rinehart v Welker* [2011] NSWCA 345 at [38]; *R v Walker (No 1 — Suppression and related orders)* [2025] NSWSC 298 at [17]. 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 & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [9]; *Qiangdong 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) 61 NSWLR 344 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]. In other cases, reporting on prior convictions for offences like murder may excite severe condemnation, if not revulsion, on the part of members of the community and the risk of prejudice on the part of jurors, justifying suppression until the conclusion of the trial: *Stinson (a pseudonym) v Nationwide News Pty Ltd* [2022] NSWCCA 235 at [44].

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 should 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.

[1-351] Court Suppression and Non-publication Orders Act 2010

Last reviewed: September 2026

The *Suppression Act* confers 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 & 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].

If an application is made to a court for a suppression order or non-publication order, the court may, without determining the merits of the application, make the order as an interim order to have effect, subject to revocation by the court, until the application is determined: s 10(1). If an order is made as an interim order, the court must determine the application as a matter of urgency: s 10(2).

[1-352] Grounds for and content of suppression or non-publication orders

Last reviewed: September 2026

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 & 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 (for example, in open court) should be considered, although delay of itself does not preclude making an order. 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.

The court must consider the utility of making the order sought, including the impact of any prior publication: *D1 v P1* at [52]; *Godla v DPP (NSW)* [2022] NSWCA 193 at [50]. An order will fail the necessity test if it is futile: *Fairfax Digital* at [76]. However, an order may be made even though it has limited utility (for example, by having a dampening effect on publicity, or where existing publicity is limited), or may be ineffective to stop behaviour that would constitute a breach: *AB (a pseudonym) v R (No 3)* (2019) 97 NSWLR at [116]–[117]; *Stinson (a pseudonym) v Nationwide News Pty Ltd* [2022] NSWCCA 235 at [43]; *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]. It also extends to the proper functioning of the courts, on the basis that if the kind of order proposed is not made, the result will be — or at least will be assumed to be — that particular unacceptable consequences will flow (for example, the future supply of information from informers will be impeded): *John Fairfax Group Pty Ltd (Receivers & Managers Appointed) v Local Court (NSW)* (1991) 26 NSWLR 131 at [161B]; *R v Kwok* (2005) 64 NSWLR 335 at [13]; *Fairfax Digital* at [8].

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, on the basis that if sex workers believed their occupations would generally be publicised in judgments, they may be disinclined to report crimes and loath to give evidence: 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].

While interlocutory criminal proceedings such as bail applications well before trial can raise adverse material about accused persons, there are a panoply of measures that trial judges can take to ensure that juries are impartial tribunals of fact: *Stinson (a pseudonym) v Nationwide News Pty Ltd* at [41].

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 (subject to the limited exception in s 8(1)(d)): *A Lawyer (a pseudonym) v DPP (NSW)* [2020] NSWSC 1713 at [55], [84], [97]; *Stinson (a pseudonym) v Nationwide News Pty Ltd* at [36]–[38]. 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. This construction was preferred by Nettle J in *AB (a pseudonym) v CD (a pseudonym)* [2019] HCA 6 at [14], in relation to s 77RF(1)(c) of the *Judiciary Act 1903* (Cth). 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 DPP (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: at [111]. In *Council of the NSW Bar Association v EFA (a pseudonym)* [2021] NSWCA 339, the Court accepted psychiatric and psychological evidence that further media reporting, and identification of the respondent, would cause further damage to his already fragile mental health, and exacerbate the conditions diagnosed: at [230].

In *Lacey (a pseudonym) v Attorney General for NSW* [2021] NSWCA 27, Basten JA 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]; Leeming JA agreeing at [41]–[43]. The offender, an Aboriginal teenage girl, sought an order prohibiting men from viewing video footage of her being strip-searched. The court found a Local Court judge may have the power to make such an order under the Act.

It may be necessary to make separate (and different) orders in respect of different forms of information in the same proceedings. See for example, *Bissett v Deputy State*

Coroner [2011] NSWSC 1182 where the nature of the medium was a relevant matter to be taken into account. In that case, RS Hulme J concluded that a DVD of relevant events was likely to have a greater impact than the transcript of the recording, and that publication of the DVD should therefore be restrained: 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: at [42]–[44].

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 limited 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 to prevent prejudice to the proper administration of justice, since s 15A of the *Children (Criminal Proceedings) Act 1987* applied and the appropriate remedy for non-compliance with s 15A is for proceedings to be brought under that section: at [38]. It is unnecessary and wrong for the court to make an order that seeks to duplicate or overlap the operation of s 15A: *Stinson (a pseudonym) v Nationwide News Pty Ltd* at [39]. 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.

[1-352.10] Take-down orders

Last reviewed: September 2026

A take-down order will fail the necessity test under s 8(1) if it is futile. If the take-down orders would not result in the articles being sufficiently removed from the internet for the orders to be effective, it would be futile to make the orders: *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384 at [89]. 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]; *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [76].

If, to make the orders effective, material must be removed from any web site globally to which access can be had from NSW or there must be an ability to prevent access by people living in NSW, the evidence should disclose whether either of these is a realistic possibility: *Fairfax Digital* at [79].

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 Qaumi* at [90]; cf *Stinson (a pseudonym) v Nationwide News Pty Ltd* [2022] NSWCCA 235 at [46]–[47].

[1-352.20] Content of the order

An order *must* specify:

- the ground/s 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 should 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 for an example of orders made under the common law; and *R v Walker (No 1 — Suppression and related orders)* [2025] NSWSC 298; *Darren Brown (a pseudonym) v R (No 2)* for examples of the 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: see s 15(1)(b).

[1-352.30] 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]–[32], where the court concluded the NSW Bar Council had standing to make an application for review.

[1-354] Other statutory provisions empowering non-publication or suppression

Last reviewed: July 2026

The *Suppression Act* does not limit or otherwise affect the operation of a provision under any other Act that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings: 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, and the justification for such an exception should be narrowly confined: *Nagi v DPP* [2009] NSWCCA 197 at [30]
- *Lie Detectors Act 1983*, s 6(3).

[1-354.10] 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.

[1-356] Closed courts

Last reviewed: July 2026

[1-356.10] 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, 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).

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

[1-356.20] Children in criminal proceedings

While a court is hearing criminal proceedings to which a child is a party, any person who is not directly interested in the proceedings is to be, unless the court otherwise directs, excluded from the place where the proceedings are being heard: s 10(1)(a) *Children (Criminal Proceedings) Act 1987*. Any family victim is entitled to enter or remain at the place the proceedings are heard: s 10(1)(c). Media representatives may enter or remain unless the court otherwise directs: s 10(1)(b).

In *AE v R* [2010] NSWCCA 203, the Court ordered the sentence appeal of the 17-year-old appellant (who was 15 at the time of the offence) be heard in open court and said in respect of s 10 (at [39]):

> Where a child is a party to criminal proceedings, Parliament has determined that the principle of open justice should be compromised…subject to the court exercising its discretion to direct otherwise. There is no need for special circumstances to be shown: it is sufficient that the court exercises its discretion in the circumstances of the particular case, bearing in mind the underlying purpose of s 10.

One factor relevant to that decision is whether the identity of the child will be protected from publication by separate provisions under Div 3A of the *Children (Criminal Proceedings) Act*. In *AE v R*, the seriousness of the offence, the importance of the principle of open justice, the fact the applicant was 17 and there was a prohibition on publication of his name, meant the principle of open justice favoured an order that the court not be closed pursuant to s 10: at [40].

Where an accused was a child at the time of the offence but is an adult at the commencement of proceedings, the statutory exclusion in s 10 is not engaged by reason of the accused's age. Accordingly, in the absence of powerful considerations in favour

of an order to close the court, the public interest in open justice will preclude the making of such an order: *GBB v R* [2019] NSWCCA 296 at [3]–[4]. In *GBB v R* the Court was satisfied the interests of the appellant and complainant were adequately protected by s 15A of the *Children (Criminal Proceedings) Act.* See also *R v JM (No 2)* [2024] NSWSC 771.

Section 15A prohibits the publication or broadcasting of the names of children involved as offenders, witnesses, or brothers and sisters of child victims in criminal proceedings. (See further at **[1-358.10] Publication of children's names in criminal proceedings** below.)

In *GBB v R*, the Court said it was at least arguable the *Suppression Act* (which defines a suppression order in s 3 to mean "an order that prohibits or restricts the disclosure of information (by publication or otherwise)") is engaged by an application to prevent people obtaining information as to the proceedings by excluding them from the room in which the proceedings are being conducted: at [5].

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

[1-356.30] Terrorism

Terrorism (Police Powers) Act 2002, s 26P requires that proceedings before the Supreme Court in connection with an application 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.

[1-356.40] 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 it considers the interests of justice require otherwise, hold that part of the proceedings in private and make an order suppressing the publication of evidence given to ensure the participant's identity is not disclosed. See also s 31E which concerns questioning, with leave, of a witness that may disclose a protected person's protected identity.

[1-356.50] 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 members of the public 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 *Collaery v The Queen (No 2)* [2021] ACTCA 28 at [96]–[106], [120]–[126].

[1-358] Self-executing prohibition of publication provisions

Last reviewed: July 2026

A number of statutory provisions prohibit the publication of information in particular circumstances. The statutory prohibitions do not depend on a court order. Trial judges should note in the judgment, reasons or orders that the relevant prohibition (for example, s 15A of the *Children (Criminal Proceedings) Act* or s 578A of the *Crimes Act*) applies: *Carrington v R* [2021] NSWCCA 257 at [8]–[9].

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 siblings of child victims in criminal proceedings (see below).
- *Crimes Act 1900*, s 578A(2) prohibits the publication of matters identifying a complainant in proceedings in respect of a prescribed sexual offence, subject to the exceptions in s 578A(4).

  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, where 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.
- *Status of Children Act 1996*, s 25.

See also the following provisions, which require the court to make certain orders unless it considers the interests of justice otherwise require:

- *Law Enforcement (Controlled Operations) Act 1997*, s 28.
- *Law Enforcement and National Security (Assumed Identities) Act 2010*, s 34.

[1-358.10] 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 s 15A(1), the appropriate remedy is for proceedings to be commenced under s 15A(7) rather than the making of a non-publication order under s 7 of the *Suppression Act*: *R v AB (No 1)* (2018) 97 NSWLR 1015 at [38].

Section 15A(5) provides that a reference to the name of the child includes a reference to any information, picture or other material that identifies them or is likely to lead to their identification. The relevant statutory question directs attention to the extent to which, if at all, publication of information (such as a deceased child victim's name with consent of their senior available next of kin under s 15E), as described in the judgment to be published, would be likely of itself, to lead to the identification of the relevant child. Section 15A does not speak in terms of whether or not it would be *possible* and is not concerned with whether or not some members of the community already know who the relevant child is, nor whether it would be a futility in the limited sense that those people familiar with the events surrounding the offence already know who the relevant child is: *R v IP* [2024] NSWCCA 16 at [13]–[15].

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 give consent in the case of a person under the age of 16 years at the time of publication or broadcasting 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, and *R v IP* [2024] NSWCCA 16 where after trial, the deceased's senior available next of kin waived their right to the protection of the deceased child's anonymity under s 15E, and the court allowed his name to be published.

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 available next of kin is available to give consent and the court is satisfied the public interest requires it. 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] (considering s 11(4A) (rep)). 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 (also considering the former s 11(4A)) 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].

[1-358.20] 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 **[1-360]**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, a vulnerable adult complainant in a vulnerable adult proceeding or a special witness in a special witness proceeding. Each proceeding is defined in ss 15Y and 15YA.

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.

[1-359] Checklist for suppression orders

Last reviewed: September 2026

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 offence proceedings) or witnesses. See **[1-354] Other statutory provisions empowering no-publication or suppression**; **[1-356] Closed courts**; **[1-358] 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) If an application is made to the court for a suppression order or non-publication order, the court may, without determining the merits of the application, make the order as an interim order to have effect, subject to revocation by the court, until the application is determined: s 10(1). If an order is made as an interim order, the court must determine the application as a matter of urgency: s 10(2).

(4) 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).

(5) 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 **[1-352] 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).

(6) 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 **[1-352.20] Content of order**. The preferable approach is that the order operate throughout the Commonwealth.

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

(7) 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] Outline of chapter

Last reviewed: April 2025

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[1-361] Introduction

Last reviewed: April 2025

The *Criminal Procedure Act 1986* (CPA) and other legislation enables categories of witnesses in various types of proceedings to give their evidence through alternative or additional measures to those ordinarily employed in the court room. These include giving evidence via audio visual link from a different location, the use of support persons, and the use of pre-recorded representations given to police. This chapter sets out the available measures according to the particular proceeding and category of witness involved.

Proceedings

[1-365] Prescribed sexual offence proceedings

Last reviewed: April 2025

Chapter 6, Pt 5, Div 1 of the CPA applies to proceedings in respect of a prescribed sexual offence, including committal proceedings and where a person is charged with either the prescribed sexual offence alone or together with any other offences: s 290. "Prescribed sexual offence" is defined in s 3(1) and includes the specific offences outlined in s 290A.

Different provisions will apply depending on whether the witness is a child complainant, a child witness, an adult complainant, an adult tendency evidence witness, or an adult witness with a cognitive impairment.

(a) Child complainant

The procedure for the giving of a child complainant's evidence in a prescribed sexual offence proceeding is governed by Ch 6, P 5, Div 1A, CPA — see **[5-400] Pre-recorded evidence in child sexual offence proceedings — Child Sexual Offence Evidence Program (CSOEP)**.

A "child" means an individual aged less than 18 years of age: s 294E. A child complainant (aged under 16 years at the time of giving evidence: s 306P(1)) is also a "vulnerable person": ss 3(1), 306M(1). Consequently, in addition to the requirements in Ch 6, Pt 5, Div 1A, the measures set out in Ch 6, Pt 6, Div 1, 3 and 4, also apply. Division 4 applies to "personal assault offences" (s 306ZA(a)), defined as including all offences under Pt 3 of the *Crimes Act 1900*, which include sexual offences: s 306M(1).

If required by the regulations, police interviews with a vulnerable person are to be recorded (s 306Q) and a vulnerable person may give evidence of previous representations made to police via this recording (s 306R, s 306S(1)(a)).

Measures	Section	Additional information	Jury direction required
Evidence must be given by way of pre-recorded hearing	ss 294G, 294I	Court may order otherwise if in interests of justice: s 294G(2), considering factors including (3) and (4)	Direction required: s 294O: • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-392]**
Evidence in chief may be given by way of child complainant's recorded interview with police	s 294I(1)(a) in conjunction with s 306U	Court may order otherwise if in interests of justice: s 306Y	Direction required: s 306X: • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-390]**
Other evidence (additional evidence in chief, cross-examination and re-examination) may be given by audio visual link	s 294I(1)(b) and (6) in conjunction with s 306U(3)	n/a	n/a
Alternative measures including screens in court or planned seating arrangements must be made available if audio visual link/CCTV not permitted, available or chosen	s 306ZH(3)	Witness can still elect to give evidence in the courtroom: s 306ZH(4)	Direction required: s 306ZI(4): • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**
Evidence must be given in presence of witness intermediary (where appointed under s 294M(3))	s 294N(1)	n/a	Direction required: s 294O: • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-395]**

Measures	Section	Additional information	Jury direction required
Have support person present	s 306ZK(2) (protection extends to persons aged 16 years or over but under 18 years: s 306ZK(7), cf s 306P) s 306ZK operates in addition to s 294C: s 294C(7)	Person may be present as an interpreter, to assist complainant with giving evidence due to any impairment, or for providing other support: s 306ZK(3) Accused may object if choice of support person is likely to prejudice the right to a fair hearing: s 30ZK(3A)	Direction required: s 306ZI(3): • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-400]**
No examination (examination in chief, cross-examination or re-examination) by unrepresented accused	s 306ZL(2)	Complainant may be examined by a person appointed by the court: s 306ZL(2)	Direction required: s 306ZI(4): • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-405]**

(b) Child witness

Chapter 6, Pt 6 provides protective measures for child witness (aged under 16 years at the time of giving evidence: s 306P(1)). A "child" means an individual aged less than 18 years of age: s 294E. A child witness is a "vulnerable person": s 306M(1). Division 4 of Pt 6 applies to "personal assault offences", defined as including all offences under Pt 3 *Crimes Act* (s 306M), which include sexual offences.

If required by the regulations, police interviews with a vulnerable person are to be recorded (s 306Q) and a vulnerable person may give evidence of previous representations made to police via this recording (s 306R, s 306S(1)(a)).

Measures	Section	Additional information	Jury direction required
Evidence in chief may be given by way of child witness's recorded interview with police	s 306U(1)	Court may order otherwise if in interests of justice: s 306Y	Direction required: s 306X: • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-390]**

Measures	Section	Additional information	Jury direction required
Other evidence (additional evidence in chief, cross-examination and re-examination) may be given by closed-circuit television	s 306U(3) in conjunction with s 306W and s 306ZB(1)	A child aged 16 or above but under 18 may give evidence via CCTV if they were under 16 at the time the charge was laid: s 306ZB(2) Court may order CCTV measure not to be used if satisfied there are special reasons in the interests of justice: s 306ZB(4), (5)	Direction required: s 306ZI(1) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction **[1-385]**
Alternative measures of screens in court or planned seating arrangements must be made available if audio visual link/CCTV not permitted, available or chosen	s 306ZH(3)	Witness can still elect to give evidence in the courtroom: s 306ZH(4)	Direction required: s 306ZI(4) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**
Evidence must be given in presence of witness intermediary (where appointed under s 294M(3))	s 294N(1)	n/a	Direction required: s 294O: • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-395]**
Have support person present	s 306ZK(2) (protection extends to persons aged 16 years or over but under 18 years: s 306ZK(7), cf s 306P)	Person may be present as an interpreter, to assist witness with giving evidence due to any impairment, or for providing other support: s 306ZK(3) Accused may object if choice of support person is likely to prejudice the right to a fair hearing: s 306ZK(3A)	Direction required: s 306ZI(3) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-400]**

Measures	Section	Additional information	Jury direction required
No examination (examination in chief, cross-examination or re-examination) by unrepresented accused	s 306ZL(2)	Witness may be examined by a person appointed by the court: s 306ZL(2)	Direction required: s 306ZI(4) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-405]**

(c) Adult complainant

Chapter 6, Pt 5, Div 1 of the CPA provides protective measures for adult complainants in sexual offence proceedings. There are additional measures for the evidence of such witness in the event of retrials or subsequent trials (see **[1-368] Retrials and subsequent trials — sexual offence proceedings**).

Measures	Section	Additional information	Jury direction required
Entitled to give evidence via CCTV from remote location, or use screens or planned seating arrangements in court	ss 294B(3)	Court may order CCTV measure not to be used if satisfied there are special reasons in the interests of justice: s 294B(5), (6)	Direction required: s 294B(7) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**
Have support person present	s 294C	If complainant is a vulnerable person, s 306ZK also applies: s 294C(7) Accused may object if choice of support person is likely to prejudice the right to a fair trial: s 294C(4)	If complainant is a vulnerable person, direction under s 306ZI(3) required: • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-400]**
No examination (examination in chief, cross-examination or re-examination) by unrepresented accused	s 294A(2)	Complainant may be examined by a person appointed by the court: s 294A(2)	Direction required: s 294A(7) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-405]**

(d) Tendency or "sexual offence witness"

In some circumstances the Crown will elect to call witnesses other than the complainant to establish alleged tendency. They are sometimes referred to as "tendency witnesses", though the CPA uses the term "sexual offence witness", defined in s 294D(2) as any witness in the proceedings (other than the complainant) against whom a prescribed sexual offence is alleged to have been committed by the accused, or against whom the accused allegedly committed acts that would constitute such an offence if they were to occur in NSW at the time of the commencement of proceedings.

The protections in Pt 5, Div 1 apply to a sexual offence witness in the same way they apply to an adult complainant: s 294D(1). If the witness previously gave evidence as a complainant in a prescribed sexual offence proceeding, a recording of that evidence (the "original evidence") may be tendered as that witness's evidence in the current proceedings.

Measures	Section	Additional information	Jury direction required
Recording of witness's evidence (evidence in chief, cross-examination, and re-examination) as a complainant in previous proceedings may be tendered as witness's evidence in current proceedings	s 294CA(2)	Once recording admitted, witness not compellable to give further evidence about same matters unless it is necessary to clarify matters, address new information, or if it is otherwise in interests of justice: s 294CA(5) Recording may not be admitted if court considers accused would be unfairly disadvantaged: s 294CA(8)	n/a
Entitled to give evidence via CCTV from remote location, or use screens or planned seating arrangements in court	ss 294B(3)	Court may order CCTV measure not to be used if satisfied there are special reasons in the interests of justice: s 294B(5), (6)	Direction required: s 294B(7) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**
Have support person present	s 294C	Entitlement to support person applies even if complainant gives evidence by CCTV or under any alternative arrangements under s 289V, s 294B or Pt 6: s 294C(2)(a) Accused may object if choice of support person is likely to prejudice the right to a fair trial: s 294C(4)	n/a

Measures	Section	Additional information	Jury direction required
No examination (examination in chief, cross-examination or re-examination) by unrepresented accused	s 294A(2)	Witness may be examined by a person appointed by the court: s 294A(2)	Direction required: s 294A(7) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-405]**

(e) Cognitively impaired witness

Chapter 6, Pt 6 provides protective measures for cognitively impaired witnesses. A cognitively impaired person is a "vulnerable person": s 306M(1). A "cognitive impairment" is defined at s 306M(2) and includes persons with an intellectual disability or a developmental disorder (including an autism spectrum disorder): see s 306M(2) for a full list of conditions. The alternative measures available under Pt 6 must only be applied to the evidence of a cognitively impaired person if the court is satisfied the facts of the case may be better ascertained if the person's evidence is given in such a manner: s 306P(2).

Division 4 of Pt 6 applies to "personal assault offences", defined as including all offences under Pt 3 *Crimes Act* (s 306M), which include sexual offences.

If required by the regulations, police interviews with a vulnerable person are to be recorded (s 306Q) and a vulnerable person may give evidence of previous representations made to police via this recording (s 306R, s 306S(1)(a)).

Measures	Section	Additional information	Jury direction required
Evidence in chief may be given by way of witness's recorded interview with police	s 306U(1)	Court may order otherwise if in interests of justice: s 306Y	Direction required: s 306X: • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-390]**
Other evidence (additional evidence in chief, cross-examination and re-examination) may be given by closed-circuit television	s 306U(3) in conjunction with s 306W and s 306ZB(1)	Court may order CCTV measure not to be used if satisfied there are special reasons in the interests of justice: s 306ZB(4), (5)	Direction required: s 306ZI(1) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**

Measures	Section	Additional information	Jury direction required
Alternative measures of screens in court or planned seating arrangements must be made available if audio visual link/CCTV not permitted, available or chosen	s 306ZH(3)	Witness can still elect to give evidence in the courtroom: s 306ZH(4)	Direction required: s 306ZI(4) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**
Have support person present	s 306ZK(2)	Person may be present as an interpreter, to assist witness with giving evidence due to any impairment, or for providing other support: s 306ZK(3) Accused may object if choice of support person is likely to prejudice the right to a fair hearing: s 306ZK(3A)	Direction required: s 306ZI(3) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-400]**
No examination (examination in chief, cross-examination or re-examination) by unrepresented accused	s 306ZL(2)	Witness may be examined by a person appointed by the court: s 306ZL(2)	Direction required: s 306ZI(4) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-405]**

[1-368] Retrials and subsequent trials — prescribed sexual offence proceedings

Last reviewed: April 2025

Chapter 6, Pt 5, Div 3 and 4 of the CPA apply to new trials of sexual offence proceedings following the hearing of the original trial.

Division 3 applies where a new trial is ordered following a successful appeal of conviction from the original trial (a "retrial").

Division 4 applies where a new trial is listed after the original proceedings were discontinued or the jurors could not reach a verdict (a "subsequent trial").

The special measures apply to complainants or "special witnesses": a sexual offence witness, a witness who is cognitively impaired, or a witness who is under 18: s 306A for Div 3; s 306H for Div 4. A record of the complainant or witness's evidence from the original proceedings (evidence in chief, cross-examination and re-examination) is called "original evidence": s 306B(2); s 306I(2).

RETRIALS			
Measures	**Section**	**Additional information**	**Jury direction required**
Complainant's "original evidence" may be tendered in new trial	s 306B(1)	Prosecutor to give written notice to accused and court at least 21 days before new trial: s 306B(3) Complainant not compellable to give further evidence in proceedings once record of original evidence admitted: s 306C	See the suggested direction at **[4-377] Suggested direction — complainant not called on retrial** where the complainant's evidence in an earlier trial is played in a retrial
Special witness's "original evidence" may be tendered in new trial	s 306B(1)	Prosecutor to give written notice to accused and court at least 21 days before new trial: s 306B(3) Court can decline to admit record of original evidence if accused would be unfairly disadvantaged: s 306B(5D) Once recording admitted, witness not compellable to give further evidence about same matters unless it is necessary to clarify matters, address new information, or if it is otherwise in interests of justice: s 306B(5A) Special witness not compellable to give further evidence in proceedings once record of original evidence admitted: s 306C	See the suggested direction at **[4-377] Suggested direction — complainant not called on retrial,** for adaptation where the witness's evidence in an earlier trial is played in a retrial

SUBSEQUENT TRIALS			
Measures	**Section**	**Additional information**	**Jury direction required**
Complainant's "original evidence" may be tendered in new trial	s 306I(1)	Prosecutor to give written notice to accused and court at least 21 days before new trial: s 306I(3) Court can decline to admit record of original evidence if accused would be unfairly disadvantaged: s 306I(5) Once record of original evidence admitted, complainant not compellable to give further evidence about same matters unless it is necessary to clarify matters, address new information, or it is otherwise in the interests of justice: s 306J(1)	See the suggested direction at **[4-377] Suggested direction — complainant not called on retrial** where the complainant's evidence in an earlier trial is played in a subsequent trial
Special witness's "original evidence" may be tendered in new trial	s 306I(1)	Prosecutor to give written notice to accused and court at least 21 days before new trial: s 306I(3) Court can decline to admit record of original evidence if accused would be unfairly disadvantaged: s 306I(5) Once record of original evidence admitted, special witness not compellable to give further evidence about same matters unless it us necessary to clarify matters, address new information, or it is otherwise in the interests of justice: s 306J(1)	See the suggested direction at **[4-377] Suggested direction — complainant not called on retrial,** for adaptation where the witness's evidence in an earlier trial is played in a subsequent trial

[1-370] Domestic violence proceedings

Last reviewed: April 2025

(a) Complainant

Chapter 6, Pt 4B provides protective measures for complainants in domestic violence proceedings. A domestic violence complainant is the person against whom the domestic violence offence is alleged to have been committed, but does not include a person who is a "vulnerable person": s 3. A "domestic violence offence" is defined in s 11 of the *Crimes (Domestic and Personal Violence) Act 2007*.

If police question a complainant as soon as practicable after the commission of the alleged domestic violence offence, the complainant may consent to the questions and answers being recorded as their "recorded statement": s 289D.

Measures	Section	Additional information	Jury direction required
Entitled to give evidence in chief via "recorded statement" given to police	s 289F(1)	Recorded statement must contain statement from complainant confirming their age and that the representations in the statement are true: s 289F(3)	Direction required: s 289J • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction **[1-390]**
Must be available for cross-examination and re-examination in the court room or via alternative arrangements permitted by the CPA	s 289F(5)	n/a	n/a
Entitled to give evidence via audio visual link from remote location, or use screens or planned seating arrangements in court	s 289V(1)	Court may order audio visual link measure not to be used if satisfied there are special reasons in the interests of justice: s 289V(3), (4)	Direction required: s 289V(5) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**

Measures	Section	Additional information	Jury direction required
No direct examination (examination in chief, cross-examination or re-examination) by unrepresented accused	s 289VA(2)	Complainant may be examined by a person appointed by the court or through use of court technology: s 289VA(2)	Direction required: s 289VA(8) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-405]**
Entitled to have support person	s 306ZQ(1)	Person may be present as an interpreter, to assist complainant with giving evidence due to any impairment, or for providing other support: s 306ZQ(2)(b) Accused may object if choice of support person is likely to prejudice the right to a fair hearing: s 306ZQ(3)	No formal jury direction required by legislation but may be prudent to give general direction regarding support persons. See suggested direction at **[1-400]**

(b) Witness who is a "vulnerable person"

A witness who is under 18 years of age or cognitively impaired is a "vulnerable person" in proceedings involving "personal assault offences", which include offences under Pt 3 *Crimes Act* and offences under ss 13 and 14 of the *Crimes (Domestic and Personal Violence) Act 2007*: s 306M(1). Where domestic violence offence proceedings involve charges that fall within the definition of "personal assault offences", a witness who is a "vulnerable person" is entitled to the protective measures under Ch 6, Pt 6.

If required by the regulations, police interviews with a vulnerable person are to be recorded (s 306Q) and a vulnerable person may give evidence of previous representations made to police via this recording: ss 306R, 306S(1)(a).

Measures	Section	Additional information	Jury direction required
Evidence in chief may be given by way of witness's recorded interview with police	s 306U(1)	Court may order otherwise if in interests of justice: s 306Y	Direction required: s 306X: • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-390]**

Measures	Section	Additional information	Jury direction required
Other evidence (additional evidence in chief, cross-examination and re-examination) may be given by closed-circuit television	s 306U(3) in conjunction with s 306W and s 306ZB(1)	Court may order CCTV measure not to be used if satisfied there are special reasons in the interests of justice: s 306ZB(4), (5)	Direction required: s 306ZI(1) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**
Alternative measures of screens in court or planned seating arrangements must be made available if audio visual link/CCTV not permitted, available or chosen	s 306ZH(3)	Witness can still elect to give evidence in the courtroom: s 306ZH(4)	Direction required: s 306ZI(4) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**
Have support person present	s 306ZK(2)	Person may be present as an interpreter, to assist complainant with giving evidence due to any impairment, or for providing other support: s 306ZK(3) Accused may object if choice of support person is likely to prejudice the right to a fair hearing: s 306ZK(3A)	Direction required: s 306ZI(3) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction **[1-400]**
No examination (examination in chief, cross-examination or re-examination) by unrepresented accused	s 306ZL	Witness may be examined by a person appointed by the court: s 306ZL(2)	Direction required: s 306ZI(4) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-405]**

[1-372] Proceedings involving accused as a "vulnerable person"

Last reviewed: April 2025

An accused who is a "vulnerable person" because they are aged under 18 or are cognitively impaired (s 306M(1)) is entitled to some limited protective measures in Ch 6, Pt 6.

If required by the regulations, police interviews with a vulnerable person are to be recorded (s 306Q) and a vulnerable person may give evidence of previous representations made to police via this recording (s 306R, s 306S(1)(a)).

Measures	Section	Additional information	Jury direction required
May be permitted to give evidence via CCTV	s 306ZC(2)	For child accused, court can only order CCTV if satisfied child will suffer harm if required to give evidence in ordinary way, or if facts will be better ascertained if evidence given via CCTV: s 306ZC(3)	Direction required: s 306ZI(2) • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**
May be permitted a support person	s 306ZD(2)(b)	Person may be present as an interpreter, to assist with giving evidence due to accused's impairment, or for providing other support: s 306ZD(2)(b)	Direction required: s 306ZI(3) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-400]**
Alternative measures of screens in court or planned seating arrangements must be made available if audio visual link/CCTV not permitted, available or chosen	s 306ZH(3)	Accused can still elect to give evidence in the courtroom: s 306ZH(4)	Direction required: s 306ZI(4) • Standard procedure • No adverse inference against accused • No greater or lesser weight to be given to evidence See suggested direction at **[1-385]**

[1-375] Government agency witnesses

Last reviewed: April 2025

A "government agency witness" includes police witnesses who give corroborative evidence of the evidence in chief of other police witnesses, and staff of the NSW Health Service who have provided an expert report or are called to give expert opinion evidence in the proceedings: s 5BAA(5) of the *Evidence (Audio and Audio Visual Links) Act 1998*. Such witnesses must give their evidence via audio-visual link from

any location in NSW, provided the necessary links are available: s 5BAA(1), (2). The court can direct otherwise if satisfied the evidence is likely to be contentious and it is in the interests of the administration of justice to appear in person in court: s 5BAA(3), (4).

For criminal proceedings in the NSW Supreme Court, Practice Note No SC Gen 15 requires parties to advise the court at least 10 working days before the hearing date whether government agency witnesses will be giving evidence via AVL.

[1-378] Commonwealth proceedings

Last reviewed: April 2025

Part IAD of the *Crimes Act 1914* (Cth) provides protective measures for vulnerable witnesses in Commonwealth criminal proceedings. The *Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Act 2024* (Cth) commenced on 11 December 2024 and amended Pt IAD to expand these protections.

The Commonwealth offences to which Pt IAD applies include war crimes, slavery, trafficking in persons, child sexual offences outside Australia, offences involving child abuse material outside Australia, torture, and offences relating to the use of postal or carriage services involving sexual activity with children. The full list of relevant offences is at s 15Y(1) and (2). Proceedings relating to such offences are called a "child proceeding" where they involve a child complainant (s 15Y(1)) or a "vulnerable adult proceeding" where they involve an adult complainant (s 15Y(2)): s 15YA.

A "child complainant" or "child witness" includes a person who was aged under 18 years at the time of the of alleged offence, but does not include a person now aged 18 years or over if they inform the court they do not wish to be treated as a child complainant or child witness: s 15YAC and s 15YAD, respectively.

A "vulnerable adult complainant" is one who is alleged to be a victim in a s 15Y(2) vulnerable adult proceeding, unless they inform the court they do not wish to be treated as a vulnerable adult complainant: s 15YAA.

A court may declare a person to be a "special witness" if satisfied they are unlikely to be able to satisfactorily give evidence in the ordinary manner due to a disability, or due to intimidation, distress or emotional trauma arising from age, cultural background, relationship to a party to the proceedings, the nature of the evidence or some other relevant factor: s 15YAB. In a special witness proceeding, the court may order that specific protective measures under Pt IAD are to apply to a special witness: s 15YAB(3).

Child complainants, child witnesses, vulnerable adult complainants and special witnesses are all classed within the term "vulnerable person" and each of the protective measures under Pt IAD apply to this category of witness.

Measures	Section	Additional provisions	Jury direction
Evidence in chief may be given by way of witness's recorded interview with police	s 15YM(1)	If recording admitted, witness must be available for cross-examination and re-examination: s 15YM(4) Admissibility of the evidence given by the recording is not affected by the fact that it is evidence of previous representations: s 15YN(1). But the court may refuse to admit the recording adduced under s 15YM: s 15YN(3)	No warning to be given to jury that the law requires greater or lesser weight to be given to the evidence because it is given via recording: s 15YQ(1)(c)
May be permitted to have their evidence (evidence in chief, cross-examination and re-examination) recorded at an "evidence recording hearing"	s 15YDB(1)	Witness may give their evidence via CCTV from another room: s 15YDC(2)(a) Recording of evidence must be admitted as the witness's evidence at the hearing of the proceeding: s 15YDD(2). Court may refuse to admit the recording: s 15YDE If recording admitted, witness not compellable to give further evidence unless it is necessary to clarify the evidence, give proper consideration to new information, or in the interests of justice: s 15YDG(1)	n/a
Evidence must be given by CCTV	s 15YI	Exception: if witness is at least 16 years of age and chooses not to; if there are no CCTV facilities available; or if the court orders it is not in the interests of justice: s 15YI(1), (2)	No warning to be given to jury that the law requires greater or lesser weight to be given to the evidence because it is given via CCTV: s 15YQ(1)(b)
Alternative measures of screens in court or planned seating arrangements must be made available if evidence is not to be given via recorded evidence hearing or CCTV	s 15YL(1), (2)	A witness aged 16 years or over may choose not to give evidence under these alternative arrangements: s 15YL(3)	No warning to be given to jury that the law requires greater or lesser weight to be given to the evidence because it is given via alternative arrangements: s 15YQ(1)(b)

Measures	Section	Additional provisions	Jury direction
Witness may be permitted to have a support person if giving evidence outside the courtroom	s 15YJ(1)(c)	Court may order a person be present to act as an interpreter, to assist witness with any difficulties in giving evidence associated with a disability, or to provide other support: s 15YJ(1)(c)	n/a
Witness may be permitted to have support person if giving evidence in person or at an evidence recording hearing	s 15YO	Court may determine it is not appropriate for the selected person to accompany the witness as a support person: s 15YO(2) Support person must not influence witness's answers or disrupt the questioning: s 15YO(4)	No warning to be given to jury that the law requires greater or lesser weight to be given to the evidence because there is a support person: s 15YQ(1)(d)
No cross-examination by unrepresented accused or child complainants or vulnerable adult complainants	s 15YF(1) (child complainants) s 15YFA(1) (vulnerable adult complainants)	Witness may be examined by a person appointed by the court: s 15YF(2), s 15YFA(2)	n/a
No cross-examination by unrepresented accused of vulnerable persons unless court gives leave	s 15YG(1)	Court must be satisfied vulnerable person's ability to give evidence under cross-examination will not be adversely affected: s 15YG(2)	n/a
No cross-examination that is inappropriate or unnecessarily aggressive	s 15YE(1)	Court to have regard to witness's personal characteristics (age, culture, mental capacity, gender) in determining if question is inappropriate or unnecessarily aggressive: s 15YE(2)	n/a
Evidence given in person must be recorded	s 15YLA(1)	Court must be satisfied the evidence could be used in another proceeding and the witness consents to the recording: s 15YLA(1)	n/a

Measures	Section	Additional provisions	Jury direction
Witness's recorded evidence from "original proceedings" may be admitted in a new trial (where new proceedings are ordered after the original proceedings are discontinued or successfully appealed)	s 15YNA, s 15YNB	Prosecutor to give written notice to accused and court at least 21 days before new trial: s 15YNB(1) If recording admitted, witness not compellable to give further evidence in new trial unless it is necessary to clarify the evidence, give proper consideration to new information, or in the interests of justice: s 15YNC(1)	No warning to be given to jury that the law requires greater or lesser weight to be given to the recorded evidence: s 15YNE

Measures and directions

[1-380] Directions and warnings generally

Last reviewed: April 2025

Directions or warnings about alternative means of giving evidence can be given at any time. In *R v DBG* [2002] NSWCCA 328 at [23], Howie J held it was "highly preferable" that such warnings be given either immediately before or immediately after the evidence is given rather than wait until the summing up. However, in *Long (a pseudonym) v R* [2021] NSWCCA 212, the court, though endorsing *R v DBG* that this course was preferable, held there was no rule to that effect and stated the timing of warnings and whether, and how often, they should be repeated, remains within the trial judge's discretion [7], [73]–[74].

The statutory requirements regarding warnings or directions to juries in Commonwealth proceedings are limited, but do not appear to preclude giving directions in the terms suggested below when particular alternative measures are employed.

[1-382] Giving of evidence by CCTV

Last reviewed: April 2025

The court retains a discretion as to whether a witness is permitted to give evidence via CCTV or audio-visual link. It is generally not sufficient to deny use of such technology merely because the jury might form the impression the accused is or was violent: *Sudath v R* [2008] NSWCCA 207 at [28]–[29]. See also *R v Pirrello, Pirrello & D'Agostino* [2019] NSWSC 1476 at [29] where it was held that while there may be some inconvenience in a witness giving evidence via AVL, inconvenience falls well short of prejudice, and even less so unfairness. There may be some disadvantage to an accused person who does not see the face of a witness giving evidence, but where counsel can undertake that role on an accused's behalf, such disadvantage as may arise falls well short of prejudice, much less impermissible prejudice.

[1-385] Suggested direction — use of CCTV or other alternative arrangements

Last reviewed: July 2025

> The [*complainant/witness*] 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.

The above direction should be adapted where the accused is a vulnerable person and is permitted by the court to give evidence by CCTV or other alternative arrangements. To say more than what is explicitly required by s 294B(7) without the ability to identify a detriment or impact of the mode of evidence on assessing the complainant's credibility is likely to contravene s 294B(7) and could convert the complainant's entitlement to give evidence by such means to a qualified entitlement: *R v Walker* [2025] NSWCCA 62 at [56]–[57]. In *R v Walker*, the judge breached s 294B(7) by directing as above then adding that any difficulty the jury had in assessing the complainant's credibility by reason of it being adduced by AVL should be resolved in the accused's favour. Where there is a clear basis upon which it is suggested there is some weakness in the Crown case as a result of the manner in which the evidence was given rather than simply because it was given by way of AVL, then see the example direction set out in *R v Walker* at [59] that may be open in an appropriate case to give.

[1-388] Recorded out-of-court representation and statements

Last reviewed: April 2025

Objectives

It was observed in *R v NZ* (2005) 63 NSWLR 628 at [170] that the objectives of permitting recorded statements given to police to be used as a witness's evidence in chief was to reduce the trauma for children giving evidence and also to assist in maintaining the reliability of the account from contamination or a failure of recollection over time.

Competence

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].

Evidence Act exemptions

The Ch 6 CPA provisions generally apply in addition to the *Evidence Act 1995* (NSW): for domestic violence complainants, see s 289E; for vulnerable persons, see s 306O.

However, the hearsay rule does prevent recorded out-of-court representations being admitted in proceedings: s 289I(1) (domestic violence complainants; opinion rule

also does not prevent admission); s 294CA(10) (sexual offence witnesses); s 306B(4) (retrials); s 306I(4) (new trials); s 306V(1) (vulnerable person; opinion rule also does not prevent admission).

Pre-requisites for admission

With respect to recorded statements of vulnerable persons, where the parties are in agreement that a witness is cognitively impaired and the facts of the case may be better ascertained if they gave their evidence via the alternative measures contained in Ch 6, P 6, this is a sufficient basis for the court to be satisfied the pre-requisite in s 306P(2) is met to allow the recorded statement to be admitted: *Dogan v R* [2020] NSWCCA 151 at [16]–[17]. The Court in *Dogan v R* held the provision for allowing the tender of a recorded police interview under s 306S(1)(a) was for the benefit of the vulnerable person, whereas the limitation under s 306P(2), that the Court should be satisfied that the facts may be "better ascertained" the tendering of the interview, was "primarily a protection for the benefit of the accused. In those circumstances there is no reason why the court should not reach the required satisfaction upon the basis of the parties' consent.": at [17].

Preferred procedure

In *R v NZ*, 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: 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: 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": at [96].

See also *AB (a pseudonym) v R* [2019] NSWCCA 82 and *CF v R* [2017] NSWCCA 318 where the principles in *Gately v The Queen* were applied.

The use of transcripts

If the jury is given a transcript of the recording (expressly permitted under ss 289K, 294J(6)(b), 306Z), it would be prudent to warn the jury consistent with the terms of the legislation including that the recording is the actual evidence.

Consideration should also be given to whether a transcript is to be provided whilst the recording is played or provided after it is played upon request. In the context of the legislation and what has been discussed above under the heading "Preferred procedure", caution should be exercised by the Court around the use of transcripts in this area. It may be prudent to raise with counsel in the absence of the jury, and before the playing of the recording, what mechanism will be put in place as to the use of the transcript including whether it will be retrieved from the jury or similar. In addition, consideration should be given to raising with counsel what directions should be given around the jury's use of the transcript at that time and/or at a later stage of the trial.

[1-390] Suggested direction — evidence of recorded statements

Last reviewed: April 2025

The direction below should be adapted to the circumstances of the case. The suggested direction for recorded statements specifically of child complainants/witnesses in sexual offence matters is incorporated into **[1-392] Suggested direction — child complainant's/witness's evidence given at pre-recorded hearing**.

The law provides that [*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. It is important that you pay attention when listening to evidence contained in a recording. As with all witnesses, once a witness has completed giving their evidence, they do not return to court at some later point in time to repeat their evidence. Accordingly, do not expect that evidence contained in a recording will be repeated by being replayed.

[*If appropriate:* After that's finished, [*the witness*] will give evidence by CCTV [*or other alternative means*]. They won't actually appear in the courtroom.]

This is standard procedure for [*children/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 their evidence in the same way as you would assess the evidence of any other witness.

[1-392] Suggested direction — child complainant's/witness's evidence given at pre-recorded hearing

Last reviewed: April 2025

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 child 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*].]

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 should you have an expectation that the evidence contained in the recording(s) will be played again.

This direction is also located at **[5-420] Suggested direction — pre-recorded evidence** of the chapter **[5-400] Pre-recorded evidence in child sexual offence proceedings — Child Sexual Offence Evidence Program (CSOEP)**.

[1-395] Suggested direction — use of witness intermediary

Last reviewed: April 2025

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. This is all standard procedure. You should not draw any inference against the accused or give [*the complainant's/child witness's*] evidence any greater or lesser weight simply because of the presence of this other person.

This direction is also located at **[5-420] Suggested direction — pre-recorded evidence** of the chapter **[5-400] Pre-recorded evidence in child sexual offence proceedings — Child Sexual Offence Evidence Program (CSOEP)**.

The direction should be adapted where the witness is not a child but has difficulties with communication and a witness intermediary has been appointed under s 294M(3)(b).

[1-398] Support person

Last reviewed: April 2025

Although adult complainants and sexual offence witnesses in prescribed sexual offence proceedings, domestic violence offence complainants, vulnerable accused persons, and vulnerable persons in Commonwealth proceedings are all permitted to have support persons present when they are giving evidence, there is no statutory requirement for a jury direction or warning to be given regarding this measure in the way it is required for "vulnerable persons" under the CPA.

For consistency and to avoid jury speculation, it may be considered appropriate to fashion a direction in such cases that corresponds with the suggested direction below for "vulnerable persons" — children and cognitively impaired persons.

[1-400] Suggested direction — presence of a support person

Last reviewed: April 2025

> You may notice that there is person sitting beside the witness as the witness gives evidence. It is standard procedure for a [*child/complainant/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.

Where a support person is utilised by a vulnerable person to assist them with any difficulty with giving evidence due to an impairment or disability (as permitted by s 306ZK(3)(b)), consider should be given to whether it is more appropriate to employ the suggested direction where a witness intermediary is used, appropriately adapted to the particular case (see **[1-395] Suggested direction — use of witness intermediary**).

[1-402] Person appointed for self-represented accused

Last reviewed: April 2025

A person appointed to ask witnesses questions in cross-examination on behalf of an unrepresented accused need not be a lawyer; the appointment of a Court Registrar or Deputy Registrar is also suitable. The person appointed should be permitted to be present when witnesses are given evidence in chief and a list of proposed questions for cross-examination does not need to be supplied beforehand to the trial judge: *Clark v R* [2008] NSWCCA 122. See also *MS v R* [2017] NSWCCA 252.

See also **[1-800] Self-represented accused regarding general court procedure and directions for proceedings involving unrepresented accused persons**.

[1-405] Suggested direction — person appointed for self-represented accused

Last reviewed: April 2025

As the accused is self-represented, the law is that the cross-examination of the complainant is to be conducted by a person appointed by the Court. In that context, [*insert name of person*], has been appointed by the Court and will ask questions of the witness in cross examination. This is standard procedure. 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.

Part IAD of the *Crimes Act 1914* (Cth) does not require a direction to be given to the jury regarding the appointment of persons to ask questions on behalf of unrepresented accused. However, it would be prudent to adapt the above suggested direction for relevant Commonwealth proceedings.

[1-408] Audio visual link for evidence given from another geographical location

Last reviewed: April 2025

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].

In *R v Wilkie* [2005] NSWSC 794, 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].

In *R v Ngo* (2003) 57 NSWLR 55 the court addressed the question of unfairness under s 5B(2)(c) at [108]:

> 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 proceedings

Terrorism and related 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* (2006) 65 NSWLR 573 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.

Child sexual offences outside Australia and related offences

In addition to the alternative measures under Pt IAD of the *Crimes Act* available for child complainants and child witnesses in Commonwealth proceedings involving offences such as slavery, trafficking in persons and child sexual offences outside Australia, there are also provisions for witnesses in such proceedings to give their evidence via audio-visual link from an overseas location under Div 279 *Criminal Code Act 1995* (Cth). 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, or 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.

Directions

New South Wales proceedings

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.

Commonwealth proceedings

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* (2006) 163 A Crim R 488, 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.

[1-410] Implied power to order alternative measures

Last reviewed: April 2025

In addition to the cited statutory provisions available for particular witnesses to give evidence by alternative means, 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]. 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] NSWSC 339 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.

[The next page is 103]

The 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]**.

[1-435] Pleas

Last reviewed: December 2025

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].

[1-440] Number of jurors

Last reviewed: September 2026

The number of jurors in a criminal trial is determined by s 19. Subject to s 22, the jury is to consist of 12 persons, or 12 persons with additional jurors as ordered by the court under s 19(2): s 19(1). The court may order up to three additional jurors be empanelled if:

- it is necessary because of the nature, likely duration or complexity of the proceedings, or any other factor that may result in a juror being discharged during the trial of the proceedings including, for example, where a trial involves distressing or sensitive material: s 19(2)(a); or
- the court estimates the trial to take two weeks or longer: s 19(2)(b); *Jury Regulation 2022*, cl 5.

An order for one, two or three additional jurors is *only* available where the court is satisfied the selection of additional jurors is an appropriate means of ensuring there will be sufficient jurors remaining when they are required to consider their verdict *and* appropriate facilities are available to accommodate them: s 19(3). Section 19 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) 207 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 2026

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 witnesses to be called: s 38(7)(a). The jury panel should be told that while the prosecutor does have a "name" as a matter of convention, they are simply referred to as Mr/Ms Crown or Mr/Ms Prosecutor. For abundant caution the prosecutor will usually identify all potential witnesses (including persons referred to in the evidence but not intended to be called), any relevant locations and/or any names or locations identified by the defence. 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.

There are various other matters that might give rise to a potential juror applying to be excused. The jury panel should be informed of the estimated duration of the trial and the need for punctual daily attendance. If the case is likely to involve considerable documentary evidence, such as transcripts of recorded conversations, 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. For trials involving translation of documents in a foreign language or interpreting evidence given in a foreign language, potential jurors who speak that language should ask to be excused if they are not prepared to act on the translation or interpretation provided. In other words, a juror's role is as a juror and not as an alternative translator or interpreter.

It is good practice to inform members of the jury panel that they may make an application to be excused, or raise any potential issue of concern, in writing if they prefer: s 38(3).

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 jurors

Last reviewed: December 2025

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 in criminal trials. Each accused has three challenges, and the Crown has three challenges for each accused: s 42(1).

Section 43(1) provides for the Crown's right to challenge for cause.

Challenges 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] Jury booklet and video

Last reviewed: September 2026

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 video 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 video. Judges wishing to obtain a copy should contact the Deputy Sheriff, Manager Jury Service.

Two booklets "Observe, listen, decide — jury service: a rewarding responsibility" and "Observe, listen, decide — welcome to jury service – a guide for jurors", are also available at all court houses and may be distributed to jury members by the court or sheriff's officers after empanelment. The booklets provide 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.

[1-470] Opening to the jury

Last reviewed: September 2026

It is suggested that the following matters be addressed in opening remarks to the jury:

- the respective role of a judge and a jury
- the nature of a criminal trial
- the onus and standard of proof
- the prohibition upon 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.

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

Last reviewed: September 2026

It is suggested that each member of the jury be provided with a document, either for reference during the opening or at the conclusion to serve as an aide mémoire.

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. The foreperson has no greater responsibility than any other member of the jury during the course of the trial or in its deliberations. Any member of the jury may write a note to the court.

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

If there are more than 12 jurors at the end of the trial, there will be a ballot to reduce the jury to 12. If you have a foreperson immediately prior to the ballot that person is exempt from being placed in the ballot and will remain on the jury. For that reason, you may decide not to select a foreperson. It is a matter for you to determine. I will inquire from you prior to the ballot if you currently have a foreperson, and if so, whether you wish that person to remain as foreperson with the result that that person will be exempt from the ballot.**]**

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 making inquiries outside the courtroom
- a juror discussing the matter with a non-juror
- a juror refusing to participate in the jury's functions
- a juror not apparently able to comprehend the English language; and
- a juror's inability to be impartial because of their 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

It is a criminal offence for a juror to make an inquiry for the purpose of obtaining information about the accused or any matters relevant to the trial. The offence is punishable by up to 2 years imprisonment and/or a fine.

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; and
- causing another person to make an inquiry.

It is a criminal offence for a juror to disclose to persons any information about:

- the jury's deliberations including any statements made, opinions expressed, arguments advanced or votes cast during their deliberations; or
- how a juror or the jury formed any opinion or conclusion in relation to an issue arising in the trial.

It is also a criminal offence for a juror or former juror, for a reward, to disclose or offer to disclose to any person that information. Both offences are 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 2026

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.

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 [*describe barrister's location*] 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 [*describe barrister's location*] 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*] has no greater responsibility than any other member of the jury. Any one of you can write a note to the judge.

How you choose your [*foreperson/representative*] is entirely up to you. They can be chosen in any way you think appropriate, at any time prior to the delivery of your verdict(s) and can be changed at any time.

[Where additional jurors are empanelled pursuant to s 19(2) *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. If it be the case that more than 12 of you remain on the jury when the time comes for you to commence your deliberations, there is a process to reduce that number to 12.

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 allow 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*.]

As you may know, there are two standards of proof applicable in Australia — proof on the balance of probabilities, which is the lesser standard of proof applicable to civil

proceedings, and proof beyond reasonable doubt, which is a much higher standard of proof applicable to criminal proceedings. As these are criminal proceedings, the standard of proof that the Crown must meet if it is to prove the offence(s) alleged is proof beyond reasonable doubt. The lesser civil standard of proof falls well below proof beyond reasonable doubt.

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 inquiry 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. This address is very limited in its scope. The purpose of this address is to indicate what issues are in dispute and very briefly the defence answer to the prosecution's allegations. Neither counsel will be making any submissions regarding what the evidence has or has not proven in their opening address.]

Then the calling of the evidence will commence. In addition to witnesses called to give evidence, there may also be documents, photographs and other material that is tendered as an exhibit in the trial and thereby will form part of the evidence. Ultimately, what weight you give to the submissions made to you in each address will depend upon your own view of the evidence.

At the end of all of the evidence both counsel will address you by way of submissions based upon the evidence. You will hear from the Crown first and then the defence. In their closing address, each counsel will suggest different ways of viewing the evidence. Each address is intended to assist you by offering you different ways to analyse the evidence. Ultimately, what weight you give to the submissions made to you in each address will depend upon your own view of the evidence.

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] Jury questions about expert evidence

Last reviewed: December 2025

In exceptional circumstances, such as where the expert evidence is particularly complex or adduced in a manner which may lead to confusion, it may be helpful 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 2026

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]. Note that a different certificate is given to a juror under examination from a judge than that given to a witness under s 128 *Evidence Act 1995*: s 55DA(3).

If there is reason (including a report under s 75C) to suspect that the trial of any criminal proceedings may be, or may have been, affected because of improper conduct by a juror, or another person in relation to a juror, the sheriff may, with the consent of or at the request of the Supreme Court or District Court, investigate the matter and report to the court on the outcome of the investigation: s 73A(1).

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).

Section 73A(1) authorises two distinct processes — both leading to an investigation and report — however, one starts with the sheriff and requires the relevant court's consent while the other starts with a request from the court: *Menon v R* [2025] NSWCCA 56 at [16]–[23].

Relevantly, *Menon v R* was decided in the context of the slightly different form s 73A took prior to the *Jury Amendment Act 2024*. The amendment commenced on 10 March 2025 and only applies to juries empanelled thereafter: *Menon v R* at [5]. The effect of the amendment is that the investigation under s 73A is not confined to circumstances where it is suspected the verdict may have been affected but also extends to circumstances where the trial may have been.

The constraints on the power of the court to investigate include a precondition that the court have a reasonable suspicion that a verdict may have been affected because of improper conduct. However, the existence of a reasonable suspicion is not a *sufficient* condition to engage the power. Highly relevant to the exercise of the discretionary power is whether an application has already been made to the sheriff and if so, what was the result, and if it has been refused, what were the reasons for doing so. Also relevant is whether there has already been an inquiry into the jury, whether by the sheriff or otherwise: *Menon v R* at [21]–[23].

[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].

[1-502] Communications between jurors and sheriff's officers

Last reviewed: December 2025

In *D'Agostino v R* [2025] NSWCCA 159 an issue arose about possible bullying and harassment occurring in the jury room. There was a delay in the matter being reported

to the trial judge and then a further delay in the matter coming to the attention of the parties. Certain events occurred in the intervening period (including officers privately interviewing a juror) which were a fundamental irregularity amounting to a miscarriage of justice. Wright and Dhanji JJ also held (at [115]) that the matter should have been dealt with promptly so as to permit the parties an opportunity to be heard as to what action should be taken; the consequence being there was a denial of procedural fairness.

[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) 199 A Crim R 419 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; *Addo 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 after death or discharge of juror

Last reviewed: September 2026

Section 53C(1) provides that where a juror dies or is discharged during the trial, the court *must* either discharge the whole jury if a trial with the remaining jurors would result in risk of a substantial miscarriage of justice or, subject to s 22, order the trial proceed with a reduced number of jurors. Section 22 permits the trial to continue after the death or discharge of a juror if the balance of jurors is not below 10 (with limited exceptions).

In *BG v R* [2012] NSWCCA 139 at [103], Adamson J identified three categories of case where the question arises as to whether the trial should continue with a reduced number of jurors:

(1) Where there is no indication how the discharged juror would have voted;

(2) Where there is evidence from which it can be inferred prospectively that the discharged juror would, have voted for an acquittal; and

(3) Where it can be inferred, only with the benefit of hindsight, that the discharged juror would have voted for an acquittal.

If the case falls into the second or the third category, it is not appropriate for the trial to continue with the remaining jurors. In such cases, something is known, or can be inferred, about what transpired in the jury room, so as to give rise to a risk of a substantial miscarriage of justice if the trial continues: *BG v R* at [103]–[104]; *Haile v R* [2007] NSWCCA 71 at [208]; *Seo v R* [2025] NSWCCA 131 at [97].

The reasoning in *BG v R* applies regardless of whether the juror was discharged for a medical condition or unavoidable work or personal commitment under s 53B, or because of juror misconduct under s 53A: *Seo v R* at [99]. The overriding principle remains the maintenance of a fair trial: *Seo v R* at [86], [99]; *Crofts v The Queen* (1996) 186 CLR 427 at 440; *Filippou v The Queen* (2015) 256 CLR 47 at [15].

Separate decisions, each with express orders and reasons, should be made for discharging a juror and for then continuing with the balance of the jury: *BG v R* 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].

As to discharging the whole jury generally, see **[1-520]**.

[1-515] Suggested direction where trial continues after discharge of juror

Last reviewed: September 2026

In criminal trials, justice must not only be done, but 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 anyone 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. As the discharged juror(s) no longer has/have any role to play in this trial I direct you that you must not have any contact or communication in any form or in any circumstances with them until after the trial has concluded. 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.*]

[1-520] Discharge of the whole jury generally

Last reviewed: December 2025

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]; *Crofts v The Queen* (1996) 186 CLR 427. 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*. 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].

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 2026

Section 55C provides that upon request the jury may be given a copy of the whole or part of the transcript of evidence of the trial. Trial judges also have an inherent power to

provide the jury with transcripts of counsels' addresses and the summing up: *Parhizkar v R* [2014] NSWCCA 240 at [6]; *R v Taousanis* [1999] NSWSC 107; *R v Bartle* [2003] NSWCCA 329 at [661]–[662]; *R v Sukkar* [2005] NSWCCA 54 at [84]–[84]. If the request is for the transcript of less than the entire evidence, consideration should be given to providing more, and perhaps even the entire transcript of evidence, for the sake of balance.

It is a discretionary decision and not always preferable: see generally *R v Fowler* [2000] NSWCCA 142 at [91]–[92]; *R v Bartle* at [687].

The parties must assiduously ensure all evidence or discussions in the absence of the jury are removed from the transcript: *Seo v R* [2025] NSWCCA 131. Where a jury is mistakenly provided with those parts of the transcript, a sufficiently clear direction from the judge may remove the unfair prejudice: see, for example, *Seo v R* [2025] NSWCCA 131 at [70]–[72].

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 of evidence

Last reviewed: December 2025

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 generally

Last reviewed: December 2025

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) 104 NSWLR 571 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 2026

Section 19(2) provides for the empanelment of one, two or three additional jurors if the Court is satisfied that the grounds set out in s 19(2)(a) or (b) are met and only if the terms of s 19(3) are also satisfied. Trial judges should consider whether 1, 2 or 3 additional jurors need be empanelled, if any, having regard to the matters in s 19(2)–(3).

Where the jury consists of more than 12 jurors (an "**expanded jury**"), immediately before the jury is required to retire to consider its verdict(s), a "**verdict jury**" must be created. A verdict jury consists of 11 jurors selected by ballot plus the foreperson, if a foreperson has been chosen by the expanded jury: s 55G(2)(a), or 12 jurors selected by ballot if a foreperson has not been selected by the expanded jury: s 55G(2)(b).

Immediately before conducting the ballot, the judge must inquire of the jury whether they currently have a foreperson (as defined in s 55G(2)(a)) and if they wish that person to remain as foreperson during the ballot, with the consequence that the foreperson is exempt from the ballot and automatically becomes a member of the verdict jury: *Fantakis v R* [2023] NSWCCA 3 at [375]–[378].

The court officer needs to be advised in advance of the ballot taking place. This is because both sets of jury cards need to be at hand and they are typically retained in a secure location away from the courtroom.

[1-540.10] Suggested procedure

Last reviewed: September 2026

What follows is a suggested guide as to how to conduct the ballot to reduce the expanded jury to the verdict jury. Considerations that will bear upon this process will vary across courthouses but include the proximity of the jury deliberation room to the court room where the ballot will occur and whether the court has a second court officer or a Sherrif's Officer available to assist.

The following procedure is designed to ensure that the verdict jury will have no opportunity of interacting with the discharged jurors following the ballot. While this is not mandated by the legislation or present authority, it has the benefit that it demonstrates to parties and the public in open court that there has been no

contamination of the 12 remaining jurors by the one, two or three former jurors who have been discharged. This provides a method to eliminate not only the risk of contamination but also the possibility of such a risk, whether it has ensued or not.

1. Before the final directions are given to the jury, and once the court has confirmed no further directions or redirections are required, inform the jury you will be taking a short break and that the purpose of the break is for the following matters to be attended to:

   (a) For the jury to send you a note indicating whether they currently have a foreperson because if they do, that person will not be included in the ballot which will take place after the break. The jury should also be informed that if they currently have a foreperson, they should indicate that juror's jury number (so that the court officer can remove this card from the cards that will be included in the ballot);

   (b) For the jury to gather together in a bundle their individual copies of exhibits and attach a note to the bundle stating their jury number (so that the court officer can readily identify the materials belonging to the juror(s) balloted off and remove those materials from the jury room before the verdict jury retires to commence its deliberations);

   (c) For the jury to say goodbye to one another because they will not all return to the jury room after the ballot and will not thereafter have an opportunity to say goodbye to those who are balloted off the jury (reminding the jury that there must not be any contact between any member of the verdict jury and any juror who comes to be balloted off the jury);

   (d) For the court officer to provide each juror their copy of the jury card they had when empanelled; and

   (e) (i) For the jury to bring with them when they return to the courtroom after the break, all of their personal belongings; or

   (ii) Each juror should leave their personal belongings in the jury room in a state where they can be readily identified and removed (by their owner).

2. The jury returns to the courtroom with their individual jury card (and, if applicable, their personal belongings) and remains standing.

3. The note written by the jury in step 1(a) is read to the court.

   (a) If the note indicates the jury *has* a foreperson, the copy of the foreperson's juror card is not placed into the ballot box and the foreperson is asked to sit down. All other juror cards are placed into the box and shuffled. The associate then selects juror cards and announces juror numbers. Those jurors whose numbers are called are asked to sit until the jury consists of 12 persons.

   (b) If the note indicates that the jury *does not have* a foreperson, the copies of all juror cards are placed into the ballot box and shuffled. The associate selects juror cards and announces juror numbers. Those jurors whose numbers are called are asked to sit until the jury consists of 12 persons.

4. The juror(s) whose number(s) were not called and who remain standing are (generously) thanked for their participation in jury duty and are formally

discharged from jury duty. Before the discharged jurors leave the courtroom (and, if applicable, with their personal belongings), they are to be reminded of any non-publication orders and of the prohibition against contacting any of the (remaining) jurors.

5. The court officer escorts the discharged jurors to collect their personal belongings (if they have not brought them to the court) and identify the juror materials belonging to the discharged jurors which are to be removed from the jury room before the verdict jury returns to the jury room to commence their deliberations.

6. It may be necessary for the officer who escorted the discharged jurors away and who will be responsible for clearing their juror materials from the jury room to return to the court room to indicate that the jury may now be able retire to the jury room.

7. The trial judge provides any final direction to the (verdict) jury before asking them to retire to the jury room to commence their deliberations. If they had indicated in their note in Step 1(a) that they do not have a foreperson, inform them that they will need to select a foreperson reminding that how they do that is matter for them and that they are all equals and the foreperson does not have any greater role in discussing the evidence and the issues in dispute.

   Note: When the ballot takes place, the court officer (and the judge) should make a note of the juror numbers called so there can be no confusion as to who is included in the verdict jury. (It is also necessary for the associate to make a record of the jurors who constitute the jury and those who were discharged.)

[1-545] Directed verdict juries

Last reviewed: September 2026

If a directed acquittal is being ordered in relation to only some accused persons or some 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 court officer needs to be advised in advance of the ballot taking place. This is because both sets of jury cards need to be at hand and they are typically retained in a secure location away from the courtroom.

[1-545.10] Suggested procedure

What follows is a suggested guide as to how to conduct the ballot to reduce the expanded jury to the verdict jury for the purpose of directed verdicts and then to reinstate the expanded jury.

1. If an application made for a directed verdict(s) is granted (generally only ever done at the end of the Crown case) and the jury at that time consists of more than 12 persons, inform the jury that you have acceded to an application for directed verdict(s) (and provide a very brief and neutral explanation as to why) and that

because there are more than 12 of them on the jury, that a ballot is required for taking the directed verdict(s). Explain to the jury that the fact of being included or not included in the directed verdict jury at this time has no bearing on whether they will be included in the final verdict jury (except if the jury has the same foreperson at both times, in which case that foreperson would be a member of both the directed verdict jury and the final verdict jury).

2. Inform the jury that you intend taking a short break and that the purpose of the break is for the jury to send you a note indicating whether they currently have a foreperson because if they do, that person will not be included in the ballot which will take place after the break. The jury should also be informed that if they currently have a foreperson, they should indicate that juror's jury number (so that the court officer can remove this card from the cards that will be included in the ballot).

3. The court officer is to provide each juror their copy of the jury card they had when empanelled.

4. The jury returns to the courtroom with their individual jury card and remains standing.

5. The note written by the jury in step 2 is read to the court.

   (a) If the note indicates the jury *has* a foreperson, the copy of the foreperson's juror card is not placed into the ballot box and the foreperson is asked to sit down. All remaining copies of juror cards are placed into the box and shuffled. The associate then selects juror cards and announces juror numbers. Those jurors whose numbers are called are asked to sit until the jury consists of 12 persons.

   (b) If the note indicates that the jury *does not have* a foreperson, the copies of all juror cards are placed into the ballot box and shuffled. The associate selects juror cards and announces juror numbers. Those jurors whose numbers are called are asked to sit until the jury consists of 12 persons.

6. The excluded juror(s) (who remain standing) are asked to move to a position outside the jury box, for example into the witness box, to denote their separation from the verdict jury but which allows them to observe what is occurring.

7. The directed verdict(s) are taken from the verdict jury. If the jury had indicated at Step 2 that they do not have a foreperson for this process, a verdict juror would be required to assume that role to deliver the directed verdicts (likely the person seated in the front row closest to the judge and where a microphone is located).

8. An order is then made pursuant to s 55G(5)(a) for the excluded jurors to rejoin the jury for the continuation of the trial in respect of the accused persons and/or counts that have not yet been the subject of a verdict in the trial.

Note 1: When the ballot takes place, the court officer (and the judge) should make a note of the juror numbers called so there can be no confusion as to who is included in the (directed) verdict jury. It is also necessary for the associate to make a record of the jurors who constitute the directed verdict jury and those who were excluded.

Note 2: If the jury still consists of more than 12 jurors immediately before the jury is required to retire to consider its verdict(s) requiring a ballot to be conducted to reduce that number to 12 (in accordance with the procedure above at **[1-540]**), a fresh ballot (to that conducted for the purposes of the directed verdict(s)) is to occur: s 55G(7). Accordingly, a different "verdict" jury could be balloted to constitute a verdict jury for the purposes of directed verdict(s) to the jury later balloted (immediately before the jury is required to retire to consider all remaining verdict(s)).

[The next page is 127]

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 witness intermediaries 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 witness intermediary

[*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 131]

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 *GG v R* [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 t/a 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

Last reviewed: October 2026

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.

Section 7 *Evidence Regulation 2026* 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

Last reviewed: July 2026

An accused person may appear personally, and may conduct their 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 and Judicial Commission of NSW, *Handbook for Judicial Officers*, 2021–, "Self-represented litigants: tackling the challenge".

[1-810] Role of the trial judge

Last reviewed: September 2026

The judge has an overriding duty to ensure a fair trial: *Dietrich v The Queen* (1992) 177 CLR 292. This requires the trial judge to take steps to ensure that a self-represented accused has sufficient information about the practice and procedure of the court as is reasonably practicable in the circumstances. The purpose of the duty is to put the accused in a position where they are able to make an effective choice as to the exercise of their rights, but it is not the trial judge's role to tell or advise an accused how to exercise those rights: *Ombelli v R* [2026] NSWCCA 65 at [113]; *MacPherson v The Queen* (1981) 147 CLR 512.

The role of the trial judge does not extend to overcoming the forensic disadvantage of a lack of legal representation by becoming, in effect, defence counsel. The steps required to be taken by the trial judge are limited to what is required to ensure the accused's trial is fair: *Ombelli v R* at [112].

The trial judge is independent of the parties and is required to be impartial and accord procedural fairness to each party: *Ombelli v R* at [111]. The judge 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 documents filed as part of the notice of the prosecution case (including the Crown Case Statement) to inform themselves 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 ask the Crown to give an outline of the Crown case and the nature of the evidence to be led, and to provide notice of the witnesses to be called and exhibits to be tendered.

While a self-represented accused must be given an opportunity to present their case, there are limits. Court time is valuable and the accused is not merely permitted to pursue any argument or issue irrespective of its relevance or the time taken. While

some leeway must be given in terms of questioning of, and putting propositions to, witnesses, in the end the tribunal of fact must determine the case according to legal principles and properly admissible evidence. The judge must ensure that questioning is fair and propositions being put have a proper foundation in the sense that they are capable of being supported by evidence reasonably available: *Zhang v R (No 4)* [2026] NSWCCA 8 at [119]–[122].

The principles governing permissible intervention in a trial by a judge were set out in *Nwagbo v The Queen* [2021] VSCA 93 at [38] (cited in *Zhang v R (No 4)* at [116]), and include:

1. The role of the judge is circumscribed by the dynamics of the adversarial system.
2. Judges should be especially careful to avoid unnecessary intervention in the presence of the jury (see also **[1-820]** below).
3. A judge must not give the appearance of adopting the role of a party to the proceeding, nor appear as if that party's partial advocate.
4. A judge must not shape the content of a trial, save for procedural or evidentiary rulings. Hence, a judge must not endeavour to fill gaps in a party's case, examine areas that the parties have left alone, nor endeavour to impact upon a witness's credit.
5. A judge may intervene in order to understand technical issues in a case, or to endeavour to clarify those issues for the jury.
6. A judge may intervene to maintain proper control over proceedings.

[1-820] Suggested information for accused before empanelment

Last reviewed: September 2026

The suggested information below assumes that the Crown has taken all reasonable steps to ensure that the self-represented accused is "appropriately informed of the prosecution case, the course it will take and procedural issues" in accordance with the Office of Director of Public Prosecutions (NSW), Prosecution Guidelines, Guideline 4.6, *Unrepresented accused*. The suggested 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, the suggested information will require appropriate amendment.

It is a matter of discretion for the trial judge as to whether aspects of the following suggested 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 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]**.

A self-represented 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].

Consideration should be given to the manner in which evidence will be elicited from a self-represented accused person should they choose to give evidence, or from a vulnerable witness where the accused is self-represented: see further **[1-840] Cross-examination of complainants in prescribed sexual offence proceedings and vulnerable witnesses in criminal proceedings** below. Raising these issues with the parties prior to empanelment will allow time for a questioner to be appointed, and for the accused to prepare and write out a list of questions proposed to be asked. The draft questions should not be made available to the Crown: *Clark v R* [2008] NSWCCA 122 at [54].

See also Judicial Commission of NSW, *Equality before the Law Bench Book,* 2006–, "Self-represented parties" at [10.1]ff and Judicial Commission of NSW, *Handbook for Judicial Officers*, 2021–, "Dealing with unrepresented litigants in lengthy and complex trials".

Charge(s) and burden of proof

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 what the role of the jury will be 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 will be 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 will usually be necessary for the matter to be discussed 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 their address, you will 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.

Explanation of the Crown case and objections

Once the Crown Prosecutor explains to the jury the nature of the charge(s) and the Crown's case against you, they 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 will be marked as exhibits. The exhibits will be 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 [*consider giving another example if an issue is obvious from documents on the file or has been raised by the Crown as likely to be contentious*]. 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 will 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 criminal proceedings: see* ***[1-840]*** *below which addresses that scenario.*]**

You will have the right to cross-examine a Crown witness: that is, to ask them 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 will need to make your allegations to that witness in the

form of questions, so that they have the opportunity to respond to your suggestions. It is also important for you to remember that any suggestion in a question you ask during cross-examination is not evidence, unless the witness agrees 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.

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 to be 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 will 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 they may reasonably be expected to have knowledge of, or the witness has given a prior statement which is inconsistent with the evidence they have 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 them any questions which you think may help you, or weaken the Crown case.

The Crown will have 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 will 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 will allege that you 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 will 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. If you propose to raise good character, you should raise it with the Crown first to see if they agree or whether they would seek to lead evidence to contradict good character. This may need to be discussed with me first.

You may raise good character before the jury 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 their 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

Last reviewed: September 2026

[*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.

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

Last reviewed: September 2026

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 without legal representation: *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 at [4] and [5] the Court of Criminal Appeal observed that there is a strong public interest in ensuring that a criminal trial which is well advanced proceeds to verdict and that an adjournment will not be readily granted in such circumstances. While acknowledging it is highly desirable that an accused person is legally represented at trial, a trial judge must be alive to the possibility that an accused person may withdraw instructions from counsel purely in order to obtain an adjournment. The Court further noted at [75] that circumstances may exist where it is reasonable for an accused to withdraw their 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" in *Dietrich v The Queen* was not intended to indicate that every instance of misbehaviour, improvidence or other fault on the part of the accused which had contributed to his or her lack or representation must automatically preclude entitlement to a stay. The Court 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 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* (1990) 19 NSWLR 91 at 95. The proper exercise of that discretion requires consideration of whether allowing a final Crown address would result in an unfair trial: *Ombelli v R* [2026] NSWCCA 65 at [158]; *TS v R* [2022] NSWCCA 222 at [102]; *MS v R* [2017] NSWCCA 252 at [72].

   In *Ombelli v R*, the decision to allow the prosecutor to give a closing address was an important aspect in according procedural fairness to the self-represented accused. A limited Crown closing would assist the accused in the preparation and presentation of his own closing address, by giving him time and the transcript of the Crown's closing, and the accused could put his case in a more structured way by reference to the evidence. Without a Crown address, the accused would have had to wait for the summing up to learn how the Crown case was put, without an opportunity to respond. Further, the prosecutor's closing did not go

beyond directing the jury's attention to the evidence in support of each count and explaining how the Crown sought to prove its case, which was circumstantial and involved various strands of evidence: at [161]–[163].

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*, 2nd edn, November 2011: see https://nswbar.asn.au/docs/webdocs/self_reps_10042014_lo.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

Last reviewed: September 2026

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 prescribed 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 or alternative arrangements are used to give evidence: ss 294A(6), 306ZL(6).

Section 294A does not prescribe a procedure for the application of its provisions. In *Clark v R* [2008] NSWCCA 122 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 not justified "without other compelling reason": at [50]–[53].

Similar restrictions apply to proceedings for Commonwealth offences. A self-represented defendant is not to cross-examine a child complainant in a child proceeding or a vulnerable adult complainant in a vulnerable adult proceeding: *Crimes Act 1914* (Cth), ss 15YF(1), 15YFA(1) respectively. A person appointed by the court is to ask questions at the defendant's request: see ss 15YFA(2), 15YF(2).

See also **[1-360] Evidence by alternative means** which sets out, in tabular form, the various legislative provisions governing the cross-examination of complainants and vulnerable witnesses in NSW and Commonwealth cases; **[1-402] Person appointed for self-represented accused**, and **[1-405] Suggested direction — person appointed for self-represented accused**.

[1-845] Suggested procedure: ss 294CB, 294A

Last reviewed: September 2026

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 inform 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 record or cause to be recorded in writing the nature and scope of the admissible 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 that might infringe the requirements of that section in advance: *Clark v R* at [49]. See further discussion of s 294CB at **[5-100]**.

Similar provisions apply to Commonwealth sexual offence trials: see *Crimes Act 1914* (Cth), ss 15YB (sexual reputation of child witness or child complainant), 15YC (sexual experience of child witness or child complainant), 15YCA (sexual reputation of vulnerable adult complainant), 15YCB (sexual experience of vulnerable adult complainant).

[1-850] Suggested information for accused in respect of a "prescribed sexual offence"

Last reviewed: September 2026

As you are representing yourself in these proceedings, you cannot ask the complainant questions once the Crown Prosecutor has finished asking their 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 their 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. They 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 they object 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 where s 294CB(4) does not apply

Last reviewed: September 2026

There are some questions that by law you cannot ask the complainant. You cannot ask them questions about what the law refers to as their "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 or may have taken part in any sexual activity, or
- has not taken part in any sexual activity.

[1-870] Suggested information for accused's intermediary

Last reviewed: September 2026

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

Last reviewed: July 2026

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

Last reviewed: September 2026

An intermediary has been appointed by me to cross-examine the complainant for the accused. They are not a lawyer representing the accused; perhaps this person is not a lawyer at all. During cross-examination, they 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 [*type, eg, 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

Last reviewed: July 2026

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 ss 15YF–15YFA, a self-represented accused is prohibited from cross-examining a child complainant in a child proceeding or a vulnerable adult complainant in a vulnerable adult proceeding, and a person appointed by the court is to ask such a witness 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

Last reviewed: December 2024

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]. The onus of proving unfairness rests on the accused: *Bin Sulaeman v R* [2013] NSWCCA 283 at [96]–[98]; *Haines v R* [2018] NSWCCA 269 at [288]. The operation of s 90 cannot be described exhaustively and the unfairness may arise in different ways: *Em v The Queen* at [56]; [109]. While the reliability of the admission is a factor, it is not an exclusive factor affecting the unfairness of its use. Its application is likely to be "highly fact specific": *Haines v R* at [270]; *Em v The Queen* at [56], [109]. 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]. Any consideration of s 90 should concentrate on voluntariness, reliability and contemporary community standards: *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at [69], [78] [91]. That admitting the evidence may cause an accused to feel compelled to give an answer to the evidence is not a relevant consideration: *Haines v R* at [272]; *R v XY* (2013) 84 NSWLR 363 at [74]; [153]–[154]. As to the application of s 90 with respect to young people see the summary of authorities in *R v KS (No 2)* [2023] NSWSC 1475 at [74]–[88] (Yehia J).

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

Last reviewed: December 2024

You have heard evidence from [*name of witness*] that they 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 them or in their 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 they 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 their 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 their position. You must also consider whether there is an alternative explanation for the accused's lack of response [*or response*], other than that they 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".

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Admissions to police

***Evidence Act 1995* (NSW), 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 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

Last reviewed: April 2024

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

Last reviewed: April 2024

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."

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.

It is not necessary to establish the accused's acts were "the only cause of death, the most important cause of death or even the only important cause of death": *Swan v The Queen* (2020) 269 CLR 663 at [27]. Causation can be established where the accused's act or omission accelerates death, even where the deceased would have died in any event from a pre-existing disease or condition: *Baker v R* [2023] NSWCCA 262 at [55], [58]; *R v Evans (No 2)* [1976] VR 523 at 527–528; *Krakouer v Western Australia* (2006) 161 A Crim R 347 at [32]–[33], [39].

[2-310] Suggested direction — causation generally

Last reviewed: April 2024

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 they 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 alleged [*act/omission*], 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 they must take or accept the victim as they were at the time of the [*act/omission*]. That is to say an accused person cannot seek to excuse themself 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.**]**

**[*If appropriate – where it is alleged the accused accelerated the victim's death*

The accused relies on evidence that at the time of the accused's alleged [*act/omission*] [*the victim*] suffered from a pre-existing [*condition/disease*] that made death inevitable [*identify the evidence presented about the condition/disease*].

Even if you find [*the victim*] suffered from a pre-existing fatal [*condition/disease*] from which they would have died in any event, it would still be open to you to find the Crown has established beyond reasonable doubt the [*act/omission*] of the accused caused [*the victim's*] death provided you are satisfied the [*act/omission*] accelerated [*the victim's*] death, and that it was a substantial and significant cause.**]**

[The next page is 233]

Character

[2-350] Introduction

Last reviewed: July 2026

Section 110(1) of the *Evidence Act 1995* provides that the hearsay rule, opinion rule, tendency rule and credibility rule do not apply to evidence adduced by an accused to prove (directly or by implication) that the accused is, either generally or in a particular respect, a person of good character.

The term "good character" has a positive aspect (that the accused possesses certain qualities or has performed good works) and a negative aspect (that the accused has no criminal convictions): *Neil v R* [2025] NSWCCA 160 at [50]; *Warton v R* [2025] NSWCCA 5 at [66]–[67].

There is discretion as to whether 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: *Melbourne v The Queen* (1999) 198 CLR 1 at [30]–[31], [157]; *Neil v R* at [82]. While there is no requirement to give a good character direction, if one is requested it would be wise to give it: *Simic v The Queen* (1980) 144 CLR 319 at 333, [25]; *Melbourne v The Queen* at [75].

The direction should convey to the jury that the accused's good character may be relevant to:

(i) the likelihood of the accused committing the offence charged; and/or

(ii) the accused's credibility: *Melbourne v The Queen* at [30]–[31].

The second limb of the direction requires a jury to consider the accused's credibility in reaching findings of fact and guilt. Where the accused has given evidence, it also requires consideration of the accused's credibility in determining whether to accept or reject the accused's account: *Barwick v R* [2023] NSWCCA 139 at [88]–[89] (a trial by judge alone where the reasons of the trial judge did not indicate that this limb of the direction had been considered).

If good character evidence is raised by the accused, the Crown may seek leave to adduce evidence in rebuttal: ss 110(2)–(3), 112; *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

Last reviewed: July 2026

The accused has called evidence to establish that they are a person of good character [*generally or in a particular respect — 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 [*if applicable: in that particular respect*].

The law provides that a jury is entitled to take evidence of an accused's good character into account in their favour 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 [*if applicable: in a particular respect*] is relevant to the likelihood of their 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.

[*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 [*if applicable: in a particular respect*] to support their 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 do reason in that way is a matter for you. 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

Last reviewed: December 2024

The accused has called evidence to establish that they are 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 them. 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 they are 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

Last reviewed: December 2024

[*Accused A*] has raised the question of their 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 their case as they choose, or might be advised, and the position so far as they are concerned is that their character is simply not in issue.

[2-430] Suggested direction — bad character (where not introduced as evidence of tendency)

Last reviewed: December 2024

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 they are 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 they are charged simply because they are 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 they are not a truthful person, when you are assessing the credibility of the evidence they have 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

Last reviewed: September 2025

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] quoting *Peacock v The King* (1911) 13 CLR 619 at 661; *Barca v The Queen* (1975) 133 CLR 82 at 104; *Crane v R* [2025] NSWCCA 93 at [202]–[208]. For an inference to be reasonable it must rest upon something more than mere conjecture or speculation: *The Queen v Baden-Clay* at [47] quoting *Peacock v The King* at 661; *Gwilliam v R* [2019] NSWCCA 5 at [101], [104]; *Crane v R* at [131]. Conjecture arises where there are no positive proved facts from which the inference can be made, meaning the method of inference fails: see the authorities referred to in *Crane v R* at [203]; see also **Inferences** at **[3-160]**. 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]. Consideration must be given to the accumulation of the evidence and the weight which is to be given to the united force of all the circumstances put together: *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 535; *The Queen v Hillier* at [48]; *Crane v R* at [133]. 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]. However, while the "probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately", it is still necessary to address whether the facts may reasonably be inferred from the evidence: *Crane v R* at [144] citing *Shepherd v The Queen* at 580.

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 their 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 they are 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: July 2026

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, and **[9-160] Complicity and Common purpose (s 11.2)**.

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 2024

This form of liability applies only where the principal offence is a "serious indictable offence": see ss 346 and 4 *Crimes Act 1900*; 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.

Liability as an accessory before the fact is incompatible with liability for constructive murder under s 18(1)(a) *Crimes Act* and is implicitly excluded by the section. An accessory must know all the essential facts which constitutes the offence, but such knowledge for constructive murder would involve knowing the

principal offender intended to commit an act or omission that ultimately caused death. Intentionally aiding, abetting, counselling or procuring the acts of the principal in those circumstances would fall within the first category of murder under s 18(1)(a). It would be inconsistent with the notion of constructive murder, which does not require intent or recklessness as to causing death or grievous bodily harm: *Batak v R* [2024] NSWCCA 66 at [183], [196]. See also **[2-770] Suggested direction — application of joint criminal enterprise to constructive murder**.

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 extended joint criminal enterprise

[2-740] Joint criminal liability

Last reviewed: April 2026

Joint criminal enterprise

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]. The agreement must be to commit the actus reus of the offence: *Decision Restricted* [2025] NSWCCA 210 at [189]–[190]. 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.

Extended joint criminal enterprise

The concept of extended joint criminal enterprise 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]. A party to a joint criminal enterprise will be liable under the doctrine of extended joint criminal enterprise for an incidental crime if they foresee, but do not agree to, the commission of that incidental crime in the course of carrying out the agreement to commit the foundational offence and if, with that awareness, they continue to participate in the enterprise: *Miller v The Queen* (2016) 259 CLR 380 at [4]. Absence of agreement invokes the doctrine; it is not necessary that a participant positively tells, or by inference communicates to, the other participant(s) that an incidental crime "should not occur" before liability arises: *AW v R* [2025] NSWCCA 47 at [89]–[91]. Liability does not require the accused to have foreseen an identified criminal act. It is sufficient if they have foreseen a criminal act of the nature and character of the criminal act which occurred: *AW v R* at [86], citing *Gillard v The*

Queen (2003) 219 CLR 1 at [112]; *Clayton v The Queen* [2006] HCA 58 at [17]; *The Queen v Taufehema* [2007] HCA 11 at [31]; and *Huynh v The Queen* [2013] HCA 6 at [4].

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 (except, potentially, in the case of alleged constructive murder: see **[2-770]**). 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: April 2026

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.

[*Where appropriate:* It is essential that you focus on the terms of the agreement, not the participants' differing reasons for entering the agreement.**]**

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 elements 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 the accused was a participant in the commission of that crime as part of a joint criminal enterprise with one or more persons.

[*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.

[2-755] Notes

Last reviewed: April 2026

1. The common law principle of joint criminal enterprise was abolished in Victoria and replaced by statutory versions contained in ss 323(1)(c) and 324 of the *Crimes Act 1958* (Vic). It was held in *The King v Rohan (a pseudonym)* [2024] HCA 3 that complicit liability under these provisions did not require the Crown to prove beyond reasonable doubt any "essential facts" of the offence that were not

actual elements of the offence. Although NSW continues to rely on common law principles of complicit liability (see *TWL v R* [2012] NSWCCA 57 at [30]–[40]), this aspect of *Rohan* does not contradict NSW decisions.

2. The doctrine of transferred malice continues to apply in circumstances where a joint criminal enterprise (JCE) or extended joint criminal enterprise (EJCE) is alleged and the accused did not perform the physical acts constituting the foundational offence. In *Fan v R* [2024] NSWCCA 114, the accused was part of an agreement to kill person X but in the process the shooter shot and killed person Y instead. It was held in the context of basic JCE, where liability is primary and the accused was imbued with the physical acts of the shooter, transferred malice also applied to the accused. In the context of EJCE, where liability is derivative, the conviction of the shooter in that case by the operation of transferred malice meant the accused was consequently also liable. There is no requirement for the actual offence committed (the murder of Y) to be part of the JCE agreement or for it to have been foreseen as possible as part of the EJCE: at [35]–[36], [53]–[63].
3. 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 the actus reus or all the acts with the relevant intention necessary to establish the offence: *Decision Restricted* [2025] NSWCCA 210 at [189]–[190]; *TWL v R* [2012] NSWCCA 57 at [36].
4. It is essential that the focus is on the terms of the agreement, not the participants' differing reasons for entering the agreement (unless, for example, there are issues regarding liability like mental incapacitation): *Decision Restricted* at [196], [204]–[205].

[2-760] Suggested direction — (b) and (c) extended joint criminal enterprise

Last reviewed: July 2025

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 elements 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 the accused 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*].

[*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.]

[2-765] Notes

Last reviewed: April 2026

1. 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 of the case.

[2-770] Suggested direction — application of joint criminal enterprise to constructive murder

Last reviewed: September 2024

As to the liability of a participant in a joint criminal enterprise (JCE) 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 (although note below more recent decisions that have distinguished parts of *R v Sharah*). 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].

It has been noted that the decision in *R v Sharah*, involving a foundational offence of armed robbery with wounding, introduced an element (referred to as the "third element" of constructive murder) 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 the related cases of *Batak v R* [2024] NSWCCA 66 at [143], [154] and *Coskun v R* [2024] NSWCCA 67 at [58]–[59], it was held the "third element" in *R v Sharah* regarding constructive murder — that a party to the foundational offence foresaw the act or omission causing death — is generally not required to be made out to establish constructive murder pursuant to s 18(1)(a), and is specifically not necessary when the doctrine of JCE is relied upon, and that any suggestion to the contrary in *R v Sharah* should no longer be followed. If an accused person is party to a JCE to carry out a relevant foundational offence then no further mental element is required regarding the death: *Coskun v R* at [52].

Noting the direction will have to be adapted to the foundational crime upon which the charge of murder is based in any given case, what follows is a suggested direction based upon *R v Sharah* for an armed robbery with wounding case.

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 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*].

[2-780] Notes

Last reviewed: September 2024

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. It was considered in *Batak v R* [2024] NSWCCA 66 that *Mitchell v The King* turned on the distinct South Australian provision (which required infliction of "an intentional act of violence" — a requirement absent from s 18(1)(a) *Crimes Act*) and did not relevantly assist in understanding the common law or the construction of s 18(1)(a). There was nonetheless concurrence that the principles that constructive crime in general should be confined so far as possible and constructive murder should not be expanded have potential relevance: at [133].
3. For a survey of the jurisprudence developing the doctrines of constructive murder and complicity, see *Batak v R* [2024] NSWCCA 66 at [50]–[110].
4. The incompatibility of the doctrine of constructive murder with liability as an accessory before the fact is discussed at **[2-710] Suggested direction — accessory before the fact**.

[2-790] Suggested direction — withdrawal from the joint criminal enterprise

Last reviewed: April 2024

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.

[2-800] Application of joint criminal enterprise to sexual assault

Last reviewed: April 2026

As to the liability of a participant in a JCE for aggravated sexual assault or aggravated sexual assault in company (*Crimes Act 1900*, ss 61J–61JA), see *Decision Restricted* [2025] NSWCCA 210. The directions for sexual assault committed as part of a JCE must clearly address the agreement to commit the actus reus of the offence, being not merely sexual intercourse, but sexual intercourse without consent: *Decision Restricted* at [136], [189]–[190]. The erroneous directions in *Decision Restricted* described the agreement as being to have sexual intercourse, "with or without consent". The Court found this amplified the prospect of the jury not understanding the significance of the need for an agreement to commit the actus reus of the offence: [189]–[190].

The Court also found that in the circumstances of that case, "inadvertent recklessness" (as distinct from knowledge or "advertent recklessness") to the absence of consent was fundamentally incapable of coherent inclusion in the JCE: see [146], [176], [183], [188]. The Court found it an extremely artificial prospect that the participants agreed to have sexual intercourse with someone in the future, and at that future time to not think about consent: [176]. By contrast, a jury could be asked to draw an inference that the participants knew the complainants were not consenting, or sufficiently recognised this prospect, to demonstrate their agreement that sexual intercourse without the complainants' consent should occur, if they were not consenting: [188].

Noting the direction will have to be adapted to the circumstances of the case, what follows is a suggested direction based upon *Decision Restricted* for an aggravated sexual assault or sexual assault in company case based on JCE. The direction can also be adapted for other sexual offences, with the Court in *Decision Restricted* also discussing the offence of aggravated sexual touching (s 61KD) in the context of a JCE.

See also the suggested directions at **[2-750]** for joint criminal enterprise generally, and **[5-910]** for further details on the elements of the offence of sexual intercourse without consent (s 61I), including the element of knowledge about consent under s 61HK.

[2-820] Suggested direction — joint criminal enterprise and sexual assault in company

Last reviewed: April 2026

The Crown must prove beyond reasonable doubt that the accused is criminally liable for the offence of sexual intercourse without consent in company based on joint criminal enterprise by proving each of the following elements:

1. there was an agreement between the [*accused and the other participants*] to engage in sexual intercourse with [*the complainant*], without their consent in company,
   (a) knowing [*the complainant*] was not consenting, or
   (b) [*where the Crown relies on recklessness as to consent*] realising [*the complainant*] may not be consenting;
2. at [*the time specified in the indictment*], the accused participated in the execution of the agreement [*summarise evidence relied upon by the Crown as to the nature of the participation*];
3. a person who was a participant in the agreement engaged in sexual intercourse with [*the complainant*];
4. the complainant did not consent to the sexual intercourse;
5. the sexual intercourse occurred in company; and
6. the sexual intercourse took place in furtherance of the agreement (that is, the person who engaged in the sexual intercourse (a) knew the complainant was not consenting or (b) realised the complainant may not be consenting).

[The next page is 319]

Consciousness of guilt, lies and flight

[2-950] Introduction

Last reviewed: September 2026

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.

There are important distinctions between the two ways post-offence conduct can be relied upon. If the words and/or conduct of an accused are relied upon as evidence of a "consciousness of guilt", they are relied upon as an implied admission. As such, the evidence forms part of the evidence against the accused in the Crown case. But if the words and/or conduct of an accused are only relied upon as being capable of affecting the jury's assessment of the accused's credibility then they do not add to the evidence in support of the Crown case: *MM v R* [2023] NSWCCA 236 at [18], *LH v R* [2024] NSWCCA 165 at [122].

If the conduct and/or words are relied on as consciousness of guilt, then the trial judge must give a direction in accordance with *Edwards v The Queen* (1993) 178 CLR 193 (see **[2-960]** below). If the Crown does not rely on the words and/or conduct as a consciousness of guilt, but rather as affecting the accused's credibility, the jury should be directed in accordance with *Zoneff v The Queen* (2000) 200 CLR 234 (see **[2-970]** below): *LH v R* at [123]–[124].

As to silence amounting to an admission: see generally *R v Rose* (2002) 55 NSWLR 701 at [260]ff, *Legione v Hateley* (1983) 152 CLR 406 at 438–439 and **[2-000] Accusatory statements in the presence of the accused**.

[2-953] Alternative charges and included offences

Last reviewed: June 2024

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]; *Quinn v R* [2023] NSWCCA 229 at [62]–[77]. 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].

[2-954] Demeanour

Last reviewed: September 2026

An accused's reaction to being confronted with an allegation is capable of being relied upon as consciousness of guilt but caution is required: *LH v R* [2024] NSWCCA 165 at [131]. In *The Queen v Favata* [2006] VSCA 44, the Crown relied on the accused being agitated and sweating profusely in his recorded interview with police as a consciousness of guilt. The Victorian Court of Appeal said there was no reason in principle for excluding the reaction or demeanour of a person, in an appropriate context, from the kinds of behaviour capable of constituting implied admissions of guilt. However, it would be "rare indeed" for a judge to be entitled to leave evidence of demeanour, reaction to events or disclosures to the jury on this basis because of the potential imprecision and unreliability of such observations and dangers of misinterpretation: *LH v R* at [131].

A person's *reaction* to a proposition being put to them differs to using demeanour to ascertain whether a witness is telling the truth. Judicial doubt has been cast on the ability of a fact-finder to determine whether someone is telling the truth from the manner in which they respond to questions. Scientific research has questioned the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of appearances: *LH v R* at [132]; *Fox v Percy* (2003) 214 CLR 118 at [31].

[2-955] Lies

Last reviewed: September 2026

There is a distinction between a witness giving an incorrect answer despite trying their best to answer truthfully, and a witness making a deliberate lie: *Jha v R* [2026] NSWCCA 55 at [63].

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; *Dawson v R* [2024] NSWCCA 98 at [134]. 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 impermissible for the tribunal of fact to use evidence as a consciousness of guilt where it has not been identified or relied upon as such by the Crown. Such evidence should only be used in that way if the conditions in *Edwards v The Queen* (1993) 178 CLR 193 at 210–211 (see below) are met: *Dawson v R* at [146].

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. In *MM v R* [2023] NSWCCA 236 the prosecutor's conduct in implicitly raising consciousness of guilt reasoning, after disavowing its use, did not necessitate a *Zoneff* direction as the relevant evidence was not a significant matter in the trial: [56]–[59].

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* 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. The "*Edwards* conditions" for use of lies as implied admissions were summarised in *Dawson v R* at [137] as:

1. the alleged statement was a deliberate lie: that is, it was false to the knowledge of the accused at the time it was made;
2. the only explanation for the lie is that the accused knew that the truth of the matter about which he lied would implicate him in the offence; and
3. the tribunal of fact, if a jury, is directed (or self-directs, in the case of a trial by judge alone) that there may be reasons for the telling of a lie apart from the consciousness of guilt.

R v Lane [2011] NSWCCA 157 is an example of where the lies could be used for consciousness of guilt reasoning and *R v ST* (1997) 92 A Crim R 390 is an example of where they could not. If the purported lie by the accused constitutes a hypothesis consistent with innocence, a jury cannot convict unless it is first satisfied beyond reasonable doubt that it is not reasonably possible that the accused's statement is true. If it is *not* reasonably possible it is true, the lie must be put aside: *Dawson v R* at [134]; *De Silva v The Queen* (2019) 268 CLR 57 at [12]. See also **[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** and generally **[3-600] Onus and Standard of Proof**.

See generally *Criminal Practice and Procedure NSW* at [2-s 161.62].

[2-960] Suggested direction — lies used as evidence of a consciousness of guilt

Last reviewed: September 2026

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 and Xie v R [2021] NSWCCA 1 at [491]–[510].*]

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*].

[2-965] Flight

Last reviewed: September 2026

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: *R v Cook* [2004] NSWCCA 52 at [25]. It is important that the jury 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: *R v Cook* at [50].

As to the admission of evidence of flight: see generally *R v Adam* [1999] NSWCCA 189 (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). There is no general principle that when the explanation for flight involves revealing other offences, the evidence should be rejected: *R v Cook* at [47]; *Steer v R* at [45]; *Markby v The Queen* (1978) 140 CLR 108 at 116.

Any direction on flight must meet the facts of the specific case: see for example, *Steer v R*. Care is required if the judge is to give alternative hypothetical explanations for the accused's flight, especially where a hypothetical explanation is one that might reasonably arise from the facts and circumstances of the case. Trial judges need to be careful not to diminish the force of, or detract completely from, the explanation relied upon by the accused: *Xie v R* [2021] NSWCCA 1 at [491]–[510].

See generally *Criminal Practice and Procedure NSW* at [2-s 161.62].

[2-970] Suggested direction from Zoneff v The Queen — limiting the use of lies to credit

Last reviewed: June 2024

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

Last reviewed: September 2026

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*. The section applies only to criminal proceedings for indictable offences: s 20(1). Section 20(2) provides:

> The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed he or she was, guilty of the offence concerned.

The prohibition in the second sentence of s 20(2) must be given full operation. The word "suggest" is a word of very wide application. Any comment made about the accused not having given evidence must not make any "reference, direct or indirect, and either by express words or the most subtle allusion" suggesting the accused did not give evidence because they were, or believed they were, guilty: *RPS v The Queen* (2000) 199 CLR 620 at [20]; *Azzopardi v The Queen* (2001) 205 CLR 50 at [56]; *Wood v R* [2012] NSWCCA 21 at [618].

If an accused does not give evidence at trial, it will almost always be desirable for the judge to warn the jury that the accused's silence in court:

(a) is not evidence against the accused,

(b) does not constitute an admission by the accused,

(c) may not be used to fill gaps in the evidence tendered by the prosecution, and

(d) may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt: *Azzopardi v The Queen* at [51].

However, the judge should not go on to comment on the way in which the jury might use the fact that the accused did not give evidence: *Azzopardi v The Queen* at [51].

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]; *Dyers v The Queen* (2002) 210 CLR 285 at [5]; *GBF v The Queen* (2020) 271 CLR 537 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

Last reviewed: September 2026

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 them to do so. They are presumed to be innocent until you have been satisfied beyond reasonable doubt by the evidence led by the Crown that they are guilty of the offence charged. Therefore, it follows that the accused is entitled to say nothing and make the Crown prove their guilt to the high standard required.

The accused's decision not to give evidence cannot be used against them 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 to offer explanation

Last reviewed: September 2026

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: *Weissensteiner v The Queen* (1993) 178 CLR 217; *RPS v The Queen* (2000) 199 CLR 620 at [35]; *O'Grady v R* [2012] NSWCCA 62 at [41]–[43]. This is usually referred to as a "*Weissensteiner* comment". It will be a rare and exceptional case where such a comment would be appropriate. The mere fact that the accused could have contradicted facts in the Crown case is not sufficient to warrant such a comment: *Azzopardi v The Queen* at [68]. It will usually be prudent for the trial judge to ask the parties about the appropriateness of such a comment.

[2-1030] Weissensteiner comments

Last reviewed: September 2026

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. What is said should be made by way of a comment and the jury should be

told they may ignore it: see*Azzopardi v The Queen* at [49]–[50]. The comment should be in terms of a failure to explain rather than a failure to give evidence: *Azzopardi v The Queen* at [65]–[67].

If a comment is made, it should be placed in its proper context. That requires identifying the facts which are said to call for an explanation and giving adequate *directions* to the jury about the onus of proof, the absence of any obligation on the accused to give evidence, and the fact the accused does not give evidence is not an admission, does not fill gaps in the prosecution's proofs and is not to be used as a make-weight. Further, the comment should not go beyond that made in *Weissensteiner*, as adapted to refer to the failure to offer an explanation rather than the failure to give evidence: *Azzopardi v The Queen* at [67]. See suggested direction at **[2-1010]** above. See also *O'Grady v R* [2012] NSWCCA 62 for a case where the judge did not err by commenting on the failure to give an explanation.

See also, *Criminal Practice and Procedure NSW* at [3-s 20.1].

[The next page is 355]

Expert evidence

[2-1100] Introduction

Last reviewed: September 2026

Under s 79(1) of the *Evidence Act 1995,* evidence of an opinion based wholly or substantially on a person's specialised knowledge, which is based on their training, study or experience, is admissible as an exception to the opinion rule in s 76. See generally: *Criminal Practice and Procedure NSW* annotations to [3–s 76]ff; and *Uniform Evidence Law* (20th edn) [EA.76.30]ff.

The starting point for the admissibility of expert evidence is relevance. The party tendering the evidence must identify the fact in issue the opinion is said to prove or assist in proving: *Honeysett v The Queen* (2014) 253 CLR 122 at [25]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [31].

There are two limbs to s 79(1): first, that the person has specialised knowledge based on their training, study or experience, and second, that the opinion proffered is based wholly or substantially on that knowledge: *R v Tang* (2006) 65 NSWLR 681 at [134].

In *Honeysett v The Queen* at [23], the High Court said:

> Specialised knowledge is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter. It may be of matters that are not of a scientific or technical kind and a person without any formal qualifications may acquire specialised knowledge by experience.

Specialised knowledge includes knowledge of child development and child behaviour (including the impact of sexual abuse on children and their development and behaviour during and following the abuse): s 79(2); see also the exception to the credibility rule in s 108C discussed in *BQ v The King* [2024] HCA 29.

The opinion, and the facts on which it is based, must be clearly delineated: *HG v The Queen* (1999) 197 CLR 414 at [39]. The evidence must show the process of reasoning behind the opinion, and explain how the field of specialised knowledge applies to the particular facts or assumptions to produce the opinion: *Dasreef Pty Ltd v Hawchar* at [37] (quoting *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]), and [128]–[130]. A failure to demonstrate that an opinion is based on the witness's specialised knowledge is a matter that goes to the admissibility of the evidence, not its weight: *Lang v The Queen* (2023) 278 CLR 323 at [11]; *Dasreef Pty Ltd v Hawchar* at [42].

In some cases, "little explicit articulation or amplification" will be required to demonstrate a connection between the specialised knowledge and the expert opinion: *Dasreef Pty Ltd v Hawchar* at [37]; see *JP v DPP (NSW)* [2015] NSWSC 1669 at [39]ff in relation to the admission of fingerprint evidence.

The requirement that the opinion be "wholly or substantially based" on specialised knowledge reflects that it will sometimes be difficult to separate the specialised

knowledge from "observations and knowledge of everyday affairs and events": *Honeysett v The Queen* at [24], quoting *Velevski v The Queen* [2002] HCA 4 at [158]; see also *Lang v The Queen* at [12]. However, the opinion must be presented in a way that makes it possible for a court to determine that it is substantially based on the person's training, study, or experience: *Honeysett v The Queen* at [24].

The truth of the facts or assumptions underlying the expert opinion is a matter to be evaluated by the fact-finder, and does not need to be proved in order for the opinion to be admissible under s 79: *Taub v R* [2017] 95 NSWLR 388 at [19]ff. Section 79 is not concerned with the reliability of the expert's opinions: *Chen v R* (2018) 97 NSWLR 915 at [62]; *Xie v R* [2021] NSWCCA 1 at [300].

An opinion which lacks cogency of reasoning may be excluded under ss 135 or 137, but once admitted, the reliability of the opinion is a matter of weight for the tribunal of fact. The cogency of reasoning involving the application of specialised knowledge can go to the admissibility of a resultant opinion. But that is only in so far as the degree of cogency of the reasoning bears on the extent to which the resultant opinion has the potential to assist the tribunal of fact in drawing requisite inferences from the evidence and so bears on the issues raised by ss 135 or 137. Assessing the probative value of the opinion having regard to the cogency of the reasoning proffered in evidence in support of it involves no departure from the now settled principle that the assessment of the probative value of evidence requires that evidence to be "taken at its highest": taking evidence at its highest involves making no assumption that the evidence in question is convincing. A prejudicial effect includes a risk that a jury might give the opinion more weight than it deserves by reason of the perceived status of the expert (the "white coat effect") or the difficulty in assessing information of a technical nature: *Lang v The Queen* per Kiefel CJ and Gageler J at [15]–[17] and Jagot J at [436]; see also discussion in *Camelo-Gomez v R* [2026] NSWCCA 63.

Once evidence of an opinion which is based on a history provided to a medical expert is admitted, the history becomes evidence of the matters asserted by the operation of s 60, unless limited under s 136: *R v Welsh* (1996) 90 A Crim R 364 at 367–369.

Failure of an expert witness to comply with the code of conduct in Sch 7 of the *Uniform Civil Procedure Rules 2005* will not necessarily render the evidence inadmissible, although it may be excluded under ss 135 or 137: *Wood v R* (2012) 84 NSWLR 581 at [719]–[729]; *Chen v R* (2018) 97 NSWLR 915.

Where expert opinions are provided in terms of statistical probability, careful directions or warnings may be required to avoid the danger of impermissible reasoning or misuse of the evidence: see *R v GK* (2001) 53 NSWLR 317; *R v Keir* [2002] NSWCCA 30 and cf *Keir v R* [2007] NSWCCA 149.

In *Aytugrul v The Queen* (2012) 247 CLR 170 at [23]–[24] and [30] the majority 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.

Careful directions need to be given to the jury about expert evidence, especially where it is in conflict. In *Dasreef Pty Ltd v Hawchar*, the majority stated at [92], "choosing between conflicting experts depends in part on "impressiveness and cogency of reasoning" (quoting *Monroe Australia Pty Ltd v Campbell* (1995) 65 SASR 16 at

27, quoting *Sotiroulis v Kosac* (1978) 80 LSJS 112 at 115). In *Velevski v The Queen*, there was no majority decision in respect of whether there was a category of competing expert evidence that a jury could not resolve: see [38], [85], [182].

[2-1130] Suggested direction — expert witnesses

Last reviewed: April 2026

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 their 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 their 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 their 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 they had been told by [*the accused and/or members of the accused's family*] and that formed part of the history on which [*CD*] relied to form their 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 their 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: April 2026

1. In *Al-Salmani v R* [2023] NSWCCA 83 at [64]–[67] the Court 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 decision which necessarily implies an acceptance that the expert is capable of answering the questions within the expert's field of expertise: [66].
2. The mere reading of various papers in a field of discipline by a person with no relevant prior training, study or experience will not constitute "study" within the meaning of s 79(1): *AJ v R* (2022) 110 NSWLR 339 at [77].
3. In *JS v DPP (NSW)* [2026] NSWCA 58, the Court held that an expert certificate could be admitted pursuant to the requirements in s 177 without requiring separate compliance with s 79. If notice is given and the expert is required to give evidence under ss 177(5), 79 will apply to any opinion they express: [45]–[46].
4. An expert witness can be a person who has acquired specialised knowledge "ad hoc" or, in other words, for the very purpose of the legal proceedings in which the opinion evidence is relied upon: *Nasrallah v R* [2015] NSWCCA 188 at [21]; *Ali v R* [2022] NSWCCA 199 at [50]. In *Ali v R*, the Court held that evidence of an interpreter that a "male voice" speaking in Hindi in several intercepted telephone conversations was the same person was admissible under s 79 (citing *Butera v DPP (Vic)* (1987) 164 CLR 180). This was because the interpreter's opinion was based on their specialised knowledge of the Hindi language, and the nuances of the pitch, tone and accent of the voice which were specific to that language: [52]–[57].
5. Evidence of identification by a purported ad hoc expert will be irrelevant and therefore inadmissible if it is based on material that is not different, in any substantial way, from what is available to the jury: *Smith v The Queen* (2001) 206 CLR 650 at [10]–[12]. In these situations, the witness will be in no better position than the jury to make an assessment: *Smith v The Queen* at [9]; *Ali v R* at [57].

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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

Last reviewed: April 2026

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 in relation to "identification evidence" and is in mandatory terms: *Decision Restricted* [2025] NSWCCA 210 at [361]. The warning is concerned with the reliability of the evidence, although it may not be required if in the end the evidence is not in dispute: *Dhanhoa v The Queen* (2003) 217 CLR 1 at [19]–[22], [53]; *Ilioski v R* [2006] NSWCCA 164 at [98]; *Kanaan v R* [2006] NSWCCA 109 at [183]; *Decision Restricted* at [361], [373].

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

Last reviewed: April 2026

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* (20th edn) at [EA.114.30]ff and *Criminal Practice and Procedure NSW* at [3-s 114]ff.

[3-010] Terminology

Last reviewed: April 2026

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 presence of the accused does not fall within the provisions of the Act: *Trudgett v R* (2008) 70 NSWLR 696 at [38], [50].

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: s 115(1). Picture identification

evidence adduced by the Crown 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 by itself 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 e.g. a family member. It falls within the scope of "identification evidence" for the purposes of the Act: *Trudgett v R* at [31]; *Gardiner v R* [2006] NSWCCA 190 at [68]–[69]; *Marco v R* [2023] NSWCCA 307 at [61].

Opinion evidence — evidence of identification, particularly of a voice, can be given as a type of expert evidence under s 79: *Nguyen v R* [2017] NSWCCA 4. 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.

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 at [60]–[61].

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 170 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 identification: *Aslett v R* [2009] NSWCCA 188 at [56].

[3-035] Identification of objects

Last reviewed: April 2026

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

Last reviewed: April 2026

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 [289] and [297] 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

Last reviewed: April 2026

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: *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 and isolating the particular matters in that case which may cause it to be unreliable: *Decision Restricted* [2025] NSWCCA 210 at [371], [378]; *Domican v The Queen* (1992) 173 CLR 555 at 561–562; 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 Clarke* (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

Last reviewed: April 2026

There is an important direction I must now give you concerning the evidence of [*name of witness*] in which they 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 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 their 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 they gave, you must still approach the task of assessing the reliability of their 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 their observation of the person. The circumstances in which the witness made their 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 their observation of the person? [*Name of witness*] said the period of observation they had was … [*recite evidence*].
- Did the witness focus their 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, blue hair, 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 their ability to accurately observe the person and store the image of the person's appearance in their 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 their 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 they recognised someone that they 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

Last reviewed: September 2025

The following suggested direction is suitable for use in relation to inferences contended for by the Crown. It should not be given in respect of inferences contended for by the defence: see **Note 6** below.

You may, in your role as judges of the facts, draw inferences from evidence.

Inferences are conclusions of fact reasonably 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 evidence that D is indeed a fact. There can be no inference unless there are facts from which to infer the fact which it is sought to establish. The question is whether, on the basis of the primary facts, it is reasonable to draw the inference.

Let me give you an example. If you wake up one morning, look through the window and see the ground is wet, you may perhaps infer it had rained overnight.

If you find that the facts are equally consistent in establishing more than one inference, then selecting one of them to prefer would amount to guesswork or, in other words, conjecture or speculation. If that is the case, you should not draw any inference.

In my example about the wet ground, you will, when you think about it, realise that the possible inference I suggested might be questionable. Someone may have used a hose or sprinkler, or a water pipe may have leaked instead.

In this case, the Crown asks you to draw an inference that … [apply principles to case in hand].

[*Where the inference concerns an essential element or fact the Crown is required to prove beyond reasonable doubt add*: Because the Crown relies upon the drawing of this inference in order to prove an element of the offence [*or essential matter the Crown is required to prove*], you must be satisfied of the inference beyond reasonable doubt. You should not draw this inference from the evidence unless it is the only reasonably available inference to be drawn from the evidence. You could not be satisfied beyond reasonable doubt if there are any other reasonably available inferences.**]**

[3-160] Notes

Last reviewed: September 2025

1. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish: *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169–170. The test is whether, on the basis of the primary facts, it is reasonable to draw the inference: *Lane v R* [2013] NSWCCA 317 at [109]–[110]; *Jones v Great Western Railway Co* (1930) 47 TLR 39 at 45.

   For an inference to be reasonable, it must rest on something more than mere conjecture or speculation: *Gwilliam v R* [2019] NSWCCA 5 at [101], [104]; *Lane*

v R at [107]; *The Queen v Baden-Clay* (2016) 258 CLR 308 at [47]; *Peacock v The King* (1911) 13 CLR 619 at 661; *Barca v The Queen* (1975) 133 CLR 82 at 104–105; *Crane v R* [2025] NSWCCA 93 at [131]. Mere conjecture or speculation arises where there are no positive proved facts from which the inference can be made, meaning that the method of inference fails: *Caswell* at 170; *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at [84]–[88]; *Jones v Great Western Railway Co* (1930) 47 TLR 39 at 45; cited in *Crane v R* at [203]. One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in the actual case a specific event happened or a specific state of affairs existed; inference requires something more than mere conjecture, guesswork or surmise: *HCF v The Queen* [2023] HCA 35 at [13].

2. If the circumstances are equally consistent with a number of varying hypotheses, "no one can be selected as the one that is true": *Crane v R* at [203], citing *Jones v Great Western Railway Co* at 45.

3. In a criminal case, where the inference concerns an element of the offence or an essential fact, the conclusion as to reasonableness of the inference must go further, and be such as to exclude other reasonable hypotheses: *Gwilliam v R* at [104]; *Luxton v Vines* (1952) 85 CLR 352 at 358; *Crane v R* at [202]–[208]. In such a case, it is necessary not only that the accused's guilt be a reasonable inference but that it be the only reasonable inference that the circumstances would enable the jury to draw: *The Queen v Baden-Clay* at [46]; *Barca v The Queen* at 104; *Plomp v R* (1963) 110 CLR 234 at 252; *Thomas v R* (1960) 102 CLR 584 at 605–606.

4. Provided the evidence is capable of giving rise to the inference contended for by the Crown, the fact the defence can suggest some other inference which would be consistent with the innocence of the accused does not, of itself, show that any probative value the evidence has is outweighed by the danger of unfair prejudice under s 137 of the *Evidence Act 1995*: *R v SJRC* [2007] NSWCCA 142 at [38]–[40]. As long as the inference or interpretation contended for by the Crown is open on the evidence, the Court in assessing probative value of the evidence is required to assume the inference sought to be drawn by the prosecution will be drawn. The starting point for the assessment is to assume that the inference most favourable to the Crown will be drawn and to assess the potential probative value on that basis, without regard to the availability of any competing inference: *R v Burton* [2013] NSWCCA 238; *R v Gregory-Roberts* [2016] NSWCCA 92 at [85].

5. Whether the evidence in question in fact bears the interpretation placed upon it by the prosecution is a matter of inference, and a matter of fact for the jury. It is frequently part of the function of the jury to determine which, if any, of a number of competing inferences should be drawn: *R v Burton* [2013] NSWCCA 335 at [160] applying; *R v SJRC* [2007] NSWCCA 142 at [39]. For a judge to withdraw it from the jury simply because some possible alternative inference is open involves a usurpation of the jury's function: *R v Berrill* [1982] Qd R 508 at 527, applied in *R v Kalajzich* (1989) 39 A Crim R 415 at 430.

6. Some care needs to be taken in terms of directions given where inference drawing is relied upon by the defence. The jury should not be directed that it should be

"very careful about drawing the inference asked of you by the defence". There is nothing wrong with directing the jury that the process of drawing an inference should be a reasonable one, but it will rarely be appropriate for a jury to be warned that it needs to be "very careful" about drawing an inference favourable to an accused in a criminal trial. That is because the accused, except in unusual cases, bears no onus: *Waldron v R* [2023] NSWCCA 128 at [38]–[39], [48]. There is no obligation on the accused to adduce evidence to prove or support their hypothesis. It is sufficient if such an hypothesis can be reasonably derived from the evidence in the Crown case. No standard of proof applies. All that is necessary is that the hypothesis be such as to raise a reasonable doubt that the accused person has been proved guilty. It is not incumbent on an accused "to establish that some inference other than that of guilt should reasonably be drawn from the evidence: *Wiggins v R* [2020] NSWCCA 256; *Barca* at [105]; *Baden-Clay* at [62].

7. Consider whether a circumstantial evidence direction is relevant — see **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* (1990) 51 A Crim R 25.

In *R v Stokes* 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

Last reviewed: April 2024

Section 21 provides that a court can order separate trials if it is of the opinion an accused may be prejudiced or embarrassed in their defence by being charged with more than one offence in the same indictment, or for any other reason it is desirable the accused be tried separately for any one or more offences charged in an indictment. Sections 21 and 29 (which provides for when more than one offence may be heard at the same time) have different provenances and distinct operations and should not be conflated. Section 21 applies to proceedings on an indictment, however s 29 does not: *McNamara v The King* [2023] HCA 36 at [30]–[33].

Some risk of forensic prejudice to an accused in a joint trial is inherent and is not of itself inconsistent with the overall interests of justice supporting a joint trial. Prejudice to a co-accused will not result in the ordering of a separate trial if it is amenable to nullification by jury directions: *McNamara v The King* at [42]; [101]; *R v Henry* [2008] NSWCCA 248 at [12]. Given matters of public policy and principle, even substantial prejudice to a co-accused of a kind not readily cured by directions will not result in the ordering of a separate trial "as a matter of course": *McNamara v The King* at [42]; [99]. To justify the ordering of a separate trial, the particular prejudice to a co-accused must occasion "positive injustice": *McNamara v The King* at [42]; *Caleo v R* [2021] NSWCCA 179 at [137]–[138].

The relevant prejudice is the danger the jury may misuse the evidence on a basis logically unconnected with the issues at trial, by way, for example, "appealing to the jury's sympathies, arousing a sense of horror or provoking an instinct to punish": *DS v R* [2023] NSWCCA 151 at [85]; *Castagna v R* [2012] NSWCCA 181 at [67]. Once the court determines an accused may be prejudiced or embarrassed in their defence, the discretion to order separate trials is affected by a number of considerations such as the likely degree of prejudice or embarrassment, the ability to cure or mitigate any prejudice by judicial direction; the extent of the severance required; the cross-admissibility of evidence; the impact of severance on witnesses who may be required to give evidence on two or more occasions; the complexity of directions required in order to ameliorate any prejudice or embarrassment, and the nature of the offence or offences to be severed: *DS v R* at [86]; *Allen v R* [2020] NSWCCA 173 at [55].

As to the public policy considerations favouring joint trials, see *Webb v The Queen* (1994) 181 CLR 41 per Toohey J and *McNamara v The King* at [37]–[41]; [99]. Generally, there will or should be a joint trial when co-accused raise "cut-throat" defences — when each seeks to blame each other for their liability in the joint criminal enterprise: *Webb v The Queen* at [89]; *R v Hawkins* [2023] NSWSC 1201 at [82]. For the principles to be applied in deciding to grant a separate trial, see *Ross v R* [2012] NSWCCA 207 at [24]–[26] and *R v Middis* (unrep, 27/3/1991, NSWSC) at 5; *McNamara v The King* at [42].

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. Where evidence tends to inculpate one accused and exculpate another, see **[3-615] Notes**, note 10. As to the admissibility of evidence adduced by one accused in the trial of another see *McNamara v The King* at [1], [53]–[75].

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.

It has not been thought inappropriate to refer to multiple accused's as "co-accused" who are "jointly charged" on a "joint indictment" and to refer to the resultant trial, in the event of pleas of not guilty, as a "joint trial". It is also appropriate to refer to the Crown "case" against each co-accused and the defence "case" for each co-accused: *McNamara v The King* at [35]–[36].

[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.]

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Multiple counts — R v Markuleski

[3-400] Suggested R v Markuleski (2001) 52 NSWLR 82 direction — multiple counts

Last reviewed: April 2026

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 truthfulness or reliability of the complainant's evidence, you would have to consider how that conclusion affected your consideration of the remaining counts. Where you entertain a reasonable doubt concerning the truthfulness or reliability of a complainant's evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally.

Notes

1. The requirement to consider multiple counts separately should be 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] (see also [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]. In some cases it may be necessary to highlight to the jury that each count depends on the complainant's evidence, and on their truthfulness or honesty, and that it may be difficult to justify a verdict of not guilty on one count (based on not believing the complainant) but guilty on other counts. Although, some care needs to be taken where there are distinctions in relation to the evidence in support of individual counts: *PM v R* [2025] NSWCCA 139 at [119], [155]. In *Cook (a pseudonym) v R* [2022] NSWCCA 282 error was found when the trial judge directed the jury the verdicts would have to be all one way or the other.

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: December 2025

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*] The account is that … [*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 [or: *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 [or: *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 [or: *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?

[3-602] Suggested direction — where the defence has an onus

Last reviewed: December 2024

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.

[3-603] Notes

Last reviewed: September 2026

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].

5. Where there are different pathways to determine guilt, a direction may be required that the jury must be unanimous in finding which one of several particular facts occurred in order to establish criminal liability of the accused: *AKB v R* [2024] NSWCCA 169 at [58]. This is sometimes referred to as "extended jury unanimity": *AKB v R* at [4]. There is a distinction between alternative legal formulations of liability based on the same or substantially the same facts (where generally there is no need for a unanimity direction), and alternative factual bases of liability (where such a direction may be required): *AKB v R* at [59]–[62]; *R v Walsh* [2002] VSCA 98 at [57]; *Lane v The Queen* (2018) 265 CLR 196 at [45]. For example, where the potential causes of the fatal injury, in a murder or manslaughter trial, are part of one continuous episode, and not discrete acts or events, a direction that the jury must be unanimously satisfied beyond reasonable doubt as to the precise act that caused death, is not necessary. Such a direction is only necessary where the separate potential causes of death could be described as discrete, whether separated as a matter of time or circumstance: *Lind v R* [2026] NSWCCA 41 at [39], citing *Zandipour v R* (2017) 53 VR 256 at [84]. The application of the principle in the context of sexual touching was also considered in *Lind v R* at [41]–[42].

[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 2026

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. The *Liberato* direction in the suggested direction at **[3-600]** is modelled on *De Silva v The Queen* (2019) 268 CLR 57 at [12], where the High Court proposed the following three limbs:

   (a) If the trier of fact believes the accused's evidence, they must acquit.

(b) If the trier of fact does not accept the accused's evidence but considers it might be true, they must acquit.

(c) If the trier of fact does not believe the accused's evidence, they should put it to one side. They must still consider whether the prosecution has, based on the evidence that is accepted, proved the accused's guilt beyond reasonable doubt.

3. 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 direction ("you cannot come to a view about who to believe") did not properly capture the second aspect of where a jury, though not positively believing the accused's account, thinks the account might be true. Nor did it make clear there was a command to acquit in such circumstances: at [103]–[104]; see also *Engstrom v R* [2026] NSWCCA 30 at [24]–[29] and [41], where the trial judge's failure to give the second limb of the direction meant the accused lost the benefit of the existence of a reasonable doubt about his guilt upon the basis that his evidence could possibly have been true.

4. 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* (2022) 109 NSWLR 288 at [72].

5. The *Liberato* direction is closely related to, but distinct from, the direction as to the onus of proof. Instructing the jury that the Crown must prove each element beyond reasonable doubt is different to instructing them that if they do not accept the accused's evidence, that does not entitle them to convict: *Evans v R* [2024] NSWCCA 245 at [98]–[99].

6. The question of whether the jury accept an accused's evidence, or think it might be true or reject it in full dictates the reasoning process and outcome and it is not a matter of the weight to be ascribed to evidence that has been accepted. Nor is it necessary for the jury to unanimously accept the accused's evidence before the accused is entitled to an acquittal: *Engstrom v R* at [6]–[7].

7. In *Barwick v R* [2023] NSWCCA 139, the Court held that although the judge (in a judge-alone trial) accepted the complainant's evidence as truthful and implicitly did not accept the appellant's version, such a finding is not inconsistent with the existence of reasonable doubt as to the appellant's guilt and the judge was required to consider the second limb of the direction: at [90]; *Douglass v The Queen* [2012] HCA 34 at [13].

8. In *Ellingford v R* [2026] NSWCCA 24, the Court held there is no difficulty with a *Liberato* direction being fashioned to an aspect of the evidence which is critical to the assessment by the jury of the offence charged. The trial judge had directed that if the jury believed the accused's evidence, or considered it might be true, that would be "a very significant step", or put the jury in "a very strong position", towards finding the Crown had not proved its case. That modified *Liberato* direction was appropriate because the jury could still convict if they found there

were no reasonable grounds for the applicant's belief that the complainant was consenting, or he was reckless as to whether the complainant was consenting (putting aside his self-induced intoxication): s 61HE (rep); at [5]; [83], [87]–[89].

9. The requirement to give a *Liberato* direction has been extended not only to cases where the accused only gives an unsworn account (see *De Silva v The Queen*) but also to cases in which the accused person does not give any version at all, but a defence witness does *and* the accused person relies on that version. If a co-accused gives evidence on which another co-accused relies, a *Liberato* direction may be calibrated accordingly: *Elkerdi v R* [2026] NSWCCA 96 at [142], [148].

When a *Liberato* direction should be given

10. In *De Silva v The Queen* (2019) 268 CLR 57, the High Court held that 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, a *Liberato* 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: 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: at [11].

11. 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: *De Silva v The Queen* 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).

[3-610] Suggested direction — essential Crown witness ("*Murray* direction") (in cases other than prescribed sexual offences)

Last reviewed: December 2024

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. 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.

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.

You are entitled to convict the accused on the evidence of [*essential Crown witness*] but only after you have carefully examined the evidence and satisfied yourselves that it is reliable beyond reasonable doubt.

[3-615] Notes

Last reviewed: April 2024

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].

Multiple accused

10. Where two or more accused are tried together and the evidence of a witness inculpates one accused and exculpates another, the trial judge should give directions which distinguish between the approach to be taken in each of the two cases. In respect of the case against the accused for which the evidence is *inculpatory* and constitutes the only evidence of an element of the offence, it is generally necessary to direct the jury that they should only act on the evidence if they are satisfied beyond reasonable doubt that the evidence is truthful, reliable and accurate. However, in respect of the case against the accused for which the evidence is *exculpatory*, the judge should generally direct the jury that they only need to decide whether the witness' evidence gives rise to a reasonable doubt. For an example of a case where this issue arose see *Huxley v The Queen* [2023] HCA 40 (where although the appeal was dismissed, it was accepted that there was an important distinction to be drawn between the two instances).

[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.

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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: *Robinson v R* (2006) 162 A Crim R 88 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": *Robinson v R* (2006) 162 A Crim R 88 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: *Robinson v R* (2006) 162 A Crim R 88 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*: *Robinson v R* (2006) 162 A Crim R 88 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]; *Robinson v R* 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: *Robinson v R* 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 Act* 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) 81 NSWLR 119 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) 81 NSWLR 119. 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 2026

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 2026

[*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.

[4-130] Notes

Last reviewed: September 2026

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: *LH v R* [2024] NSWCCA 165 at [129]–[130].

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 of Ch 3, *Evidence Act 1995* (NSW)

[4-200] Introduction

Last reviewed: July 2026

This chapter deals with the law and suggested directions to be given concerning:

1. Tendency
2. Coincidence
3. Context; and
4. Background evidence.

Unless otherwise stated, the section numbers below refer to the provisions of the *Evidence Act 1995*.

Part 3.6 of Ch 3, *Evidence Act* contains provisions dealing with the admissibility of tendency and coincidence evidence. It is always necessary for the trial judge to enquire of the adducing party the purpose for which the evidence is to be placed before the jury, as that will determine what sections of the *Evidence Act* apply and how directions should be framed: *Qualtieri v R* [2006] NSWCCA 95 at [80].

Where evidence is not admitted as tendency or coincidence evidence, such as context or background evidence, then the issues will likely be whether the evidence is relevant and whether it should be excluded under ss 137 or 135. Evidence that is not admissible under Pt 3.6 of the Act to prove a matter must not be used to prove that matter even if it is relevant for another purpose: s 95.

Generally where evidence is not admitted for a tendency or coincidence purpose it will be necessary to give a warning against tendency or coincidence reasoning where there is a real possibility that the jury might use it in that way: *Toalepai v R* [2009] NSWCCA 270 at [48]; *JWM v R* [2014] NSWCCA 248 at [147]–[150]; *R v Jiang* [2010] NSWCCA 277 at [44]. Whether an anti-tendency direction will be required is best assessed in the context of the evidence led at trial, since such a direction will not always be necessary: *R (Cth) v Seguel* [2024] NSWCCA 37 at [82]; *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [52]. Similar consideration should be given if the evidence is admitted for a context or background purpose: see *DP v R* [2025] NSWCCA 45 at [51]ff for a summary of relevant principles regarding anti-tendency directions where context evidence is adduced.

Tendency evidence

[4-202] Introduction

Last reviewed: July 2026

The admission of tendency evidence is governed by Pt 3.6 *Evidence Act* and in particular ss 97, 97A, 100 and 101.

Section 97(1) relevantly provides:

> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless—
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Taylor v R [2020] NSWCCA 355 at [85]–[122] contains a useful summary of the legislative history of, and caselaw on, tendency evidence. The following discussion of the caselaw must be read with the terms of s 94(4) in mind (which commenced after *Taylor v R*). This section puts "beyond doubt that any principle or rule of common law or equity preventing or restricting the admissibility of this kind of evidence is not relevant when applying Pt 3.6 of the *Evidence Act*": see Second Reading Speech, Evidence Amendment (Tendency and Coincidence) Bill 2020, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1916.

The term "not admissible" in the context of s 97(1) should generally be understood as meaning "not admissible over objection": *Al-Sheikh v R* [2025] NSWCCA 205 at [76]–[77]; *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 at [149]. The reference to a party adducing evidence in s 97 is best understood as identifying the party seeking to *use* evidence for a tendency purpose, even if that party had not originally adduced the evidence. If no objection is taken to that proposed use, it may be so used by the trier of fact without the necessity for the court to determine the issues raised by ss 97, 97A (if applicable) and 101. That is not to suggest that a court would err if it considered the application of those sections in any event, having provided procedural fairness; the court has an overriding duty to ensure a fair trial. If a tendency use *is* objected to, then whether or not such a use is permissible will depend upon application of the criteria in those sections: *Al-Sheikh v R* at [79]–[81].

Tendency evidence is a form and special class of circumstantial evidence: *DPP v Roder (a pseudonym)* [2024] HCA 15 at [23]. An alleged tendency is an "intermediate fact" to be proved in its own right and, if established, can be deployed in aid of proof of the relevant charge(s): *The King v AR* [2026] HCA 10 at [7]; *DPP v Roder (a pseudonym)* at [23], [27]. The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind, or to act in a particular way, to the likelihood that the person had a particular state of mind, or acted in a particular way, on the occasion in issue. The starting point requires identifying the tendency and the fact(s) in issue which it is adduced to prove: *Hughes v The Queen* (2017) 263 CLR 338 at [16].

The tendency sought to be proved must be clearly articulated before a ruling on admissibility of the evidence for a tendency purpose can be made: *New v R* [2025] NSWCCA 32 at [180]. Otherwise, there will usually be three issues in determining the admissibility of tendency evidence:

1. notice
2. significant probative value; and
3. the prejudicial effect of the tendency evidence.

[4-204] Notice

Last reviewed: July 2026

Subject to s 97(2), a party seeking to adduce tendency evidence must give reasonable notice in writing in accordance with s 5 of the *Evidence Regulation 2026*: ss 97(1)(a), 99. As to the date by which notice should be given, see s 99; District Court Rules 1973, Pt 53 r 10C; Supreme Court Rules 1970, Pt 75 r 3(6); and Uniform Civil Procedure Rules (UCPR), r 31.5.

The purpose and significance of the notice requirement (including giving the other party a reasonable opportunity to address and respond to it) were discussed in *Bryant v R* [2011] NSWCCA 26 at [50]–[51] and *R v AC* [2018] NSWCCA 130 at [23]–[25]. The question of whether or not notice is reasonable is to be evaluated by the court, having regard to the purpose of s 97 in the context of the Act as a whole: *Wright v R* [2025] NSWCCA 108 at [47]. Matters which may be relevant include:

- the timing of service of the notice relative to trial
- any adverse impact on a party consequent upon the timing of the service
- the nature and breadth of the tendency evidence, and
- whether or not that evidence was already in the brief of evidence or identified as evidence the Crown may rely upon at trial: [31].

In determining whether notice is reasonable it is not mandatory for the court to take into account any non-compliance with rules or regulations of court made under s 99 (including r 31.5 of the UCPR), although in an appropriate case such non-compliance might be relied upon: [47]–[54].

As for the contents of a properly drafted tendency notice, see *R v Gardiner* [2006] NSWCCA 190 at [128]. Section 100 sets out the circumstances in which notice may be dispensed with. The power conferred by s 100(1) is to "direct" that the tendency rule does not apply despite a party's failure to give notice, and accordingly is subject to s 192: *R v AC* at [22]; *R v Harker* [2004] NSWCCA 427 at [34]. When the power to dispense is engaged, the task of the court is to weigh the interests of justice, in the circumstances of the particular case, taking into account the purposes for the notice requirement, other ways in which those purposes might be achieved, and any reason for dispensing with the requirement notwithstanding that those purposes might not be achieved: *R v AC* at [26]ff.

Care must be taken by the court not to import elements into the asserted tendency in addition to those stated in a tendency notice or amended tendency notice.

Reformulation of a tendency without providing notice under s 97(1)(a) may render evidence inadmissible: see *TL v The King* [2022] HCA 35 at [33]; see also *New v R* [2025] NSWCCA 32 at [180]. Usually, it is desirable that any amendment to an asserted tendency should be by way of an amended notice by the relevant party seeking to rely upon the tendency evidence. Otherwise, any disparity between the tendency asserted or evidence identified in the tendency notice and that asserted or relied on in the trial should be the subject of a direction under s 100(1): cf *DP v R* [2025] NSWCCA 45 at [63]–[67].

[4-206] Significant probative value

Last reviewed: July 2026

In determining the probative value of evidence for the purposes of s 97(1)(b), 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* (2016) 257 CLR 300 at [51]–[52], [54], [58]; *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56 at [69]; *TL v The King* [2022] HCA 35 at [28].

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* (2017) 263 CLR 338 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].

The assessment of whether evidence has significant probative value involves consideration of two matters: 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: *Hughes v The Queen* at [41]; see also *DPP v Roder (a pseudonym)* [2024] HCA 15 at [24]. 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, in other words, the evidence must be "important" or "of consequence" to the assessment of the probability of the existence of a fact in issue: *Hughes v The Queen* at [41]; see also *TL v The King* at [28].

Other things being equal and leaving aside considerations under s 97A, the greater the specificity of the alleged tendency the more likely it will be significantly probative of the charge to which the tendency relates, but the more difficult it may be to establish the alleged tendency and to relate it to all or most of the charged conduct. Conversely, the more general the alleged tendency, the less likely that it will be significantly probative of the charge(s) to which it relates, but the less difficult it may be to establish the alleged tendency and to relate it to all or most of the charged conduct: *The King v AR* [2026] HCA 10 at [40]; *TL v The King* at [29]; *Hughes v The Queen* at [64]; [153]; [224]; *McPhillamy v The Queen* [2018] HCA 52 at [36]–[38].

While similarity between the conduct said to demonstrate the alleged tendency and the conduct in issue is not a precondition to the admission of tendency evidence, it is a common feature of a tendency which can give that evidence significant probative value: *The King v AR* at [47]; *Hughes v The Queen* at [34], [39], [91]–[92], [216] at

(8). However, there is no general rule requiring close similarity between the tendency evidence and the offence: *TL v The King* at [29]. 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: *Bektasovski v R* [2022] NSWCCA 246 at [93]; *The Queen v Bauer (a pseudonym)* at [57]. 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; however, 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].

See also *The Queen v Bauer (a pseudonym),* at [58], [60], where the Court considered the probative value of tendency evidence in sexual offence proceedings involving a single complainant, compared to multiple complainants. However, that discussion should now be read in light of s 97A — concerning the presumption of significant probative value for child sexual assault proceedings — see further below.

[4-208] Significant probative value — the possibility of collusion, contamination or concoction

Last reviewed: April 2025

Section 94(4) and (5) were inserted into the Act in 2020 and affects hearings which commenced from 1 July 2020.

Section 94(4) 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.

Section 94(5) 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, in *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56 at [69]–[70], the Court left open the possibility that, where the risk of contamination, concoction or collusion is so great it would not be open to the jury rationally to accept the evidence, it could be taken into account in assessing probative value. In the Second Reading Speech, the Attorney General stated: "Proposed section 94(5) … closes that small gap left open by the courts …" (Evidence Amendment (Tendency and Coincidence) Bill 2020, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1917).

[4-210] Tendency evidence in child sexual assault proceedings — s 97A

Last reviewed: July 2026

Section 97A applies to proceedings in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence (as defined in s 97A(6)) is a fact in issue (s 97A(1)).

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 (even if they have not acted on the interest)

(b) the defendant acting on a sexual interest they have or had in children.

Section 97A 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).

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, in the Second Reading Speech (NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1915) the Attorney General said:

> … 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.

For the purposes of determining whether "significant probative value" is satisfied in a child sexual assault case, s 97A creates a rebuttable presumption that that threshold is met for any tendency of the kinds described in subs (2) of s 97A: *R v Clarke* [2023] NSWCCA 123 at [16]. Section 97A evinces a clear legislative intention to make it easier for the prosecution to adduce tendency evidence: *Davidson (a pseudonym) v R* [2024] NSWCCA 60 at [46]. It represents a very significant departure from the previous state of the law: *R v Clarke* at [37]–[38].

In *Stenner-Wall v R* [2023] NSWCCA 163 at [14], Beech-Jones CJ at CL (agreeing with Button J; Hamill J also agreeing) noted that exceptional circumstances may be established where the particular circumstances of one or more of the matters identified in s 97A(5) are such as to demonstrate the absence of significant probative value on the part of the subject evidence.

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].

[4-212] Unfairly prejudicial effect of tendency evidence

Last reviewed: September 2025

Subject to s 101(3), tendency evidence about a defendant adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant: s 101(2).

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.

In *The Queen v Bauer (a pseudonym)* (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) 93 NSWLR 474 at [189]–[193]; *Taylor v R* [2020] NSWCCA 355 at [122] (xvii)–(xxviii).

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 whether the probative value of tendency evidence outweighs the danger of unfair prejudice to an accused, the trial judge must have regard to the directions which can be given to remedy or ameliorate any unfair prejudice which might be occasioned in the absence of directions and whether those directions would be sufficient to remedy or ameliorate that prejudice: *Davidson (a pseudonym) v R* [2024] NSWCCA 60 at [51]. It is important that the unfair 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* [2017] NSWCCA 76 at [36] (decided prior to amendment of s 101, however the principle still applies).

[4-214] Standard of proof

Last reviewed: September 2026

Section 161A of the Criminal Procedure Act 1986

Section 161A(1) of the *Criminal Procedure Act 1986* provides a jury must not be directed that evidence relied upon as tendency evidence needs to be proved beyond reasonable doubt. Section 161A(2) provides if evidence is adduced as both tendency evidence and as proof of an element or essential fact of a charge before the jury, the jury may be directed that the evidence needs to be proved beyond reasonable doubt, but only to the extent that it is adduced as proof of the element or essential fact.

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 (a pseudonym)* (2018) 266 CLR 56 at [86]; see also *DPP v Roder (a pseudonym)* [2024] HCA 15 at [29]. The terms of s 161A(3) pick up and preserve what the Court said in The *Queen v Bauer (a pseudonym)* at [86], although it is not restricted to uncharged acts: *The King v AR* [2026] HCA 10 at [8].

In *Astill v R* [2024] NSWCCA 118, the Court held s 161A(3) was not engaged where there was direct evidence from each of the relevant complainants as well as, in relation to some of the other counts, complaint evidence, documentary evidence, evidence of other witnesses and admissions made by the applicant. The tendency evidence was not "indispensable" within the meaning of *Shepherd v The Queen* in the sense that failure to prove the existence of the tendency would mean there was no case to go to the jury: [56]–[57].

Directions

In *DPP v Roder (a pseudonym)*, the High Court (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) held at [37]:

> … it follows from the nature of tendency evidence that, in a case where the prosecution relies on both uncharged and charged acts to establish an alleged tendency of the kind under consideration here, a single separate tendency direction should ordinarily be given. Such a direction should not direct or invite the jury to make findings in respect of charged conduct, but instead should indicate the evidence relied on to support the alleged tendency, direct the jury to consider whether they are satisfied of the alleged tendency and then advise the jury that, if they are so satisfied, they can use that tendency in considering whether it is more likely that the accused committed the specific offences

> with which he or she is charged. Careful directions should be given to the jury as to the requisite onus and standard of proof as well as to the contents of the elements of the offence and the need for separate consideration of each charge.

See also *The King v AR* at [9]–[11]; *Astill v R* at [44].

The High Court in *DPP v Roder (a pseudonym)* confirmed NSW authorities have been correct to hold that the principle in *The Queen v Bauer (a pseudonym)* (at [86]) — that a judge should not ordinarily direct a jury that before they may act on evidence of uncharged acts adduced to support an alleged tendency, they must be satisfied of proof of the uncharged acts beyond reasonable doubt — also applies to charged acts, and this conforms with s 161A: [25], [29]. The judge should direct the jury that, if established, the tendency (as opposed to the evidence said to support the tendency) can be deployed in aid of proof of the charges on the indictment: *DPP v Roder (a pseudonym)* at [27]; *The King v AR* at [27]. Responding to the risk of "circular reasoning", that absent such directions the jury might apply a "less rigorous standard of proof to the charges on the indictment", the High Court in *DPP v Roder (a pseudonym)* at [27]–[28] generally adopted the approach in *JS v R* [2022] NSWCCA 145 (Basten AJA; Hamill and Dhanji JJ agreeing) at [43]:

> Insofar as the applicant complained that the reasoning was "incoherent", this was premised on the assumption that the Crown, in a linear process, sought to prove the commission of an offence (at a standard of proof less than beyond reasonable doubt), and then relied on that finding to prove the tendency, and then relied on the tendency to prove the offence. However, this does not accurately represent the reasoning process involved. It is the tendency that is relied on as circumstantial evidence in proof of the charge on the indictment. The proper approach is to have regard to all the evidence of relied on in proof of the tendency as evidence of the tendency alleged. To the extent that the jury is satisfied of the existence of the tendency, the tendency may be relied on in proof of the charge. Given this process, it is preferable not to direct a jury to make findings as to the conduct relied on in proof of a charge. Rather the jury should be directed with respect to finding the alleged tendency.

An alternative direction suggested by the respondent in *DPP v Roder (a pseudonym)*, that the jury when considering the respondent's guilt for each particular charge, could not use the direct evidence of the corresponding charged act as part of the body of evidence relied on by the prosecution to support the alleged tendency, was rejected: [32]–[36]. A similar submission had been previously rejected in *Rassi v R* [2023] NSWCCA 119: [105]–[106], [109] (Hamill J); [3]–[5] (Beech-Jones CJ at CL); see also *Astill v R* at [47]–[49].

It is not appropriate for a tendency direction to incorporate a warning as to the reliability of the evidence, which is said to establish the relevant conduct, and indirectly the alleged tendency. That would be contrary to the approach preferred in *JS v R* at [43] and *DPP v Roder (a pseudonym)* at [37]: *Decision Restricted* [2025] NSWCCA 22 at [55]–[57] (not the subject of adverse comment by the High Court which allowed the appeal from this decision in *The King v AR*).

In *BRC v R* [2020] NSWCCA 176, it was held that a warning to a jury that they 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].

For an example of tendency evidence admitted in the context of drug supply offences, see *MacGill v R* [2026] NSWCCA 102.

Particularisation of the tendency

The formulation of the tendency will often be critical to the admissibility and use of the evidence said to support the alleged tendency as well as the reasoning towards guilt that the alleged tendency is said to support: *The King v AR* at [40]; *Hughes v The Queen* (2017) 263 CLR 338 at [40], [64], [153], [216] (5).

Where a tendency direction groups the conduct engaged in against each complainant together so as to formulate an alleged tendency in a manner specific to them both, it will fail to achieve its purpose of cross-admissibility: *Kanbut v R* [2022] NSWCCA 259 at [65]. The fundamental flaw in the tendency direction in *Kanbut v R* flowed from the manner in which the Crown formulated the alleged tendency: [66]–[69], [74]; see also *The King v AR* [2026] HCA 10 at [41]–[47].

The closer the correspondence between the alleged tendency and the charged conduct and the fewer the instances of charged conduct relied on to establish an alleged tendency, the greater the potential for a direction that invites the jury to make findings in respect of that conduct to a lesser standard in order to determine whether or not the alleged tendency was established to undermine the jury's understanding of the necessity for proof of the elements of the charges beyond reasonable doubt: *The King v AR* at [58]; *DPP v Roder (a pseudonym)* at [28]. Careful directions should be given to the jury as to the requisite onus and standard of proof as well as to the contents of the elements of the offence and the need for separate consideration of each charge: *DPP v Roder (a pseudonym)* at [37].

It is highly desirable for the Crown to clearly articulate to the jury in its opening address that it relies on a particular tendency as part of its circumstantial case and the evidence relied upon in support of it. This then alerts the trial judge to the possibility an anti-tendency direction might be needed for other evidence that could potentially be used for a tendency purpose. Similarly, the trial judge will be assisted in his or her summing up if the Crown is clear in its closing address what evidence it relies on to establish the tendency. It is the prosecutor's obligation to open and close the case with reference to the evidence relied on for a tendency purpose: *DP v R* [2025] NSWCCA 45 at [82]–[84].

[4-216] Tendency evidence adduced by the accused

Last reviewed: April 2025

In circumstances where tendency evidence has been adduced by the accused, the jury should not be directed to exercise caution before drawing inferences based on that tendency evidence. Moreover, the tendency directions should not be tied to circumstantial evidence directions requiring that all other rational inferences need be excluded because it suggests that the accused bears an onus of proof: *Waldron v R* [2023] NSWCCA 128 at [39]–[48].

[4-218] Suggested tendency evidence direction — single complainant — applies to charged acts, other acts or combinations thereof

Last reviewed: July 2026

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) and shortly after directions concerning the drawing of inferences. The timing may vary depending on the issues in the particular trial.

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 as to the standard of proof where the exception in s 161A(3) applies. The observations in *The King v AR* [2026] HCA 10 and *DPP v Roder (a pseudonym)* [2024] HCA 15 (referred to above) and *JS v R* [2022] NSWCCA 145 at [40] should also be taken into account, including that the directions need to be crafted carefully to avoid undermining general directions concerning proof beyond reasonable doubt for each charge.

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.

IMPORTANT NOTE TO TRIAL JUDGES: The suggested directions set out below are given by way of example. Where the prosecution relies on evidence for a tendency purpose, trial judges must formulate careful directions which must be fashioned to address the particular circumstances of the case and must guard against the improper use of tendency evidence and the potential for prejudice which is inherent in such evidence: *Rassi v R* [2023] NSWCCA 119 at [73]–[74].

Part of the Crown case is that the accused had a tendency to [*set out the tendency asserted in the notice or as ruled admissible*].

The Crown says you would be satisfied, on the basis of the following evidence, that the accused had this tendency [*identify the evidence relied upon by the Crown for a tendency purpose*].

The Crown says this evidence shows that the accused had a tendency to [*repeat short description of the asserted tendency*] which makes it more likely they committed the offence(s) charged in the indictment.

In deciding whether the accused had the asserted tendency, you must only have regard to the evidence relied upon for that purpose. You should consider all of that evidence as a whole.

Determining whether the asserted tendency is established involves the drawing of an inference.

You need to consider the evidence and determine whether the tendency contended for by the Crown can be inferred. This involves determining whether the alleged tendency is a rational inference to draw in all the circumstances. In doing so you would consider whether there might be alternative explanations (that is, alternative to the existence of the alleged tendency).

[*Refer to any arguments by the defence about dissimilarities or why the jury would not draw the inference contended for by the Crown.*]

If you are not satisfied of the asserted tendency, you must put the whole issue of tendency completely to one side and not have any regard to it at all.

If you are satisfied of the asserted tendency, then you can use that in considering whether it is more likely the accused committed the specific offence(s) with which they are charged.

Finding the accused did have the tendency the Crown asserts is not however enough to prove guilt for any charged offence(s). It may assist the Crown to prove the accused committed the offence(s), but it is not enough by itself to prove the guilt of the accused for any of the specific charged offences. The question is only whether it makes it more likely the accused conducted themself in the way the Crown alleges on any of the specific occasion(s) that are the subject of the charge(s). It is just one part of the evidence the Crown relies upon in proof of the relevant specific charged offence(s). That is the only way the asserted tendency may be used.

Ultimately, you have to decide whether the specific offence(s) with which the accused has been charged has been proved beyond reasonable doubt.

When considering whether a specific 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.

[*Consider including if appropriate, particularly where there is a single complainant and it is only the charged conduct that is relied upon as the basis for establishing the tendency*: You should not allow your findings as to tendency to distract you from your ultimate duty which is, before finding the accused guilty of any charge, to find the particular charge proved beyond reasonable doubt.]

[*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(s) 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.]

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*].

[4-220] Suggested tendency evidence direction — multiple complainants — charged acts

Last reviewed: July 2026

Part of the Crown case is that the accused had a tendency to [*set out the tendency asserted in the notice or as ruled admissible*].

The Crown says you would be satisfied on the basis of the following evidence, that the accused had this tendency [*identify the evidence relied upon by the Crown for a tendency purpose; for example, what the Crown alleges the accused did in counts [eg 1–10] of the indictment based on what each complainant said about those counts*.].

The Crown says this evidence shows the accused had a tendency to [*repeat short description of asserted tendency*] which makes it more likely the accused committed the offence(s) charged in the indictment.

In deciding whether the accused had the asserted tendency, you must only have regard to the evidence I have identified. You should consider all of that evidence as a whole.

Determining whether the asserted tendency is established involves the drawing of an inference.

You need to consider the evidence and determine whether the tendency contended for by the Crown can be inferred. This involves determining whether the alleged tendency is a rational inference to draw in all the circumstances. In doing so you would consider whether there might be alternative explanations (that is, alternative to the existence of the alleged tendency).

[*Refer to any arguments by the defence about dissimilarities or why the jury would not draw the inference contended for by the Crown.*]

If you are not satisfied of the asserted tendency, you must put the whole issue of tendency completely to one side and not have any regard to it at all.

If you are satisfied of the asserted tendency, then you can use that in considering whether it is more likely the accused committed the specific offences with which they are charged in counts [1–10].

Finding the accused did have the tendency the Crown asserts is not however enough to prove guilt for any specific count. It may assist the Crown to prove the accused committed the offences charged in counts [1–10] but it is not enough by itself to prove the guilt of the accused for any of the specific charged offences. The question is only whether it makes it more likely the accused conducted themself 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 may be used.

Ultimately, you have to decide whether each specific count with which the accused has been charged has been proved beyond reasonable doubt.

When considering whether a specific 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.

[*Consider including if appropriate, particularly where it is only the charged conduct that is relied upon as the basis for establishing the tendency*: You should not allow your findings as to tendency to distract you from your ultimate duty which is, before finding the accused guilty of any charge, to find the particular charge proved beyond reasonable doubt.]

[*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.]

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*].

Coincidence evidence

[4-222] Introduction

Last reviewed: April 2026

The admission of coincidence evidence is governed by Pt 3.6 *Evidence Act* and in particular ss 98, 100 and 101.

Section 98(1) provides:

> (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard

to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless—

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note—

One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(1A) To avoid doubt, subsection (1) includes the use of evidence from 2 or more witnesses claiming they are victims of offences committed by a person who is a defendant in a criminal proceeding to prove, on the basis of similarities in the claimed acts or circumstances in which they occurred, that the defendant did an act in issue in the proceeding.

Coincidence evidence is a species of circumstantial evidence which invites the tribunal of fact to engage in probabilistic reasoning that two or more events could not have occurred coincidentally. It gains its probative value when it suggests the objective improbability of an event occurring accidentally: *Sampson v R* [2023] NSWCCA 239 at [55] and [56] citing *Page v R* [2015] VSCA 357 at [45]. Coincidence reasoning is not limited to the issue of identification: see the examples given in *Addo v R* [2022] NSWCCA 141 at [56]. Section 98 can be satisfied by a form of reasoning that relies on the improbability of two alleged victims describing separate but similar crimes committed by an accused unless they are telling the truth. Reasoning in that form is predicated on the relevant "event" being the giving of the account of the crime by the alleged victim rather than the crime itself: [57].

There is an "overlap" or "awkwardness" between tendency and coincidence reasoning that has been recognised, particularly where there is no dispute as to the identity of the alleged offender: *Sampson v R* at [56]; *El-Haddad v R* [2015] NSWCCA 10 at [46]; *Saoud v R* (2014) 87 NSWLR 481 at [43]; see also *Addo v R* at [66]–[68] and the discussion about s 98(1A) below at **[4-234]**.

To apply s 98 it is necessary for the tendering party to identify the "basis" upon which the evidence is sought to be adduced. It can then be determined whether the mode of reasoning under s 98 is engaged: *Addo v R* at [52]. There will usually be three issues in determining the admissibility of coincidence evidence:

1. notice;
2. significant probative value; and
3. the unfairly prejudicial effect of the coincidence evidence.

The series of steps involved in determining the admission of coincidence evidence were set out in *R v Gale* (2012) 217 A Crim R 487 at [31]; *R v Duckworth* (2012) 217 A Crim R 487 at [31]; see also *Xie v R* [2021] NSWCCA 1 at [780]; and *Shah v R* [2024] NSWCCA 113 at [92]–[98] where they were applied.

[4-223] Notice

Last reviewed: September 2025

Subject to s 98(2), a party seeking to adduce coincidence evidence must give reasonable notice in writing in accordance with s 6 of the *Evidence Regulation 2026*: ss 98(1)(a), 99.

The contents of a properly drafted coincidence notice were set out in *R v Zhang* [2005] NSWCCA 437 at [131]. See also the discussion in *El-Haddad v R* at [56].

For further commentary on the statutory provisions and rules governing notice, including when notice may be dispensed with, see **[4-204]** in relation to tendency evidence above.

[4-224] Significant probative value

Last reviewed: September 2025

For coincidence evidence to be admissible the court must be satisfied that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value: s 98(1)(b). Section 94(4) provides that any principle or rule of the common law or equity that prevents or restricts the admissibility of evidence about propensity or similar fact evidence in a proceeding is not relevant when applying Pt 3.6 to tendency or coincidence evidence about a defendant.

In *Xie v R* [2021] NSWCCA 1 at [776]–[781], the Court reviewed multiple authorities on assessing probative value under s 98.

The observations in *IMM v The Queen* (2016) 257 CLR 300 as to the assessment of significant probative value for the purposes of s 97(1)(b) also apply to s 98(1)(b): *A2 v R* [2018] NSWCCA 174 at [1032]–[1033]; *R v Matonwal & Amood* [2016] NSWCCA 174 at [77]–[78]; *Xie v R* at [778]–[779]; *Sampson v R* [2023] NSWCCA 239 at [59]–[62]. See the discussion above at **[4-206].** In *R v Gale,* the Court identified a "serious logical fallacy" in so far as the similarities relied upon as coincidence evidence assumed the very same facts the Crown sought to prove: [37]; distinguished in *Sampson v R* at [46].

It is necessary to give consideration to the evidence sought to be tendered as a whole, rather than separate consideration of each particular circumstance relied upon: *R v Matonwal* at [73], [75]; *R v MR* [2013] NSWCCA 236 at [9]–[10]; [78]–[79]. The degree of similarity between the events will be relevant to the assessment of the probability that the events did not occur coincidentally: *Sampson v R* at [59]. However, 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* [2017] NSWCCA 40 at [24]–[26]; *Sampson v R* at [59].

[4-225] Significant probative value — the possibility of collusion, contamination or concoction

Last reviewed: September 2025

Section 94(5) provides in determining the probative value of coincidence evidence, it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination. For further discussion of this provision and s 94(4), see above at **[4-208]**.

[4-226] Unfairly prejudicial effect of coincidence evidence

Last reviewed: September 2025

Coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant: s 101(2). For a general discussion see **[4-212] Unfairly prejudicial effect of tendency evidence**.

[4-228] Standard of proof — s 161A Criminal Procedure Act 1986

Last reviewed: September 2025

See **[4-214] Standard of proof** for commentary on s 161A of the *Criminal Procedure Act 1986*.

[4-232] Suggested coincidence evidence direction — identity in issue

Last reviewed: September 2025

The following suggested direction concerns where the coincidence reasoning is relied upon *between counts on the indictment*; identity is the issue; the coincidence evidence is not the only evidence relied upon in respect of each count to establish identity; and it is also not an essential intermediate fact. Note that in *Davis v R* [2018] NSWCCA 277 (at [77], [105]) the Court accepted it was an intermediate fact whether the same person killed all three victims.

The next direction involves whether you draw a conclusion that two [or more] events are so similar that the same person must have been responsible.

In relation to the conduct the subject of each of the charges on the indictment, the Crown argues that there are such similarities between each of them [*if appropriate:* and/or the circumstances in which they occurred] that you would be satisfied that the same person(s) committed each of them. The Crown case is that the person was in each instance the accused.

The Crown says that it is highly improbable that the two [or more] [*short description, eg robberies, home invasions, etc*] were committed by different people and it is just a coincidence that they happen to be so similar. In other words, the similarity of the two [or more] events cannot be explained as having occurred by chance or coincidence. The Crown says that would be so highly improbable that you would conclude the real explanation is that the same person(s) committed both [or all] [*short description of events*]. The Crown says if you draw this conclusion, it is something you can take into account along with the evidence specifically relating to each charge.

You first need to decide whether there are the similarities between the events [*if appropriate:* and/or the circumstances in which they occurred] that the Crown says exist. The Crown says there are the following [*describe the asserted similarities*].

You then need to decide whether the similarities that you are satisfied exist persuade you to draw the inference it is highly improbable the events [*if appropriate:* and/or the circumstances in which they occurred] occurred by chance or coincidence and so the explanation must be that the same person, namely the accused, committed both/all of them.

You will recall the direction I gave to you about the care that needs to be applied to the drawing of inferences which included that you must consider whether there might be alternative explanations for the evidence. You should bear in mind those directions in deciding whether you can draw the inference contended for by the Crown. [*Refer to any arguments by the defence about dissimilarities or why the jury would not draw the inference contended for by the Crown*.]

If you are satisfied that you can draw the inference contended for by the Crown, that the same person committed both/all of the [*short description*], then it is something you can take into account along with the evidence relating to each charge in deciding whether the Crown has proved the guilt of the accused of each charge beyond reasonable doubt.

If you cannot draw the inference contended for by the Crown, then you must look at the evidence of each charge independently. In other words, only by reference to the evidence that is specific to that separate charge.

[*If appropriate:* give an anti-tendency direction — see anti-tendency direction at end of **[4-238]** which can be adapted.]

[4-234] Suggested coincidence evidence direction — multiple complainants — charged acts

Last reviewed: September 2025

This form of coincidence evidence is reflected in s 98(1A), which provides coincidence evidence includes the use of evidence from two or more witnesses claiming they are victims of offences committed by the defendant to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the defendant did an act in issue in the proceedings: see also *Addo v R* [2022] NSWCCA 141 at [70]–[71].

The only available path of reasoning authorised by s 98 is (*Addo v R* at [87]):

(1) it is improbable that the similar accounts would be given by different persons coincidentally;

(2) therefore the complainants gave similar versions because each was true and ought therefore be accepted; and

(3) thus, the accused committed the relevant offences against each complainant.

If the evidence of two or more witnesses shows sufficient similarity to be admissible as coincidence evidence, it can be used to prove that the 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.

The below suggested direction assumes there are two complainants.

On the indictment there are allegations against the accused made by two complainants, [*complainant A and complainant B*]. What [*complainant A*] alleges the accused did to them is the primary evidence relied upon by the Crown to prove the charge(s) in respect of them. It is the same situation with [*complainant B*].

The Crown says the accounts given by [*complainant A and complainant B*] are so similar that it is highly likely that the accused did the acts in issue (that is, that each complainant is telling you the truth in giving their separate accounts). In other words, the similarity between the accounts of [*complainant A and complainant B*] cannot be explained by chance or coincidence but was instead the consequence of the two complainants telling the truth in their accounts.

The Crown says if you draw this conclusion, it is something you can take into account along with the evidence specifically relating to each charge.

You first need to decide whether there are the similarities between the accounts of [*complainant A and complainant B*] that the Crown says exist. The Crown says there are the following similarities [*describe asserted similarities in acts and/or circumstances*]. You then need to decide whether the similarities that you are satisfied exist persuade you to draw the inference it is highly improbable the versions given by the complainants are similar by chance or coincidence.

You will recall the direction I gave to you about the care that needs to be applied to the drawing of inferences which included that you must consider whether there might be alternative explanations for the evidence. You should bear in mind those directions in deciding whether you can draw the inference contended for by the Crown.

If you are satisfied that you can draw the inference contended for by the Crown that, by reason of the similarity in the complainants' versions, the accused must have committed the acts complained of then it is something you can take into account along with the evidence relating to each charge in deciding whether the Crown has proved the guilt of the accused of each charge beyond reasonable doubt.

If you cannot draw the inference contended for by the Crown, then you must look at the evidence of [*complainant A*] completely independently without having regard to the evidence of [*complainant B*] and the evidence of [*complainant B*] without having regard to the evidence of [*complainant A*].

[*Refer to arguments of Crown and defence including dissimilarities and, if appropriate, the possibility of concoction/contamination accounting for the similarity in the allegations.*]

[*If appropriate:* give an anti-tendency direction — see anti-tendency direction at end of **[4-238]** which can be adapted.]

Context evidence

[4-236] Introduction

Last reviewed: September 2025

Where evidence is not admitted as tendency or coincidence evidence, as is the case with context evidence (sometimes referred to as "relationship evidence"), then the issues around admissibility will likely be whether the evidence is relevant and whether it should be excluded under ss 137 or 135.

Although not confined to particular offences, context evidence is most often admitted in child sexual assault cases. An example of its operation could be where the complainant in a sexual assault case is permitted to give evidence of other (uncharged) acts, often of a sexual nature, allegedly committed against them by the accused. In this way, context evidence is adduced to put into a meaningful context a complainant's account about conduct which is the subject of a specific charge, without which the jury might have difficulty believing the complainant's evidence: *DP v R* [2025] NSWCCA 45 at [50]; *HML v The Queen* (2008) 235 CLR 334 at [2]–[11].

It is essential to identify the purpose of the evidence tendered by the Crown and in this respect the Court is not bound by what the Crown asserts it to be: *RWC v R* [2010] NSWCCA 332 at [130]; *RG v R* [2010] NSWCCA 173 at [34]. Evidence is not admissible simply because it proves the relationship between the complainant and the accused: *R v ATM* [2000] NSWCCA 475 at [73]. There must be an issue which the evidence may explain or resolve by placing the alleged events in their true context: *DJV v R* [2008] NSWCCA 272 at [29]; *Norman v R* [2012] NSWCCA 230 at [33]; *CA v R* [2017] NSWCCA 324 at [65]. Otherwise, the evidence is irrelevant or may be relevant only as tendency: see, for example, *DJV v R* at [36]–[39]; *RWC v R* at [130].

In *BRC v R* [2020] NSWCCA 176 at [52]–[64], Simpson AJA reviewed a number of authorities to draw out the distinction between context and tendency evidence. See also *Qualtieri v R* [2006] NSWCCA 95 at [119]ff in relation to how context and tendency evidence bolster the credibility of the complainant in different ways.

Context evidence does not go directly to the guilt of the accused: *RWC v R* at [122]; *KTR v R* [2010] NSWCCA 271 at [92]. Rather, context evidence is relevant to:

- Explain what may be otherwise unexplained or raise questions in the mind of the jury concerning the behaviour of the complainant in response (or non-response) to the alleged conduct of the accused. For example, a lack of surprise or complaint: *RWC v R* at [122]; *DJV v R* at [28]; *RG v R* [2010] NSWCCA 173 at [38]; *CA v R* at [73]; *DP v R* at [50].
- Overcome false impressions conveyed to the jury such as the incident "came out of the blue" or "occurred in startling isolation": *KTR v R* at [90]; *KJS v R* [2014] NSWCCA 27 at [38]; see also *Norman v R* at [26].
- Demonstrate the extent to which the accused has groomed or habituated a complainant to an environment in which sexual conduct may occur: *DP v R* at [50]; *KJS v R* at [36]–[37].

[4-238] Suggested direction — context evidence

Last reviewed: September 2025

For a discussion of the purpose and requirements of an anti-tendency direction see *DP v R* [2025] NSWCCA 45 at [52]–[54]. See also the commentary as to when such a direction may be appropriate at **[4-200] Introduction** above. The timing at which a direction is given depends on the case. It may be given at the time the context evidence is led: *Greenaway v R* [2021] NSWCCA 253 at [56]. An anti-tendency direction should be given if there is a real risk of tendency reasoning being adopted: *Medich v R* [2021] NSWCCA 36 at [133].

Evidence of other alleged acts (in the context of sexual assault allegations)

Before you can convict the accused in respect of any charge in the indictment, the Crown must prove beyond reasonable doubt that the particular conduct alleged occurred. That is, the Crown must prove the particular act to which [*the/each*] charge relates as alleged by the complainant [and any state of mind].

In addition to the complainant's evidence specific to [*the/each*] count/s in the indictment, the Crown has led evidence of other acts of alleged misconduct by the accused towards the complainant.

This evidence is referred to as evidence of "other alleged acts".

The evidence of other alleged acts is as follows:

[*Specify the evidence of other acts upon which the Crown relies*].

It is important that I explain the relevance of the evidence of other alleged acts.

It was admitted for the purpose of placing the complainant's evidence specific to [*the/each*] count(s) in the indictment, into what the Crown says is the context. By context I mean other allegations made by the complainant against the accused.

[*Outline the Crown's submission of the issue/s justifying the reception of context evidence.*]

[*The following should be adapted to the circumstances of the case:*]

Without hearing the evidence of other alleged acts, you may think the complainant's evidence was less understandable.

For example,

- you might wonder about the likelihood of apparently isolated acts occurring out of the blue without any reason or circumstance to link them in any way
- you might wonder why the complainant did not complain sooner
- you might wonder why the complainant was not surprised by the alleged charged conduct occurring or why they behaved in a certain way during the course of the alleged charged conduct
- you might wonder why the complainant was unable to recall all of the details of an alleged event particularly if they allege that similar event(s) to those charged in the Indictment happened on the other occasions.

It is for [*that reason/these reasons*] that the complainant has given evidence about other alleged acts.

[*Note: attention should be directed to any particular matters that might affect the weight to be given to the evidence.*]

Whether you give the evidence of other alleged acts the significance the Crown asks you to place on the evidence is a matter entirely for you.

However, there are important warnings regarding how you are *not* entitled to use the complainant's evidence of other alleged acts.

- You must not use evidence of other alleged acts as establishing a tendency on the part of the accused to commit offences of the type charged. You cannot reason that the accused is more likely to have committed [*the/each*] offence(s) charged in the indictment or that the accused is the type of person who would commit [*the/each*] offence(s) charged in the indictment simply because the complainant has given evidence that other alleged acts occurred [*assuming evidence of other alleged acts is not relied upon for tendency reasoning purposes*].
- You must not substitute the complainant's evidence regarding other alleged acts for their evidence that is specific to [*the/each*] charge in the indictment.
- You must not reason that because the complainant alleges that the accused did something wrong to them on some other occasion/s, that the accused must have behaved in that way or in a similar way on the occasion giving rise to [*the/each*] charge in the indictment.

Background evidence

[4-240] Introduction

Last reviewed: April 2026

Where evidence is not admitted as tendency or coincidence evidence, as is the case with background evidence, then the issues around admissibility will likely be whether the evidence is relevant and whether it should be excluded under ss 137 or 135.

The term "background evidence" is adopted to specifically distinguish types of evidence from "tendency", "coincidence" and "context evidence" described above.

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 complainant, 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 as circumstantial evidence to prove that the accused committed the offence charged.

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.

Recognising there may be overlap, and although the language around these categories is not fixed, for the purposes of this chapter background evidence might be conveniently thought of as either:

(a) Relationship evidence (although not in the same sense as context evidence discussed above at **[4-236]**); or

(b) Transactional evidence.

Relationship evidence

Evidence concerning the relationship of the accused and another or others may be relevant and admissible in the context of the facts in issue in the trial.

Relationship evidence has been admitted to prove:

- Animosity between the accused and the deceased in order to rebut accident: see *Wilson v The Queen* (1970) 123 CLR 334. The evidence can be admitted to show why certain persons acted as they did where that is a relevant consideration: see *R v Toki (No 3)* [2000] NSWSC 999 at [70]–[72]; *R v FDP* (2008) 74 NSWLR 645 at [36]–[39].
- The accused's state of mind: *R v Serratore* [2001] NSWCCA 123 at [37]–[40];
- The identification of the offender: *R v Serratore* (1999) 48 NSWLR 101 at [21]–[23].

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 at 595–597; 602–603; 609; 630, 634–635; *R v Quach* [2002] NSWCCA 519 at [15], [43]; see also *R (Cth) v Seguel* [2024] NSWCCA 37 at [74].

Transactional evidence

Evidence showing a set of connected events (or a course of conduct) can be admissible even though revealing misconduct by the accused. Evidence of conduct that forms part of a relevant transaction ("transaction evidence") will itself be relevant because "without [evidence of such conduct] the transaction of which the [fact in issue] formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event": *O'Leary v The King* (1946) 73 CLR 566 per Dixon J at 577; *R v Mostyn* [2004] NSWCCA 97 at [116]; see also discussion in *Decision Restricted* [2025] NSWCCA 210 at [250]–[265]. This kind of evidence is sometimes referred to as evidence coming within the *O'Leary* principle or *O'Leary* transactional evidence.

It will be admissible whether it occurred before or after the alleged offence: *R v Mostyn* at [119].

Transactional evidence is distinguishable from tendency evidence and evidence proving an accused had a continuing state of mind (ie, evidence of a state of mind in existence at one point in time to suggest that the same continuing state of mind may well have been in existence a short time later or a short time earlier): *Haines v R* [2018] NSWCCA 269 at [222]–[226].

The following are some further examples:

- Where the accused was charged with an import type offence, the Court found that there was a set of connected events forming a single transaction, commencing with

the accused's on-line searches about the purchase of illicit drugs and its purification and packaging and concluding with the accused's receipt of the overseas package in circumstances where he was equipped to purify and process the drug: *R (Cth) v Seguel* [2024] NSWCCA 37 at [74].

- Conduct during a massage before an alleged sexual assault: *Jiang v R* [2010] NSWCCA 277 at [45]–[47].
- Identification of the accused as the offender: *O'Leary v The King* (1946) 73 CLR 566 at 575; 576; 577–578; 582; *Haines v R* [2018] NSWCCA 269 at [227]–[231] (where insulin was administered to two elderly residents of an aged care facility on the same evening and the trial proceeded on the basis that the two murders were treated as forming a single transaction).

A possible direction regarding the use of transactional evidence could be:

The Crown has led evidence of the accused's conduct at or about the same time as the alleged offence, specifically, the accused [*insert conduct*]. On the Crown case that conduct is integrally connected to the conduct for which the accused has been charged. The alleged offence could not be truly understood without reference to that evidence. If you accept the accused committed those other actions, you can use that other conduct to find there is one event – both before and/or after the charged act [*whichever is applicable*] — and you can use that evidence to understand the context of the accused's actions as alleged during the offence.

[*The form of direction will very much depend upon what the fact in issue is in the proceedings. For example, this would not be applicable where identification is the issue.*]

In addition to being transactional evidence, the conduct may also evince a particular state of mind at a time so proximate to the time of the commission of the alleged offence as to permit an inference that the same state of mind continued up to the time of the offence: *R v Adam* [1999] NSWCCA 189 at [27], [30]; *R v Player* [2000] NSWCCA 123 at [16]–[17]; *R v Serratore* [2001] NSWCCA 123 at [37]; *R v Mostyn* at [135]; *Jiang v R* at [45]; *Elomar v R* [2014] NSWCCA 303 at [366]; see also discussion in *Decision Restricted* at [266]–[268].

[4-242] Suggested direction — background evidence

Last reviewed: September 2025

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. 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) against the accused. 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 complainant 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*].

[*Set out any relevant defence argument*].

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, they 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 they have been charged. You cannot punish the accused for other conduct attributed to them by finding them 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.

[The next page is 657]

Unfavourable witnesses

***Evidence Act 1995* (NSW), s 38**

[4-250] Introduction

Last reviewed: April 2025

Section 38(1) of the *Evidence Act 1995* provides that a party calling a witness may, with leave, cross-examine the witness about:

(a) evidence given by the witness that is unfavourable to the party, or

(b) a matter of which the witness may reasonably be supposed to have knowledge about and which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence, or

(c) whether the witness has, at any time, made a prior inconsistent statement.

Such cross-examination can only be permitted with leave and, therefore, s 192 of the Act applies: *R v Hogan* [2001] NSWCCA 292; see *Lane v R* [2013] NSWCCA 317 at [165]–[166]. The evidence can be rejected under s 137 of the Act if its probative value is outweighed by the danger of unfair prejudice: see *R v Fowler* [2003] NSWCCA 321.

A prior inconsistent statement can be admissible as to the truth of its contents under s 60 of the Act: see *Adam v The Queen* (2001) 207 CLR 96 at [19], [21], [23], [37]; *R v Ryan (No 7)* [2012] NSWSC 1160; *RC v R* [2022] NSWCCA 281 at [75]–[78]. Its use can be limited under s 136 if the evidence might be unfairly prejudicial to a party, or misleading or confusing.

Cross examination "about" evidence that is "unfavourable"

The term "unfavourable" does not mean adverse; it means not favourable: *R v Souleyman* (1996) 40 NSWLR 712 at 715; *DPP v Garrett (a pseudonym)* [2016] VSCA 31 at [47], [64]–[66]; *Kanaan v R* [2006] NSWCCA 109 at [83]; *Doyle v R* [2014] NSWCCA 4 at [292]. However, evidence is not unfavourable simply because it does not fit a particular case theory of the prosecution: *Doyle v R* at [292]. Section 38 may be used by the Crown to examine the extent of inconsistencies between experts. The provision is not limited to situations where the unfavourable evidence is unexpected. Where the views of experts differ, the extent and basis for disagreement can be tested with the Crown seeking leave to cross-examine under s 38: *Gilham v R* [2012] NSWCCA 131 at [405]. "Unfavourable to the party" means "unfavourable to the case which the party is seeking to advance". The party's case may be discerned from its opening, its pleadings and/or the evidence which the court has already heard or which is proposed to be called. If the evidence of the witness is inconsistent with, or likely to be contradictory of, that identified case, it will ordinarily satisfy the description of "unfavourable". The inconsistency or contradiction may arise because the witness asserts a fact — or fails to assert a fact — in circumstances that render this unfavourable, even where it does not actually detract from the party's case: *DPP v Garrett* at [67]–[69]; see also *R v Kneebone* (1999) 47 NSWLR 450 at 461–462.

The word "about" in the chapeau to s 38(1) makes it clear that leave may be granted to not only conduct cross-examination specifically directed to one of the subjects

referred to in s 38(1), but also to the probability of establishing a factual state of affairs in relation to the matters contended for by the party conducting the cross-examination: *Doyle v R* at [293]; *R v Le* (2002) 54 NSWLR 474 at [67], [73].

Cross examination as to credibility

Section 38(3) provides that the party may, with leave, question the witness about matters relevant only to the witness's credibility. In some circumstances, a witness may be questioned about matters which are connected to matters of credibility, without a specific grant of leave under s 38(3). This includes where the questions concern the motive of the witness to lie in giving evidence or in respect of changes to the witness' original statement: *Odisho v R* [2018] NSWCCA 19 at [12]; [52]–[54]; *R v Le* at [59], [66]–[67].

Whether a prosecutor can make a submission impugning the evidence of a prosecution witness where no application under s 38 is made depends on the basis upon which the credibility (in the sense which includes reliability) is sought to be impugned and the circumstances of the trial, including the other evidence: *ZL v R* [2023] NSWCCA 279 at [136], [145]; *R v Walton* [1999] NSWCCA 452 at [42]; *R v Kennedy* [2000] NSWCCA 487 at [40]. Where the attack on a witness is a significant one and involves a positive proposition of wrongdoing, it will usually be necessary for the prosecutor to seek leave to cross-examine the witness pursuant to s 38: *ZL v R* at [137]. However, where the evidence is challenged by the Crown because it is obviously contrary to the Crown case and the witness is clearly partisan (because of a relationship with the accused) and the attack made on the witness is merely that their evidence is incorrect or ought not to be accepted because of the relationship or motive, the prosecutor will not necessarily be obliged to seek leave before making a submission that the witness's evidence ought not to be accepted: *ZL v R* at [138]; *Odisho v R* at [58]–[59].

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.

Depending on the extent and nature of the cross-examination and the degree to which s 38 was used it may be necessary to give the following direction.

[4-255] Suggested direction — s 38 cross-examination including prior inconsistent statement by a Crown witness

Last reviewed: April 2025

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 them. In the usual case it is the opposing party who has the right to test a witness by cross-examination.

[*If there is a prior inconsistent statement, add:*

However, in relation to the witness, [*name of witness*], I permitted the Crown to ask them questions concerning the evidence they gave in light of a statement that they had previously made.

It is a matter for you to decide what, if any, of [*name of witness*] evidence that you accept as honest and reliable. [*This direction may need to be modified if s 38(1)(a) or (b) is relied upon*.]

[*Depending on answers provided by the witness in cross-examination, it may be necessary to 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

Last reviewed: July 2026

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]**). The procedure under s 31 of the Act, which provides for special verdicts, is available in proceedings where the accused has been found unfit to be tried: *R v Bugmy (No 2)* [2026] NSWSC 70 at [57]–[59].

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

Last reviewed: July 2026

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.	43
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.	

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. After an inquiry:	44
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 Local Court judge 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].	
Note 3: The court may enter a special verdict of act proven but not criminally responsible at any time in the proceedings under s 31, including where the accused has been found unfit to be tried: *R v Bugmy (No 2)* [2026] NSWSC 70 at [57]–[59].	

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
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.	

Step 3: Bail	**Section**
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
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**.	80
The MHRT must make the determination as to fitness on the balance of probabilities: s 80(3).	
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)).	50

Step 4A: Ongoing MHRT review for an accused found unfit	Section
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).	

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
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 1**: If a jury is determining the special hearing, a direction such as that at [4-331] will be required: see s 56(11). **Note 2:** The court may enter a special verdict of act proven but not criminally responsible at any time in the proceedings under s 31, including where the accused has been found unfit to be tried: *R v Bugmy (No 2)* at [57]–[59].	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	33

Step 5A: Act proven but not criminally responsible	Section
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**	
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. (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.	66

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	63(2), 65

Step 5B: Offence committed on limited evidence	Section
(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. **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.	

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.

[The next page is 681]

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] NSWCCA 198 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) 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* [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

Last reviewed: July 2025

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* [2009] NSWCCA 71 at [57].

That a witness is not material negates the need to give a *Mahmood* direction: see *Singh v R* [2025] NSWCCA 34 at [134]; *Gregg v R* [2020] NSWCCA 245 at [537].

See *Singh v R* at [127]–[139] for some of the circumstances that may be relevant in deciding whether or not to give a *Mahmood* direction.

[4-375] Suggested comment — witness not called by prosecution

Last reviewed: July 2025

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 they 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

Last reviewed: July 2025

The appropriate direction to be given where a complainant did not give evidence in person in accordance with s 306B *Criminal Procedure Ac*t 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 [1-390] 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 their evidence from an earlier trial was played to you. This includes the cross-examination of the complainant 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 the complainant's 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 they 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

Last reviewed: July 2026

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) 259 CLR 47 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 their 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].

In *Decision Restricted* [2026] NSWCCA 76 at [22]–[23] it was held that a warning under s 165(1)(d) will not usually be appropriate where the evidence is favourable to the accused or does not advance the prosecution case. That is because in such a case there will be "good reasons" pursuant to s 165(3) not to give the direction. To the same effect, see also *Decision Restricted* [2025] NSWCCA 210 at [284]; [309]–[341].

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 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": see *R v Saltan* [2002] NSWCCA 423 at [15]–[29].

[4-385] Suggested direction

Last reviewed: April 2026

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 an 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 an 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 themselves onto others, and to justify their own conduct. In the process, the witness may construct untruthful stories, which tend to play down their 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 their 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 the witness's 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 elements 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, they 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 their 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 they failed to give the evidence they 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

Last reviewed: April 2026

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

Last reviewed: April 2026

In *Robinson v R* (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 *Robinson v R* were applied in *GAR v R (No 2)* [2010] NSWCCA 164 at [103].

[4-392] Suggested direction

Last reviewed: April 2026

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 their 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

Last reviewed: April 2026

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].

There will generally be "good reasons" not to give a warning under s 165(1)(d) where the evidence is favourable to the accused or does not advance the prosecution case: s 165(3) and *Decision Restricted* [2025] NSWCCA 210 at [334].

[4-397] Where an accused gives evidence implicating another accused

Last reviewed: April 2026

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* (1994) 181 CLR 41 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 their 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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Sexual assault trials — procedural matters

para

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Complaint evidence

[5-000] Introduction

Last reviewed: April 2026

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 under s 60.

Complaint evidence is not restricted to sexual assault cases. Evidence can be admitted under s 66 as relevant to any offence provided it is first-hand 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.

The Crown may also seek to adduce, pursuant to s 66(2), evidence of the complainant's distress at the time of making the complaint. Such evidence is ordinarily relevant under s 55 *Evidence Act* on either or both of two bases: as evidence that could support the complainant's *credit* if the jury finds a causal connection between the distress and the making of the complaint; and as evidence that could support the *occurrence* of the offending if the jury finds a causal connection between the distress and the offending: *The King v Ryan Churchill (a pseudonym)* [2025] HCA 11 at [3], [27]; *The King v Tsalkos* [2025] HCA 49 at [24]. See also *Davis v R* [2024] NSWCCA 120 at [146] and *AS v R* [2022] NSWCCA 291 at [169]. It is erroneous to separate a complainant's distress from the content of their complaint when assessing its admissibility and use: *The King v Tsalkos* at [24], [26], [32].

[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: April 2024

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 [*a person or people*] about the alleged assault by the accused. This is referred to as "complaint evidence".

[*Set out the evidence of complaint.*]

It is for you to determine whether there was complaint by the complainant.

If you determine that complaint was made, the following direction/s 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 they described. So, not

only would you have the complainant's evidence before you about being assaulted by the accused, you would also have the description of the assault that was given to [*witness*].

[*Set out the competing arguments as to this, if any.*]

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 circumstances in which the complainant did*] makes it more likely the complainant is telling you the truth about having been assaulted by the accused.

The defence disputes this [*set out defence arguments*].

[*Where the evidence is limited to solely 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*].

[*If appropriate add:* 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*].**]**

[*Where the offence is a prescribed sexual offence (see [5-045] Direction where difference in complainant's account — prescribed sexual offences only — s 293A Criminal Procedure Act 1986) add:*

The defence case is that [*witness*] was not telling the truth, that there were gaps in the account [*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.**]**

[*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: July 2026

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; *Van Gestel v R* [2023] NSWCCA 263; *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 2024

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]. This requires the accused to establish a real or actual disadvantage which is not merely speculative, theoretical or presumptive: *Dawson v R* [2024] NSWCCA 98 at [93]; *Brown v R* [2022] NSWCCA 116 at [43]; *Shanmugam v R* [2021] NSWCCA 125 at [45]. In *Dawson v R*, the court rejected the argument that a s 165B direction should be given where there is a *risk* of prejudice arising from an accused's loss of opportunity to investigate whether evidence (now no longer available due to delay) would have assisted the accused's defence. The words "risk, or danger, of prejudice" should not be imported into s 165B: at [103], [105].

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* (2014) 86 NSWLR 623 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].

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* 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].

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 complainants

[5-100] Introduction

Last reviewed: December 2025

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].

In proceedings for prescribed sexual offences, s 294CB(2) governs the admissibility of evidence relating to the complainant's prior sexual history. Section 294CB(2) provides that evidence of the complainant's sexual reputation is inadmissible. Section 294CB(3) provides that evidence of the complainant's sexual activity or experience 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).

The section is not directed to sexual activity founding the Crown case but other sexual activity or experience (or lack thereof) that emerges incidentally, for reasons unrelated to founding any charge: *Rowney v R* [2007] NSWCCA 49 at [68]; *Smith (a pseudonym) v R* [2025] NSWCCA 145 at [12].

Section 294CB(5)–(8) sets out the procedure for the giving of evidence said to fall within an exception in s 294CB(4).

Evidence related to the complainant's sexual experience or sexual activity cannot be given unless the court has first decided the evidence is admissible: s 294CB(5)(b). A decision on admissibility must be sought in advance of cross-examination under s 294CB(6); *Smith v R* at [16].

The accused may be permitted to cross-examine the complainant on evidence of their sexual experience (or lack thereof) 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). That right is engaged irrespective of whether the Crown was intending to lead the evidence and irrespective of whether it is inadmissible: *Smith v R* at [55].

In relation to implications in the Crown case, the statutory test in s 294CB(6) is not one of risk as to how jurors might reason but one of whether the evidence and submissions relied upon by the Crown conveyed an implication of prior sexual experience or activity (or lack thereof): *WHS v R* [2024] NSWCCA 242 at [44]–[46] (noting the High Court granted special leave to appeal, with that being an issue in the appeal).

In relation to disclosures in the Crown case, whether evidence engages s 294CB(6) by disclosing sexual experience or activity is not determined by assessing the credibility or reliability of a disclosure by reference to other evidence: *Smith v R* at [53].

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) .

If the court decides the evidence is admissible, the court must give written reasons for that decision and record the nature and scope of the evidence before it 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: *Chia v R* [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].

Similar provisions apply for Commonwealth offences listed in Pt IAD of the *Crimes Act 1914* (Cth) — protecting vulnerable persons. Evidence of the sexual reputation of a child witness, child complainant, or vulnerable adult complainant is inadmissible in a proceeding: *Crimes Act 1914*, ss 15YB, 15YCA. Evidence of the sexual experience of a child witness, child complainant, or vulnerable adult complainant is inadmissible in a proceeding, unless the court gives leave: 15YC(1), 15YCB(1). The court must not give leave unless satisfied the evidence:

(a) is substantially relevant to facts in issue;

(b) has substantial probative value; and

(c) either is of sexual activity alleged to form part of a connected set of circumstances in which the alleged offence was committed, or if the evidence is of sexual activities with a defendant in the proceeding, relates to sexual activity that occurred or was recent at the time of the alleged offence: ss 15YC(2), 15YCB(2).

Mandatory considerations in determining substantial probative value (without limiting the matters to which the court may have regard) are:

(a) whether the evidence tends to prove the complainant knowingly or recklessly made a false representation when under an obligation to tell the truth;

(b) the period of time elapsed since the acts or events relating to the evidence occurred; and

(c) whether the probative value outweighs any distress, humiliation or embarrassment to the complainant: ss 15YC(4), 15YCB(4).

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)

Last reviewed: April 2025

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: *Taylor v R* (2009) 78 NSWLR 198 at [36]; *Chia v R* [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). These are discussed below.

Section 294CB(4)(a)(i) – sexual experience or activity at time of offence

The starting point for any application of s 294CB(4)(a)(i) is a clear identification of the evidence that purportedly discloses or implies the complainant's "sexual experience" or "sexual activity" (or lack thereof) and which is said to fall within the exception. There is an important difference between whether the evidence is relied upon as evidence of sexual experience or as evidence of sexual activity: *Cook (a pseudonym) v The King* [2024] HCA 26 at [38]. Sexual experience is a characterisation that can persist separately from a particular sexual act and involves a continuing "experience" or lack of experience. Common examples are characterisations of "virgin", "sex worker", or the continuing experience of a survivor of sexual assault: *Cook (a pseudonym) v The King* at [39]; *GEH v R* [2012] NSWCCA 150 at [63]–[65].

The terms "sexual experience" and "sexual activity" do not include experimental or explorative touching between very young children who are not sexually aware and between whom such contact does not derive from or relate to a purpose of sexual gratification: *WHS v R* [2024] NSWCCA 242 at [41]; *Uddin v R* [2020] NSWCCA 115 at [42]. The sexual experience or activity must have occurred prior to the events charged: *WHS v R* at [43]; *Cook (a pseudonym) v The King* at [35].

The preposition, "of", requires a link between the characterisation of the sexual experience (or lack thereof) and the evidence upon which the person relies to establish that sexual experience (or lack thereof). Provided the characterisation continues at the time of the alleged sexual offence, the evidence will also usually be evidence of sexual experience "at or about the time of the commission of the alleged prescribed sexual offence": *Cook (a pseudonym) v The King* at [40].

In *Elsworth v R* [2022] NSWCCA 276 at [119] it was held that the terms "sexual experience" and "sexual activity" 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" and *Cook (a pseudonym) v The King* at [38].

Section 294CB(4)(a)(ii) — events form part of connected set of circumstances

Connected events are not sufficient. Section 294CB(4)(a)(ii) contains an additional requirement that the events must "form part of" the connected set of circumstances "in which" the alleged sexual offence was committed. The effect of this additional requirement in s 294CB(4)(a)(ii) is to narrow the operation of para (a) to near-contemporaneous events that were sufficiently integrated with the alleged offending so that it can be said that the events are part of the circumstances of the alleged occurrence of the sexual offence itself: *Cook (a pseudonym) v The King* at [44]; *Behi v R* [2024] NSWCCA 89 at [281]; *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 at [189]–[195].

In *Elsworth v R* at [118] the court held 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. See also *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* at [11]–[13]; [35]; and *Chia v R* [2021] NSWCCA 51 at [59]–[60] (Leeming JA, Walton J agreeing), but cf Adamson J at [88]–[91].

False complaint evidence may have the capacity to fall within the exceptions in s 294CB(4): *Adams v R* [2018] NSWCCA 303 at [163]–[177]. However, where there is false complaint evidence years remote from the alleged offending, the temporal requirement in s 294CB(4)(a) cannot be satisfied: *Jackmain v R* at [25]; [190]; [235]; [238]; [240].

In *Behi v R*, the applicant was convicted of sexual offences against his chiropractic patient during treatment. The applicant sought to impugn the complainant's credibility on the basis her employment as a sex worker at a brothel meant she knew how to object if she perceived inappropriate behaviour, but she failed to do so as a patient. The Court held the trial judge correctly excluded evidence of this employment as it was not part of a connected set of circumstances in which the offending occurred and not sufficiently integrated with the offending: [279]–[286].

Section 294CB(4)(b) — relates to relationship existing at time of offence

The evidence that relates to a relationship cannot be identified without first identifying the nature and scope of the relationship. The relationship referred to in the subsection encompasses a wide range of possibilities. It could be one of abuse, or one of trust and confidence, or mutual emotional connection between the complainant and an accused. It is a question of degree, dependent upon the facts of a particular case, whether interactions between two persons are sufficient for it to be said that they have formed a relationship, but it must be more than a casual acquaintance: *Cook (a pseudonym) v The King* at [49]–[51].

Section 294CB(4)(c) — evidence relevant to presence of semen, pregnancy, disease or injury

The term "disease or injury" in s 294CB(4)(c) has been held to encompass a psychological condition of diagnosed depression and suicidal ideation: *JAD v R* [2012] NSWCCA 73 at [83]. However, although recognised psychological conditions may fall within the definition, general emotions of fear and anxiety — without more — will be not be sufficient for the purposes of the provision: *GP v R* [2016] NSWCCA 150 at [34], [44].

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].

In *WS v R* [2022] NSWCCA 77, 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: *WS v R* at [78]–[80] (Macfarlan JA; Walton J agreeing); cf Rothman J at [108]–[111].

In *Chia v R* [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: December 2024

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) 110 NSWLR 339 at [73].

Leave is required for evidence under s 108C but not under s 79(2).

[5-310] Notes

Last reviewed: December 2024

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* (2022) 110 NSWLR 339 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* at [64]–[66]: *BQ v R* [2023] NSWCCA 34 at [233]–[239]. There is also nothing objectionable about an expert contextualising the effect of their research by explaining child sexual abuse often takes place in the home and while other family members are proximate; such evidence does not concern the behaviour of perpetrators but is directed to important parts of the context in which child victims respond: *BQ v The King* [2024] HCA 29 at [38]–[39]

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 *BQ v The King*, the High Court held, in relation to similar expert evidence, that as well as being opinion evidence, it bore upon the jury's assessment of the complainant's honesty and reliability and was relevant to whether the offences occurred, for example, by having the capacity to rebut an attack on the complainant's credibility because of delay in disclosure: [34]. In the circumstances of *Aziz (a pseudonym) v R*, 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]. However, caution should be exercised in applying previous decisions such as *Aziz (a pseudonym) v R* and *AJ v R* to other cases, notwithstanding apparent similarity of issues or expert evidence. The proper scope of an expert's evidence depends upon the evidence led in the particular proceedings: *BQ v The King* at [27].

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]. In *BQ v The King*, the High Court confirmed it would have been erroneous for the trial judge to give the general jury direction the evidence was "educative" only and said nothing about the complainant's credibility, as the very purpose it was led was to avoid the jury's assessment of the complainant's evidence being affected by common misapprehensions about child sexual abuse: [46], [49]. The proper approach is not to enunciate a general direction appropriate to all counter-intuitive or educative evidence or to direct that such evidence might be used only to respond to a credibility attack but not to support credibility. Instead, where necessary, the legitimate and potentially illegitimate uses of such evidence should be identified and, where there is a risk of illegitimate use, then that may warrant exclusion under ss 135 or 137 *Evidence Act* or a jury direction to guard against that illegitimate use: [51].

[The next page is 761]

Pre-recorded evidence in child sexual offence proceedings — Child Sexual Offence Evidence Program (CSOEP)

[5-400] Introduction

Last reviewed: April 2025

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, replacing the pilot scheme (with some amendments), and applying 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 Criminal Practice Note 31 (commenced 31 March 2025).

[5-410] Requirements for, and conduct of, pre-recorded hearings

Last reviewed: April 2025

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 31.

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 (PRH): cl 84.

An order under s 294G(1)(a) that a child not give evidence at a PRH 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 PRH to take place,

(b) the sufficiency of preparation time for both parties,

(c) the continuity and availability of counsel at both the PRH 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 after 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 PRH 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 additional evidence in chief and be cross-examined and re-examined during the PRH: 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 (previously referred to as a "JIRT interview") is not played during the PRH: Practice Note 31 at [19]. The parties and the judge will watch the child interview before the PRH. The child will watch (and/or read) the child interview transcript before the PRH: Practice Note 31 at [19]. See also **[1-372] Giving evidence of out-of-court representations**. Edits to the child interview(s) are to be agreed before the PRH as the PRH is the start of the trial. If there is no agreement the matter is to be listed for argument before the PRH.

At the balance of the trial, the child interview(s), will be played as evidence in chief, followed by the recording of the pre-recorded evidence hearing as additional evidence in chief, cross examination and re-examination. Any edits to the recordings of the PRH 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 PRH, or (b) where the former presiding judge only presides over a PRH and not over proceedings thereafter. It does not matter if a different judge conducts the PRH 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 (WI) to assist with the giving of the child's evidence where the child is under 16 years of age. A WI 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)). The court can order a WI to prepare a report assessing the communication needs of a witness over 16 to assist in determining whether a witness has difficulty communicating.

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 WI would be on the panel: at [25]. WIs are accredited professionals from the fields of speech pathology, social work, psychology, teaching, or occupational therapy.

A WI 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 WI), 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 WI) 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 WI 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 WI 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 WI had been appointed. The prohibition imposed by cl 89(5)(b) (now s 294M(5)(b)) is on appointing a WI with a prior professional association with the witness; there is no requirement the assistance provided warrants a conclusion that the WI 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 WI 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 a WI is appointed by the Court, the WI must prepare a written report about the communication needs of the witness, which must be provided to the Court at least one week before the commencement of the PRH and provided to the parties as soon as it becomes available: s 294M(7), (8); Practice Note 31 at [8]. See also **[5-430] CSOEP — procedure**.

The *Evidence Act 1995* applies to WIs 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 a WI must take before acting as an intermediary see *Criminal Procedure Regulation 2017*, cl 111.

During a PRH, the witness may only give evidence if the WI 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 WI: 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 WI 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 WI 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 WI was used. See **[5-420] Suggested direction — pre-recorded evidence** below.

[5-420] Suggested direction — pre-recorded evidence

Last reviewed: April 2025

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 child 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 PRH, 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; and
   - 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 and so their name can be included in names read to jury panel in advance of applications to be excused.
6. If the support person is not a witness assistance officer they should be told of the importance of remaining completely impassive during the evidence of the child.
7. 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 PRH 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].

8. 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.

9. 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)).

10. 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].

11. 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**.

12. 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].
13. 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].
14. See also *Child Sexual Offence Evidence Program (CSOEP)* resource page on the Judicial Information Research System (available to District Court judges and their associates only).

[5-430] CSOEP List — procedure

Last reviewed: April 2025

The procedure for child sexual offence matters progressing in the NSW District Court is contained in Practice Note 31.

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 CSOEP 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)
  - legal argument
  - 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))
- At the conclusion of the CSOEP callover the court is expected to make orders in accordance with Criminal Practice Note 31, Annexure C at [37], [46].

Ground Rules Hearing (GRH)

- GRH may be conducted in-person or via AVL. The accused is excused from appearing if legally represented (Practice Note 31 at [10])
- Witness Intermediary presents their report to the court and discusses recommendations.
- The report documents the communication needs of the witness and recommends modes of questioning (eg, non-tag questions), including the use of visual aids (eg, timelines).
- The Court and parties may pose questions of the Witness Intermediary to seek clarification; recommendations may be amended or added.
- At the conclusion of the GRH, the Court makes orders that the PRH is to be conducted according to the Witness Intermediary's recommendations and orders in accordance with Practice Note 31, Annexure A at [12]–[13].

Pre-Recorded Evidence Hearing (PRH)

- The PRH is the commencement of trial. The accused is to be arraigned at the commencement of the PRH (Practice Note 31, at [15]). The parties are to advise the court of any anticipated pre-trial issues or legal argument to be resolved prior to the PRH and the judge presiding over the PRH is to endeavour to resolve this during or around the time of the PRH (Practice Note 31, at [25]–[26]).
- Agreed edits to the child interviews are to be provided before the commencement of the PRH.
- 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. All evidence is to be regarded (Practice Note 31 at [18])
- Witness Intermediary permitted to interject where mode of questioning not in compliance with recommendations or where witness requires breaks.
- Any item to be shown to the witness during PRH by either party is to be provided to Court in marked envelopes the day before the PRH (Practice Note 31 at [20]).
- The judge will check what items are to be shown to the witness to determine if there is material that may traumatise the witness that does not need to be shown to them.
- Child interview(s) and any transcript to be marked for identification only and not tendered as an exhibit.
- At the conclusion of the PRH, the Court is to make orders in accordance with Practice Note 31, Annexure B at [23].
- The representatives for the prosecution and defence appearing at the PRH are expected to appear for the balance of the trial (Practice Note 31 at [24]).
- Practitioners should notify the prosecution and then the Court (which may be done by email to District-Court-CSOEP@justice.nsw.gov.au) as soon as possible of an intention to apply to vacate the PRH or enter a plea of guilty. To vacate a PRH, an application must then be made by Notice of Motion and supporting affidavit (Practice Note 31 at [28]).

Balance of trial

- All agreed edits to the PRH recordings are to be made in advance of the balance of the trial.
- Copies of edited discs and transcripts are to be provided to the Court in advance of the balance of the trial.
- Child witness is not to give further evidence without Court's leave (s 294K(1)).
- Jury is to be given a direction regarding pre-recorded evidence **[5-420]**.
- Jury is to be played child interview and then the 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.
- Child interview, PRH recordings and any transcripts to be marked for identification only are not to be tendered as exhibits.

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Sexual assault communications privilege

[5-500] Introduction

Last reviewed: July 2025

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 p 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 p 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 p 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). To engage the power in s 299B, leave is not required and the s 299D test does not apply.
- 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; I Nash, "Use of the sexual assault communications privilege in sexual assault trials" (2015) 27(3) *JOB* 21 and R Gilbert, "Sexual assault communications privilege — an update" (2025) 37(1) *JOB* 1.

[5-510] What communications are protected?

Last reviewed: July 2025

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 is broad but it relates to the counselling communications themselves; it does not catch the mere fact or existence of counselling, nor, generally, the nature of therapy. However, in some cases, information disclosing the nature of therapy may have been communicated only through a "protected confidence": *Decision Restricted* [2025] NSWCCA 55 at [52].

The definition of a "counselling communication" is also broad: see s 296(4). 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

Last reviewed: July 2025

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 or alleged 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 for claims of client legal privilege): *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, under s 299B(1), to examine each document to determine whether it contains a protected confidence. However, nothing in s 299B confines the power to that purpose: *Rohan v R* [2018] NSWCCA 89 at [54]. Where a question arises as to leave to subpoena or produce documents, the same discretion to examine the documents is available: s 299B(1); *KS v Veitch (No 2)* at [28] per Basten JA; *ER v Khan* at [97], [104]; *Rohan v R* at [58] cf RA Hulme J's comments concerning s 299B's intended application at [59]–[60], [67]. In fact, there will likely be many cases where inspecting the documents is important, if not determinative, in considering whether the s 299D(1) requirements for leave are met: *Decision Restricted* [2025] NSWCCA 55 at [27]. In *JK v R* [2025] NSWCCA 44, the Court highlighted the difficulty for judges to decide whether a document contains a protected confidence, or satisfies the s 299D test, without examining it: at [24], [51]. However, the documents do not need to be inspected in every case: *Decision Restricted* [2025] NSWCCA 55 at [26]; *KS v Veitch (No 2)* at [23], [28]; *Rohan v R* at [82]. Note that to call to aid the power in s 299B, leave is not required and the s 299D test does not apply: *Decision Restricted* [2025] NSWCCA 55 at [75].

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]. 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 p 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 will have 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]. The requirement in s 299D(1)(a) that the evidence "*will* … have substantial probative value" establishes a high bar, but it ought not be interpreted as an insurmountable one or an absolute preclusion to access documents containing protected confidences: *Decision Restricted* [2025] NSWCCA 55 at [31]; *KS v Veitch (No 2)* at [36]. It does, however, require more than establishing a legitimate forensic purpose for seeking the material: *KS v Veitch (No 2)* at [31]–[32]; *Decision Restricted* [2025] NSWCCA 55 at [31]. The use of the word "will" does not present a hurdle as high as "inevitability", but clearly connotes something more than a possibility or being "more likely than not": *Decision Restricted* [2025] NSWCCA 55 at [32].

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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Sexual assault offences

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)

Last reviewed: July 2025

The accused is charged with assaulting the complainant and at the time of (or immediately before or immediately after) the assault committing 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 or 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 they realised that there was a possibility that the complainant was not consenting but they went ahead anyway, or they did not even think about whether the complainant was consenting or not — in other words, they 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 their 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 they did, the touching was lawful.]

[*Where there is no touching, substitute:*

An assault is an unlawful threat made to the complainant causing them 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 their 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 the accused uses their 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 the accused's 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's 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 their consent knowing that the complainant 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 they 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 the accused 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 or not the complainant was consenting to the act amounting to the assault, treating the question of whether the complainant was 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 they are 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 they 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 the accused's 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 the accused's mind if they 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 they realised that there was a possibility that the complainant was not consenting but they went ahead anyway, or they did not even think about whether the complainant was consenting or not — in other words, they 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

Last reviewed: July 2026

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] NSWCCA 248 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); cf *Nguyen v DPP (NSW)* [2023]

NSWCCA 42 at [44] (quoted in *Van Gestel v R* [2023] NSWCCA 263 at [55]), where Button J said that the element of indecency is "wholly objective" and "does not require a mental element (whether intention, knowledge, recklessness, or anything else) about that attribute on the part of an accused person".

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] NSWCCA 62 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)

Last reviewed: July 2025

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.

In company — s 61M(3)(a)

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 complainant they will be "in company", even if the complainant 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 complainant into submission. The perspective of the complainant (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.*]**]**

Under authority — s 61M(3)(c)

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 their care or 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 or 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*].

Complainant has serious physical disability or cognitive impairment — s 61M(3)(d), (e)

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 the complainant then had an appreciably below average general intellectual function such that they 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

Last reviewed: July 2025

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] 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) 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". They are three separate elements and should operate independently in determining what relationships fall within the description of "under the authority of" another person; they do not work together to create a new composite or portmanteau result: *Hu v R* [2025] NSWCCA 66 at [40]–[47]; *KSC v R* [2012] NSWCCA 179 at [125]; *Manojlovic v R* [2020] NSWCCA 315 at [79]; Second Reading Speech, Crimes (Child Assault) Amendment Bill 1985, NSW, Legislative Assembly, *Debates*, 12/11/1985, p 9325. The words "care", "supervision" and "authority" should be given their ordinary English meaning: see *Hu v R* at [48]; *KSC v R* at [125]. 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 … 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: *R v Howes* at [50]; *R v MacFie* at [20]–[21]. The relevant question is whether a relationship of the stated kind exists at the time of the offence, and not necessarily whether the accused is actually exercising or exploiting his position of advantage at that time: *R v Howes* at [5]. *R v Howes* was referred to with approval in *Kennedy v R* [2017] NSWCCA 193 at [51]–[53].

A patient receiving treatment from a health care professional is "in the care of", and thus "under the authority of", the health care professional: *Hu v R* at [49]. The ordinary meaning of "care" captures the underlying concept of a health care professional being responsible for the patient's welfare by virtue of their relationship and the patient's dependence on the professional training and conduct of the health care professional. For example, an adult patient is "under the authority" of an osteopath providing treatment: *Hu v R* at [48]–[49]. 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 2026

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). See also note 13 below.

[5-710] Suggested procedure before empanelling jury and formally arraigning accused

Last reviewed: September 2026

Given the nature of this offence, it is expected the Crown would adopt the preferable, and more straightforward, course of including any alternative counts under s 66EA(13) on the indictment (*Nolan v R* [2024] NSWCCA 140 at [8]), 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: *Nolan v R* at [3]–[8]; [37].

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 2026

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.]

[*If the Crown has charged alternate sexual acts*: All of the unlawful sexual acts in this case have been charged in the alternative to Count 1 as separate offences. Each alternate count has elements which I have identified in my directions (or will identify in my directions).]

[*If the Crown has not charged alternate sexual acts*: None of the unlawful sexual acts in this case have been charged (in the alternative to Count 1) as separate offences. Therefore, although you need to be satisfied that two or more of these acts occurred, you do not need to be satisfied that each unlawful sexual act occurred at a specific time or place. However, you must be satisfied that the accused committed at least one unlawful sexual act in New South Wales.]

You also 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 [*where applicable: — including more than one instance of the same conduct —*] 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 2026

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.

13. Whilst s 66EA offences were intended to apply retrospectively (see s 66EA(7)), the Second Reading Speech introducing the amending legislation (Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018) states:

> The offence will apply retrospectively as long as the sexual acts that make up the unlawful sexual relationship were illegal at the time they were committed.

See, for example, *Grant v R* [2024] NSWCCA 78, where, because the appellant's sexual relationship with the victim was not criminalised by s 81 (rep) of the *Crimes Act 1900* (an offence under s 81 is incapable of being committed by a woman: *Lam v R* [2024] NSWCCA 6), the relationship was not "unlawful" within the meaning of s 66EA(2): *Grant v R* at [35], [37]–[38].

[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. Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

[5-800] Suggested direction — sexual intercourse without consent (s 61I) for offences committed before 1 January 2008

Last reviewed: July 2026

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*].

Elements

The Crown must prove beyond reasonable doubt each of the following three elements:

1. the accused had sexual intercourse with the complainant;
2. the complainant did not consent to that act of intercourse; and
3. the accused knew the complainant was not consenting.

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 concerns the nature of the act alleged in the indictment. The Crown must prove that the act of sexual intercourse occurred.

Sexual intercourse includes [*describe the relevant act of intercourse from the definition in s 61H(1) Crimes Act 1900 (as in force before 1 January 2008) as referred to below*:

(a) the penetration to any extent of the genitalia of a female person or anus of any 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 penis of a person into the mouth of another person (often referred to as an act of fellatio), or

(c) cunnilingus (the application of the mouth or tongue to the female genitalia), 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(1)(a) as in force before 1 January 2008):*

"Genitalia" includes a surgically constructed vagina.**]**

[*If appropriate:* 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.]

[*If applicable —proper medical purposes exception (s 61H(1)(a)):*

Penetration carried out solely for proper medical purposes is not sexual intercourse. The Crown must prove beyond reasonable doubt that the penetration was not solely for proper medical purposes and may do so by proving either that there was no proper medical purpose or that, in addition to any proper medical purpose, the penetration was also for another purpose, such as sexual gratification or arousal.**]**

2. The complainant did not consent

This concerns the complainant's state of mind. The Crown must prove that the complainant did not consent to the act of intercourse.

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. 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 [*repealed s 61R(2)(d)*].

[*If required — (s 292A Criminal Procedure Act 1986 — circumstances in which non-consensual sexual activity occurs):* You should also 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]***].**]**

[*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.**]**

[*If applicable — threats or 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.

[*If applicable — persuasion:*

Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.**]**

3. The accused knew the complainant was not consenting

The Crown is required to prove the accused knew the complainant did not consent to the sexual intercourse.

This element concerns the accused's state of mind, that is, what they knew. It is not concerned with what anyone else would have known.

[*If there is evidence raising an issue of the accused's intoxication, add:*

The law is that any intoxication of the accused that was self-induced must be ignored. If the accused was intoxicated by voluntarily drinking alcohol and/or taking drugs, you must ignore the effects of intoxication on them when determining this element. You must consider what the accused's state of mind would have been if they had not been intoxicated: that is, if the accused had been sober.**]**

The Crown will have proved the accused knew the complainant did not consent to the sexual intercourse if it proves that: [*refer only to those of the following matters that arise from the evidence*]

(a) the accused actually knew the complainant did not consent; or

(b) the accused was reckless as to whether the complainant consented (*repealed s 61R(1)*). To establish the accused was reckless, the Crown must prove either:

  (i) the accused failed to consider whether or not the complainant was consenting at all and just went ahead with the act of intercourse

  [*where appropriate:* even though the risk the complainant was not consenting would have been obvious to someone with the accused's mental capacity if the accused had turned their mind to it]; or

  (ii) the accused realised the possibility that the complainant was not consenting but went ahead with the act of intercourse regardless of whether the complainant was consenting or not.

(c) **[*If applicable:*** the accused knew the complainant consented under a mistaken belief [*refer to relevant mistaken belief in repealed ss 61R(2)(a) or 61R(2)(a1)*].

> The law says that if an accused knows the complainant was consenting to the sexual intercourse under a mistaken belief they are taken to know that the complainant did not consent. So, the Crown must prove that the accused actually knew the complainant consented because of that mistaken belief.**]**
>
> [*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

Last reviewed: September 2024

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 their 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. In *R v Tolmie* (1995) 37 NSWLR 660 at 672D Kirby P stated that recklessness is established "where the accused has not considered the question of consent and a *risk that the complainant was not consenting would have been obvious to someone with the accused's mental capacity if they had turned their mind to it*" (emphasis added). In *Tuuholoaki v R* [2024] NSWCCA 135 at [274] Adamson JA (Wilson and Faulkner JJ agreeing) held the italicised words above were used in *R v Tolmie* in the context of a consideration of the law and there was no indication they were intended to form part of directions to a jury. It was not considered in *Tuuholoaki v R* or in *Lee v R* [2023] NSWCCA 203 that the words are required in directions in every case. The suggested direction at **[5-800]** allows for the words to be used in appropriate cases.
6. 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 their knowledge the accused honestly but wrongly believed that the complainant was consenting: *Bochkov v R* at [93]. Where the Crown has not excluded 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.
7. 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*

Last reviewed: July 2026

* Legislative provisions cited below refer to the *Crimes Act 1900* in force 1.1.2008–30.11.2018; 1.12.2018–31.5.2022 (respectively).

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 relates*].

Elements

The Crown must prove beyond reasonable doubt each of the following three elements:

1. at the time and place specified in the indictment, the accused had sexual intercourse with the complainant
2. the complainant did not consent to that act of intercourse; and
3. the accused knew the complainant was not consenting.

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 concerns the nature of the act alleged in the indictment. The Crown must prove that an act of sexual intercourse occurred.

   Sexual intercourse includes [*describe the relevant act of intercourse from the definition in s 61H; s 61HA*]:

   (a) the penetration to any extent of the genitalia of a female person or anus of any 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 penis 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).

   (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(1)(a); s 61HA(a)):*

   "Genitalia" includes a surgically constructed vagina.**]**

   [*If applicable — proper medical purposes exception (s 61H(1)(a); s 61HA(a)):*

   Penetration carried out solely for proper medical purposes is not sexual intercourse. The Crown must prove beyond reasonable doubt that the penetration was not solely for proper medical purposes and may do so by proving either that there was no proper medical purpose or that, in addition to any proper medical purpose, the penetration was also for another purpose, such as sexual gratification or arousal.**]**

2. **The complainant did not consent**

   This concerns the complainant's state of mind. The Crown must prove that the complainant did not consent to the act of sexual intercourse.

   A person consents to sexual intercourse if, at the time of the act of intercourse, they freely and voluntarily agree to that act of intercourse. [*s 61HA(2); s 61HE(2)*]. Consent can be given verbally or it can be expressed by actions. However, a

person who does not offer physical or verbal resistance to sexual intercourse is not, by reason only of that fact, to be taken to consent to the sexual intercourse. [*s 61HA(7); s 61HE(9)*].

[*If required — (s 292A Criminal Procedure Act 1986 — circumstances in which non-consensual sexual intercourse occurs):* You should also bear in mind that non-consensual sexual intercourse 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]**.*]**]**

[*If applicable — circumstances in which there is no consent — (s 61HA(4)–(5); s 61HE(5)–(6)):*

The law provides that a person does not consent to sexual intercourse if the person [*refer only to those that apply*]:

(a) does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or

(b) does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or

(c) 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

(d) consents to the sexual intercourse because the person is unlawfully detained, or

(e) 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 (s 61HA(6)(a), (b) or (c); s 61HE(8)(a), (b) or (c)):*

Substantial intoxication: s 61HA(6)(a); s 61HE(8)(a)

If you are satisfied that anything the complainant said and did to indicate consent occurred while they were substantially intoxicated by [*alcohol and/or (a) drug(s)*], then you can take the fact that they were substantially intoxicated into account in assessing whether they freely and voluntarily agreed to the sexual intercourse.

Intimidatory, threatening or coercive conduct: s 61HA(6)(b); s 61HE(8)(b)

If you are satisfied that anything the complainant said and did to indicate consent occurred because of intimidatory or coercive conduct, or other threat (even if that conduct does not involve threat of force), then you can take the fact they were intimidated, coerced or threatened into account in assessing whether they freely and voluntarily agreed to the sexual intercourse.

Abuse of position of authority or trust: s 61HA(6)(c); s 61HE(8)(c)

If you are satisfied that anything the complainant said and did to indicate consent occurred because the accused abused their position of authority or trust then you can take the fact the accused abused their position of authority or trust into account in assessing whether the complainant freely and voluntarily agreed to the sexual intercourse.**]**

[*If applicable — persuasion:* Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.**]**

3. **The accused knew the complainant was not consenting**

The Crown is required to prove that the accused knew the complainant did not consent to the sexual intercourse.

This element concerns the accused's state of mind, that is, what they knew. It is not concerned with what anyone else would have known.

When deciding whether the Crown has proved this element, you must consider all of the circumstances, including any steps taken by the accused to ascertain whether the complainant consented to the sexual intercourse [*s 61HA(3)(d); s 61HE(4)(a)*].

[*If there is evidence raising an issue of the accused's intoxication, add:*

The law is that any intoxication of the accused that was self-induced must be ignored. If the accused was intoxicated by voluntarily drinking alcohol and/or taking drugs, you must ignore the effects of intoxication on them when determining this element. You must consider what the accused's state of mind would have been if they had not been intoxicated: that is, if the accused had been sober [*s 61HA(3)(e); s 61HE(4)(b)*].**]**

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 — s 61HA(3); s 61HE(3).*]

(a) the accused actually knew the complainant did not consent [*s 61HA(3)(a); s 61HE(3)(a)*]; or

(b) the accused was reckless as to whether the complainant consented [*s 61HA(3)(b); s 61HE(3)(b)*]. To establish the accused was reckless, the Crown must prove either:

(i) the accused failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of intercourse

[*where appropriate:* even though the risk the complainant was not consenting would have been obvious to someone with the accused's mental capacity if the accused had turned their mind to it]; or

(ii) the accused realised the possibility that the complainant was not consenting but went ahead with the act of intercourse regardless of whether the complainant was consenting or not; or

(c) the accused may have actually believed the complainant consented, but the accused had no reasonable grounds for that belief [*s 61HA(3)(c); s 61HE(3)(c)*]. [*If appropriate:* other than the accused's self-induced intoxication]; or

(d) **[*If applicable:*** the accused knew the complainant consented under a mistaken belief about [*refer to those parts of s 61HA(5); s 61HE(6) that may apply*]. If the accused knew the complainant consented under a mistaken belief the law says that the accused is taken to know that the complainant did not consent. So, the Crown must prove that the accused actually knew the complainant consented because of that mistaken belief.**]**

[*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

Last reviewed: July 2026

1. The *Crimes Amendment (Consent — Sexual Assault Offences) Act 2007* commenced on 1 January 2008 and applied 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) (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) (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 61KC), 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 61HA 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 their 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. In *R v Tolmie* (1995) 37 NSWLR 660 at 672D, Kirby P stated that recklessness is established "where the accused has not considered the question of consent and a risk that the complainant was not consenting would have been obvious to someone with the accused's mental capacity if they had turned their mind to it" (emphasis added). In *Tuuholoaki v R* [2024] NSWCCA 135 at [274] Adamson JA (Wilson and Faulkner JJ agreeing) held the italicised words above were used in *R v Tolmie* in the context of a consideration of the law and there was no indication they were intended to form part of directions to a jury. It was not considered in *Tuuholoaki v R* or in *Lee v R* [2023] NSWCCA 203 that the words are required in directions in every case. The suggested direction at **[5-820]** allows for the words to be used in appropriate cases.

6. 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: 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].

7. Section 61HE(4) (rep) (previously s 61HA(3), in almost identical terms) relevantly provided that, for the purpose of making a finding on knowledge about consent, the trier of fact must have regard to all the circumstances of the case (a) including any steps taken by the person to ascertain whether the complainant consents to the sexual activity, but (b) not including any self-induced intoxication of the accused. Provided there is the necessary focus upon an accused's actual state of mind, there is no error in approaching the difficult task of explaining to the jury how s 61HE(4)(b) works by paraphrasing "ignoring intoxication"by using the words "as if they were sober" or …"if they had not been intoxicated": *Poveda v R* [2025] NSWCCA 174 at [125]. However, such directions must be "unambiguous in emphasising that there is no room for hypothesising beyond that which is

necessarily involved in the removal of an accused's self-induced intoxication from the matters to be taken into account when making findings as to an accused's knowledge": *Poveda v R* at [127].

8. If the case is limited to specific methods of proof of absence of knowledge of consent under s 61HE(6), care should be taken to ensure jury directions do not suggest other methods of proof are available. It is not orthodox, and may be misleading or confusing, to refer to the mental states of thought and belief in the context of proof and actual knowledge of absence of consent. Knowledge, thought, and belief are related but distinct concepts: *Kumar v R* [2025] NSWCCA 119 at [86], [93]–[96]. Accordingly, the suggested direction above in relation to the third element may need to be modified. Further, where the Crown has invited the jury to follow a particular path of reasoning towards guilt which the judge has determined to not be permissible (or even where the nature of the evidence adduced could encourage the jury to do so) it will often be necessary to provide explicit direction against such a path of reasoning: *Kumar v R* at [106].

9. If the accused knows the complainant is labouring under a mistaken belief as set out in s 61HE(6), the accused 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].

10. 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]; *Smee v R* [2024] NSWCCA 121 at [16]. It is not necessary to prove a causal connection between the substantial intoxication and what was said or done to indicate consent. Section 61HE(8)(a) does not use language of causation, in contrast to the word "because" used in s 61HE(8)(b) (intimidatory, threatening or coercive conduct) and s 61HE(8)(c) (abuse of position of authority or trust): *Smee v R* at [14]–[16]; *Pandamooz v R* [2023] NSWCCA 221 at [54]–[57], [71]–[74].

11. For further commentary on recklessness and intoxication: see **Notes** at **[5-810]**.

12. 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].

13. 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].

14. 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] (considering s 61H(1)(a) (rep)). The exception may be excluded when the relevant acts giving rise to the offence occurred during a medical examination. In *Decision Restricted* [2020] NSWCCA 138 at [51],

Basten JA (Fagan J and Hidden AJ agreeing), also considering s 61H(1)(a) (rep), held that, "sexual arousal of the practitioner is not, and cannot be, a proper purpose for carrying out a medical examination or procedure." There is no requirement that the sole purpose of penetration in such a context be for sexual gratification: *Decision Restricted* [2020] NSWCCA 138 at [56]–[60].

[5-840] Suggested direction — s 61J circumstance(s) of aggravation

Last reviewed: July 2026

Element 4:

Infliction of actual bodily harm — s 61J(2)(a)

It is an aggravating circumstance if at the time of, or immediately before or after, the commission of the offence, the accused intentionally or recklessly inflicted actual bodily harm on the complainant [*or any other person who was present or nearby*].

The Crown must prove three things:

1. there was an injury inflicted on [*the complainant or another person who was present or nearby*] that amounted to actual bodily harm. The Crown case is that there was an injury inflicted by the accused which was [*specify nature of injury*]. Actual bodily harm is any hurt or injury that interferes with the health or comfort of a person. It does not need to be permanent, but it must be more than fleeting or trivial. Bruises and scratches are typical examples of injuries that can amount to actual bodily harm. Pain can be an indicator of actual bodily harm, but is not actual bodily harm by itself.
2. the applicant inflicted actual bodily harm at the time of, or immediately before or after, the alleged sexual intercourse without consent. Whether the harm was inflicted in that timeframe is a matter of fact for you to decide.
3. the infliction of actual bodily harm was [*intentional or reckless*]. The focus for this element is on the accused's state of mind at the time the harm was inflicted.

[*Where appropriate:* The Crown has no direct evidence about what the accused's state of mind was at that time. The Crown asks you to draw an inference or conclusion as to what the accused's state of mind was based upon [*as appropriate:* the circumstances in which the event occurred, the accused's conduct, or what they said before, at the time, or after]. Because the Crown relies upon the drawing of this inference in order to prove an element of the offence, you must be satisfied of the inference beyond reasonable doubt. You should not draw this inference from the evidence unless it is the only reasonably available inference to be drawn from the evidence. You could not be satisfied beyond reasonable doubt if there are any other reasonably available inferences.**]**

[*Where the charge is intentionally inflicted*: Where a specific result is the obvious and inevitable consequence of a person's act, and where they deliberately did that act, you may readily conclude that they did that act with the intention of achieving that specific result.**]**

[*Where the charge is recklessly inflicted:* An injury is inflicted recklessly if the accused realised that some form of actual bodily harm may possibly be inflicted upon [*the complainant*] by their actions, yet they went ahead and acted as they did. The accused does not have to realise the possibility of the particular type of injury/injuries relied upon by the Crown as amounting to actual bodily harm being inflicted. The accused cannot be found to have acted recklessly unless the Crown proves that they actually thought about the consequences of their act and at least realised the possibility of actual bodily harm occurring.**]**

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 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 the accused 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 without their consent;

and

(b) [*alleged co-offender*] was physically present when the sexual intercourse without the complainant's consent occurred.

For [*alleged co-offender*] to be "physically present", the Crown must prove [*alleged 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 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 in the accused's care or under their 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 in the care, or under the 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 intercourse but guilty of sexual intercourse".

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

Last reviewed: July 2026

1. In relation to the infliction of actual bodily harm, the precise ambit of the prescribed timescale in s 61J(2)(a) (see also s 61J(2)(b) and (b1)) will fall to be determined in light of the facts and circumstances of the individual case: *OR v R* [2025] NSWCCA 234 at [120]. The happening of the sexual intercourse "defines and circumscribes" the relevant time for the infliction of actual bodily harm, and this harm must have "a relationship both in fact and in time to the offence": *OR v R* at [120]; *Papadopoulos v R* [2007] NSWCCA 274 at [49]; *R v Hitchins* [1983] 3 NSWLR 318 (in relation to s 98).

2. 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 complainant (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 complainant was unaware of the other person.

3. In *KSC v R* [2012] NSWCCA 179 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: at [124]–[126]. See Note 3 at **[5-640] Notes — aggravated indecent assault under s 61M** for a discussion of what constitutes the aggravating circumstance of being under authority.

4. The definition of "under the authority" includes either being in the care of a person, being under the supervision of a person, or being under the authority of a person. These elements can and should operate independently for the purpose of satisfying s 61H(2). When there is a relationship of patient and health care professional and the patient is receiving treatment from the health care professional, the patient is "in the care of", and thus "under the authority of", the health care professional for the purposes of s 61H(2): *Hu v R* [2025] NSWCCA 66 at [47]–[49].

5. "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].

6. Inadvertent recklessness with respect to consent (or not considering at all whether the other person is consenting), is inconsistent with the application of principles concerning a joint criminal enterprise (JCE) to commit the crime of sexual intercourse without consent, because an agreement would require turning one's mind to, and considering the possibility of, the absence of consent: *Decision Restricted* [2025] NSWCCA 210 at [146], [176], [183]. Advertent recklessness, on the other hand, is capable of coherent combination with JCE in relation to sexual intercourse without consent. The prosecution can ask the jury to draw an inference that the participants sufficiently recognised the prospect that the complainants were not consenting, to demonstrate their agreement that sexual

intercourse without the complainants' consent should occur, if they were not consenting: *Decision Restricted* at [188]–[189]. See further: **[2-820] Suggested direction — joint criminal enterprise and sexual assault in company**.

[The next page is 831]

Sexual intercourse without consent — from 1 June 2022

[5-900] Introduction

Last reviewed: April 2026

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (the amending Act) commenced on 1 June 2022 and replaced the definition of consent in the former *Crimes Act 1900*, s 61HE with Pt 3, Div 10, Subdiv 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 was 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 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 Subdiv 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 Subdiv 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

Last reviewed: July 2026

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.
5. Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

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

The Crown must prove beyond reasonable doubt each of the following three elements:

1. at the time and place specified in the indictment, the accused had sexual intercourse with the complainant;
2. the complainant did not consent to that act of intercourse; and
3. the accused knew the complainant was not consenting.

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 concerns the nature of the act alleged in the indictment. The Crown must prove that the act of sexual intercourse occurred.

Sexual intercourse includes [*describe the relevant act of intercourse from the definition in s 61HA(1) as referred to below:*

(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 — medical or hygienic purposes exception (s 61HA(2)):*

Penetration carried out solely for proper [*medical and/or hygienic*] purposes is not sexual intercourse. The Crown must prove beyond reasonable doubt that the penetration was not solely for proper [*medical and/or hygienic*] purposes 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, such as sexual gratification or arousal.**]**

2. The complainant did not consent

This concerns the complainant's state of mind. The Crown must prove 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 sexual intercourse occurs):*

You should bear in mind that non-consensual sexual intercourse 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, they 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 sexual intercourse is not, by reason only of that fact, to be taken to consent to the sexual intercourse [*s 61HI(4)*].

**[*If applicable — circumstances in which there is no consent — s 61HJ:*

The law provides that a person does not consent to sexual intercourse if 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 themself, 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 they or another person is unlawfully detained,

(h) participates in the act of intercourse because they are overborne by the abuse of a relationship of authority, trust or dependence,

(i) participates in the act of intercourse because they are mistaken about the nature of the act of intercourse,

(j) participates in the act of intercourse because they are 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 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 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"].**]**

[*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.**]**

[*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 they may have consented to that activity, it does not follow that for that reason only that they consented to the act of intercourse alleged by the Crown.**]**

[*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 they may have consented to that activity, it does not follow that for that reason only that they consented to the act of intercourse alleged by the Crown.**]**

[*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 act of intercourse with the accused alleged by the Crown.**]**

3. The accused knew the complainant was not consenting

The Crown is required to prove beyond reasonable doubt that the accused knew the complainant did not consent to the sexual intercourse alleged.

This element concerns the accused's state of mind, that is, what they knew. It is not concerned with what anyone else would have known.

When deciding whether the Crown has proved this element, you must consider all of the circumstances in which you find the act of sexual intercourse occurred, including what, if anything, the accused said or did [*s 61HK(5)(a)*].

[*If there is evidence raising an issue of the accused's intoxication, add:*

The law is that any intoxication of the accused that was self-induced must be ignored. If the accused was intoxicated by voluntarily drinking alcohol and/or taking drugs, you must ignore the effects of intoxication on them when determining this element. You must consider what the accused's state of mind would have been if they had not been intoxicated: that is, if the accused had been sober [*s 61HK(5)(b)*].**]**

The Crown will have proved the accused knew the complainant did not consent to the sexual intercourse if it proves that [*refer only to those of the following that arise from the evidence*]:

(a) the accused actually knew the complainant did not consent [*s 61HK(1)(a)*]; or

(b) the accused was reckless as to whether the complainant consented [*s 61HK(1)(b)*]. To establish the accused was reckless, the Crown must prove either:

  (i) the accused failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of intercourse

  [*where appropriate*: 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

  (ii) the accused realised the possibility that the complainant was not consenting but went ahead with the act of intercourse regardless of whether the complainant was consenting or not.

(c) any belief the accused had, or may have had, that the complainant consented was not reasonable in the circumstances [*s 61HK(1)(c)*]. The Crown must prove that in all the circumstances in which the accused found themselves it was not reasonable for the accused to believe that the complainant was consenting. What is reasonable is judged according to community standards [*If appropriate:* other than the accused's self-induced intoxication].

[*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.]

[*Where accused's cognitive or mental health impairment is an issue regarding application of s 61HK(2), see* ***[5-915]*** ***Suggested direction — accused's cognitive or mental health impairment a substantial cause for not ascertaining consent (s 61HK(3)–(4))***].

[*For aggravated forms of the offence add from* ***[5-930]*** *as appropriate.*]

[5-915] Suggested direction — accused's cognitive or mental health impairment a substantial cause for not ascertaining consent (s 61HK(3)–(4))

Last reviewed: July 2025

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 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 them 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]****.*]

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 act of intercourse; and
2. Their [*cognitive/mental health*] impairment was a substantial cause of the accused not saying or doing anything to ascertain whether the complainant consented to the act of intercourse.

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 act of intercourse was such that their belief the complainant was 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 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.

[5-920] Notes

Last reviewed: July 2026

1. Sexual intercourse includes penetration of the genitalia or anus except where it is "carried out solely for proper medical or hygienic purposes": s 61HA(2) . 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] (considering s 61H(1)(a) (rep)). The exception may be excluded when the relevant acts giving rise to the offence occurred during a medical examination. In *Decision Restricted* [2020] NSWCCA 138 at [51], Basten JA (Fagan J and Hidden AJ agreeing), also considering s 61H(1)(a) (rep), held that, "sexual arousal of the practitioner is not, and cannot be, a proper purpose for carrying out a medical examination or procedure".

2. 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, Subdiv 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.

3. 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.

4. 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).

5. 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.

6. 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).

7. 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).

8. 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

9. 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".

10. 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.

11. 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.

12. 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 NSW: 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].

13. 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].

14. 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 sex workers, 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.

15. The Crown should precisely identify the fraudulent inducement from the outset of the trial: *R v Tamawiwy (No 2)* at [15].

Knowledge about consent

16. 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.

17. In *R v Tolmie* (1995) 37 NSWLR 660 at 672D Kirby P stated that recklessness is established "where the accused has not considered the question of consent and a risk that the complainant was not consenting would have been obvious to someone with the accused's mental capacity if they had turned their mind to it" (emphasis added). In *Tuuholoaki v R* [2024] NSWCCA 135 at [274] Adamson JA (Wilson and Faulkner JJ agreeing) held the italicised words above were used in *R v Tolmie* in the context of a consideration of the law and there was no indication they were intended to form part of directions to a jury. It was not considered in *Tuuholoaki v R* or in *Lee v R* [2023] NSWCCA 203 that the words are required in directions in every case. The suggested direction at **[5-910]** allows for the words to be used in appropriate cases.

18. Inadvertent recklessness with respect to consent (or not considering at all whether the other person is consenting), is inconsistent with the application of principles concerning a joint criminal enterprise (JCE) to commit the crime of sexual intercourse without consent, because an agreement would require turning one's mind to, and considering the possibility of, the absence of consent: *Decision Restricted* [2025] NSWCCA 210 at [146], [176], [183]. Advertent recklessness, on the other hand, is capable of coherent combination with JCE in relation to sexual intercourse without consent. The prosecution can ask the jury to draw an inference that the participants sufficiently recognised the prospect that the complainants were not consenting, to demonstrate their agreement that sexual intercourse without the complainants' consent should occur, if they were not consenting: *Decision Restricted* at [188]–[189]. See further: **[2-820] Suggested direction — joint criminal enterprise and sexual assault in company**.

19. 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).

20. 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].

21. 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.

22. A "reasonable time" is not defined.

23. 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, in this context, 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). It is noted that the definition of "cognitive impairment" which applies in s 61HK(3) is that set out in s 23A(8) of the *Crimes Act* and **not** the definition of "cognitive impairment" which otherwise applies in Div 10 of Pt 3, which is that set out in s 61HD. The reason for the distinction appears to be that s 61HK(3)(a) concerns cognitive impairment of an accused person, whereas the other references to cognitive impairment in Div 10 are references to the cognitive impairment of the complainant.

24. Section 61HK(5) provides that, for the purpose of making a finding on knowledge about consent, the trier of fact must (a) consider all the circumstances of the case, including what, if anything, the accused said or did, and (b) not consider any self-induced intoxication of the accused. Provided there is the necessary focus upon an accused's actual state of mind, there is there is no error in approaching the difficult task of explaining to the jury how s 61HE(4)(b) works by paraphrasing "ignoring intoxication" by using the words "as if they were sober" or …"if they had not been intoxicated": *Poveda v R* [2025] NSWCCA 174 at [125] (decided in respect of an earlier provision with similar effect). However, such directions must be "unambiguous in emphasising that there is no room for hypothesising beyond that which is necessarily involved in the removal of an accused's self-induced intoxication from the matters to be taken into account when making findings as to an accused's knowledge": *Poveda v R* at [127].

[5-930] Suggested direction — s 61J circumstance(s) of aggravation

Last reviewed: July 2026

Element 4:

Infliction of actual bodily harm — s 61J(2)(a)

It is an aggravating circumstance if at the time of, or immediately before or after, the commission of the offence, the accused intentionally or recklessly inflicted actual bodily harm on the complainant [*or any other person who was present or nearby*].

The Crown must prove three things:

1. there was an injury inflicted on [*the complainant or another person who was present or nearby*] that amounted to actual bodily harm. The Crown case is that there was an injury inflicted by the accused which was [*specify nature of injury*]. Actual bodily harm is any hurt or injury that interferes with the health or comfort of a person. It does not need to be permanent, but it must be more than fleeting or trivial. Bruises and scratches are typical examples of injuries that can amount to actual bodily harm. Pain can be an indicator of actual bodily harm, but is not actual bodily harm by itself.
2. the applicant inflicted actual bodily harm at the time of, or immediately before or after, the alleged sexual intercourse without consent. Whether the harm was inflicted in that timeframe is a matter of fact for you to decide.
3. the infliction of actual bodily harm was [*intentional or reckless*]. The focus for this element is on the accused's state of mind at the time the harm was inflicted.

[*Where appropriate:* The Crown has no direct evidence about what the accused's state of mind was at that time. The Crown asks you to draw an inference or conclusion as to what the accused's state of mind was based upon [***as appropriate***: the circumstances in which the event occurred, the accused's conduct, or what they said before, at the time, or after]. Because the Crown relies upon the drawing of this inference in order to prove an element of the offence, you must be satisfied of the inference beyond reasonable doubt. You should not draw this inference from the evidence unless it is the only reasonably available inference to be drawn from the evidence. You could not be satisfied beyond reasonable doubt if there are any other reasonably available inferences.**]**

[*Where the charge is intentionally inflicted*: Where a specific result is the obvious and inevitable consequence of a person's act, and where they deliberately did that act, you may readily conclude that they did that act with the intention of achieving that specific result.**]**

[*Where the charge is recklessly inflicted:* An injury is inflicted recklessly if the accused realised that some form of actual bodily harm may possibly be inflicted upon [*the complainant*] by their actions, yet they went ahead and acted as they did. The accused does not have to realise the possibility of the particular type of injury/injuries relied upon by the Crown as amounting to actual bodily harm being inflicted. The accused cannot be found to have acted recklessly unless the Crown proves that they actually thought about the consequences of their act and at least realised the possibility of actual bodily harm occurring.**]**

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 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 the accused 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 without their consent;

and

(b) [*alleged co-offender*] was physically present when the sexual intercourse without the complainant's consent occurred.

For [*alleged co-offender*] to be "physically present", the Crown must prove [*alleged 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 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 in the accused's care or under their 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 in the care, or under the 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 intercourse but guilty of sexual intercourse".

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*].

[5-940] Notes

Last reviewed: July 2026

1. In relation to the infliction of actual bodily harm, the precise ambit of the prescribed timescale in s 61J(2)(a) (see also s 61J(2)(b) and (b1)) will fall to be determined in light of the facts and circumstances of the individual case: *OR v R* [2025] NSWCCA 234 at [120]. The happening of the sexual intercourse "defines and circumscribes" the relevant time for the infliction of actual bodily harm, and

this harm must have "a relationship both in fact and in time to the offence": *OR v R* at [120]; *Papadopoulos v R* [2007] NSWCCA 274 at [49]; *R v Hitchins & Elliott* [1983] 3 NSWLR 318 (in relation to s 98).

2. 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.

3. In *KSC v R* [2012] NSWCCA 179 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: at [124]–[126]. See Note 3 at **[5-640] Notes — aggravated indecent assault under s 61M** for a discussion of what constitutes the aggravating circumstance of being under authority.

4. The definition of "under the authority" includes either being in the care of a person, being under the supervision of a person, or being under the authority of a person. These elements can and should operate independently for the purpose of satisfying s 61H(2). When there is a relationship of patient and health care professional and the patient is receiving treatment from the health care professional, the patient is "in the care of", and thus "under the authority of", the health care professional for the purposes of s 61H(2): *Hu v R* [2025] NSWCCA 66 at [47]–[49].

5. "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 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: July 2026

The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* repealed the basic and aggravated offences of indecent assault (former ss 61L and 61M *Crimes Act 1900*, respectively) and replaced them with separate offences of sexual touching in ss 61KC and 61KD for adults, and in ss 66DA and 66DB for children.

The 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: July 2026

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)**.

Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

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 was not consenting.

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".

[*If applicable — medical or hygienic purposes exception (s 61HB(3)):*

Touching done solely for genuine [*medical and/or hygienic*] purposes is not sexual touching. The Crown must prove beyond reasonable doubt that the touching was not solely for genuine [*medical and/or hygienic*] purposes and may do so by proving either that there was no genuine [*medical and/or hygienic*] purpose or that, in addition to any genuine [*medical and/or hygienic*] purpose, the touching was also for another purpose, such as sexual gratification or arousal.**]**

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 was not consenting

The Crown is required to prove the accused knew the complainant did not consent to the sexual touching.

This element concerns the accused's state of mind, that is, what they knew. It is not concerned with what anyone else would have known.

When deciding whether the Crown has proved this element, you must consider all of the circumstances, including any steps taken by the accused to make sure the complainant consented to the sexual touching.

**[*If there is evidence raising an issue of the accused's intoxication, add:*

The law is that any intoxication of the accused that was self-induced must be ignored. If the accused was intoxicated by voluntarily drinking alcohol and/or taking drugs, you must ignore the effects of intoxication on them when determining this element. You must consider what the accused's state of mind would have been if they had not been intoxicated: that is, if the accused had been sober.**]**

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: July 2026

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.

3. Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

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 was not consenting.

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".

[*If applicable — medical or hygienic purposes exception (s 61HB(3)):*

Touching carried out solely for proper [*medical and/or hygienic*] purposes is not sexual touching. The Crown must prove beyond reasonable doubt that the touching was not solely for proper [*medical and/or hygienic*] purposes 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 touching was also for another purpose, such as sexual gratification or arousal.**]**

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 was not consenting

The Crown is required to prove that the accused knew the complainant did not consent to the sexual touching.

This element concerns the accused's state of mind, that is, what they knew. It is not concerned with what anyone else would have known.

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.*]

When deciding whether the Crown has proved this element, you must consider all of the circumstances in which you find the act of sexual touching occurred, including what, if anything, the accused said or did [*s 61HK(5)(a)*].

[*If there is evidence raising an issue of the accused's intoxication, add:*

The law is that any intoxication of the accused that was self-induced must be ignored. If the accused was intoxicated by voluntarily drinking alcohol and/or taking drugs, you must ignore the effects of intoxication on them when determining this element. You must consider what the accused's state of mind would have been if they had not been intoxicated: that is, if the accused had been sober. [*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 you decide there is a possibility the accused had, or may have had, a belief that the complainant consented, the Crown must prove that in all the circumstances in which the accused found themselves it was not reasonable for the accused to believe that the complainant was consenting. What is reasonable is judged according to community standards [*If appropriate:* other than the accused's self-induced intoxication].

[*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.

[*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 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 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: July 2026

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 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 complainant 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. Section 61HB(3) provides that, "Touching carried out solely for proper medical or hygienic purposes is not "sexual touching" for the purposes of this Division". The question is not whether the touching was or could have been medically justifiable, but whether *a* purpose of the touching was sexual gratification. A medical justification may support an inference that touching was undertaken solely for a proper purpose but is not dispositive: *Kamal v R* [2026] NSWCCA 13 at [120]; see also *Decision Restricted* [2020] NSWCCA 138 at [56]–[60].
5. Prior to 1 June 2022, s 61HB(3) read, "Touching done for genuine medical or hygienic purposes is not sexual touching". The subsection was amended to clarify, "that the exception will not apply when [the touching] was for both a medical or hygienic purpose and for a sexual gratification purpose": Second Reading Speech, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, NSW, Legislative Assembly, *Debates*, 20 October 2021, p 7513. In *Decision Restricted* [2020] NSWCCA 138 at [51], Basten JA (Fagan J and Hidden AJ agreeing) held, in relation to the exception in the former s 61H ("where the penetration is carried out for proper medical purposes") that "sexual arousal of the practitioner is not, and cannot be, a proper purpose for carrying out a medical examination or procedure."

6. 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). There is no error in approaching the difficult task of explaining to the jury how s 61HE(4)(b) works by paraphrasing "ignoring intoxication" by using the words "as if they were sober" or …"if they had not been intoxicated": *Poveda v R* [2025] NSWCCA 174 at [125]. However, such directions must be "unambiguous in emphasising that there is no room for hypothesising beyond that which is necessarily involved in the removal of an accused's self-induced intoxication from the matters to be taken into account when making findings as to an accused's knowledge": *Poveda v R* at [127].
7. 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: July 2026

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.

Element 5:

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 without consent;

and

(b) [*alleged co-offender*] was physically present when the sexual touching without consent 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 in the care or under the supervision or authority of the accused [*whether generally or at the time of the offence*]. It is a matter for you to determine whether the evidence establishes the complainant was in the care, or under the 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: July 2025

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 complainant 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". Each of the three elements: being in the care of a person; being under the supervision of a person; and, being under the authority of a person, operate independently in determining what relationships might fall within the description of being "under the authority of another person" for the purposes of the circumstances of aggravation. They are ordinary English words a jury would

have no difficulty understanding: *KSC v R* [2012] NSWCCA 179 at [125]; *Hu v R* [2025] NSWCCA 66 at [40]–[47]. As to the scope of "in the care, or under the supervision or authority" see **[5-640] Notes — aggravated indecent assault under s 61M**. See also *R v Howes* [2000] VSCA 159 at [4]; *R v MacFie* [2000] VSCA 173 at [18], [21]; *Kennedy v R* [2017] NSWCCA 193 at [51]–[58]. 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: July 2026

This direction can be adapted for an offence involving a child between 10 and 16 years 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.

Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

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**

   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".

[If applicable — medical or hygienic purposes exception (s 61HB(3)):

Touching carried out solely for proper [*medical and/or hygienic*] purposes is not sexual touching. The Crown must prove beyond reasonable doubt that the touching was not solely for proper [*medical and/or hygienic*] purposes 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 touching was also for another purpose, such as sexual gratification or arousal.**]**

[*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 a complainant to sexually touch the alleged offender or a third person, or inciting a third person to sexually touch the complainant (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: July 2026

The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* repealed the basic and aggravated offences of act of indecency (former ss 61N and 61O *Crimes Act 1900*, respectively) and replaced 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 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: July 2026

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)**.

Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

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 was not consenting.

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".

[*If applicable — medical or hygienic purposes exception (s 61HC(3)):*

An act carried out solely for genuine [*medical and/or hygienic*] purposes is not a sexual act. The Crown must prove beyond reasonable doubt that the act was not carried out solely for genuine [*medical and/or hygienic*] purposes and may do so by proving either that there was no genuine [*medical and/or hygienic*] purpose or that, in addition to any genuine [*medical and/or hygienic*] purpose, the act was also carried out for another purpose, such as sexual gratification or arousal.**]**

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 was not consenting**

The Crown is required to prove the accused knew the complainant did not consent to the sexual act being carried out.

This element concerns the accused's state of mind, that is, what they knew. It is not concerned with what anyone else would have known.

When deciding whether the Crown has proved this element, you must consider all of the circumstances in which you find the sexual act occurred, including any steps taken by the accused to make sure the complainant consented to the sexual act being carried out.

[*If there is evidence raising an issue of the accused's intoxication, add:*

The law is that any intoxication of the accused that was self-induced must be ignored. If the accused was intoxicated by voluntarily drinking alcohol and/or taking drugs, you must ignore the effects of intoxication on them when determining this element. You must consider what the accused's state of mind would have been if they had not been intoxicated: that is, if the accused had been sober.]

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: July 2026

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.
3. Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

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 was not consenting.

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".

[*If applicable — medical or hygienic purposes exception (s 61HC(3)):*

An act carried out solely for proper [*medical and/or hygienic*] purposes is not a sexual act. The Crown must prove beyond reasonable doubt that the act was not carried out solely for proper [*medical and/or hygienic*] purposes 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 act was also carried out for another purpose, such as sexual gratification or arousal.**]**

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 was not consenting

The Crown is required to prove the accused knew the complainant did not consent to the sexual act alleged.

This element concerns the accused's state of mind, that is, what they knew. It is not concerned with what anyone else would have known.

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.*]

When deciding whether the Crown has proved this element, you must consider all of the circumstances in which you find the sexual act occurred, including what, if anything, the accused said or did [*s 61HK(5)(a)*].

[*If there is evidence raising an issue of the accused's intoxication, add:*

The law is that any intoxication of the accused that was self-induced must be ignored. If the accused was intoxicated by voluntarily drinking alcohol and/or taking drugs, you must ignore the effects of intoxication on them when determining this element. You must consider what the accused's state of mind would have been if they had not been intoxicated: that is, if the accused had been sober [*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 you decide there is a possibility the accused had, or may have had, a belief that the complainant consented, the Crown must prove that in all the circumstances in which the accused found themselves it was not reasonable for the accused to believe that the complainant was consenting. What is reasonable is judged according to community standards [*If appropriate:* other than the accused's self-induced intoxication].

[*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.]

[*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 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 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: July 2026

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) 108 NSWLR 407 (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. Section 61HC(3) provides that, "An act carried out solely for proper medical or hygienic purposes is not a "sexual act" for the purposes of this Division". In relation to the equivalent exception in s 61HB(3), the question is not whether the touching was or could have been medically justifiable, but whether a purpose of the touching was sexual gratification. A medical justification may support an

inference that touching was undertaken solely for a proper purpose but is not dispositive: *Kamal v R* [2026] NSWCCA 13 at [120]; see also *Decision Restricted* [2020] NSWCCA 138 at [56]–[60].

7. Prior to 1 June 2022, s 61HC(3) read, "An act carried out for genuine medical or hygienic purposes is not a sexual act". The subsection was amended to clarify, "that the exception will not apply when [the act] was for both a medical or hygienic purpose and for a sexual gratification purpose": Second Reading Speech, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, NSW, Legislative Assembly, *Debates*, 20 October 2021, p 7513. In *Decision Restricted* [2020] NSWCCA 138 at [51], Basten JA (Fagan J and Hidden AJ agreeing) held, in relation to the exception in the former s 61H ("where the penetration is carried out for proper medical purposes") that "sexual arousal of the practitioner is not, and cannot be, a proper purpose for carrying out a medical examination or procedure."

8. 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). There is no error in approaching the difficult task of explaining to the jury how s 61HE(4)(b) works by paraphrasing "ignoring intoxication" by using the words "as if they were sober" or …"if they had not been intoxicated": *Poveda v R* [2025] NSWCCA 174 at [125]. However, such directions must be "unambiguous in emphasising that there is no room for hypothesising beyond that which is necessarily involved in the removal of an accused's self-induced intoxication from the matters to be taken into account when making findings as to an accused's knowledge": *Poveda v R* at [127].

[5-1240] Suggested direction — aggravated offence (s 61KF)

Last reviewed: July 2026

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.

Element 5:

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 without their consent;

and

(b) [*alleged co-offender*] was physically present when the sexual act without consent 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 in the accused's care, or under their 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 in the care, or under the 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: July 2025

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". Each of the three elements: being in the care of a person; being under the supervision of a person; and, being under the authority of a person, operate independently in determining what relationships might fall within the description of being "under the authority of another person" for the purposes of the circumstances of aggravation. They are ordinary English words a jury would have no difficulty understanding: *KSC v R* [2012] NSWCCA 179 at [125]; *Hu v R* [2025] NSWCCA 66 at [40]–[47]. As to the scope of "in the care, or under the supervision or authority" see **[5-640] Notes — aggravated indecent assault under s 61M**. See also *R v Howes* [2000] VSCA 159 at [4]; *R v MacFie* [2000] VSCA 173 at [18], [21]; *Kennedy v R* [2017] NSWCCA 193 at [51]–[53]. 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(a))

Last reviewed: July 2026

This direction can be adapted for an offence involving a child between 10 and 16 years against s 66DD. 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.

Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

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**

   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".

[*If applicable — medical or hygienic purposes exception (s 61HC(3)):*

An act carried out solely for proper [*medical and/or hygienic*] purposes is not a sexual act. The Crown must prove beyond reasonable doubt that the act was not carried out solely for proper [*medical and/or hygienic*] purposes 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 act was also carried out for another purpose, such as sexual gratification or arousal.**]**

[*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 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".

[5-1265] Suggested direction — sexual act in presence of child under 10 (s 66DC(a1))

Last reviewed: July 2026

The suggested direction below is based on the offence in s 66DC(a1) which makes it an offence to carry out a sexual act in the presence of a child who is under the age of 10 where the presence of the child is a source of sexual arousal or gratification of the person carrying out the sexual act. The equivalent offence for a child between 10 and 16 years is found in s 66DD(a1), and the direction can be adapted accordingly.

Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

The accused is charged with carrying out a sexual act in the presence of the complainant where the presence of the complainant was a source of the accused's sexual arousal or gratification. 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 the act in the presence of the complainant;
3. the presence of the complainant was a source of sexual arousal or gratification of the accused; and
4. 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**

   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 in the presence of the complainant**

   The act itself must be voluntary and intentional, not an accident or carried out by mistake. The complainant must be present.

   In determining whether the act was intentionally carried out in the presence of the complainant, you are to consider the act and all of its surrounding circumstances. [*refer to specific Crown allegations regarding the act*].

This may include the nature of the act and the proximity between the accused and the complainant when the act was carried out.

3. **The complainant's presence was a source of sexual arousal or gratification of the accused**

   The Crown must prove the presence of the child was a source of arousal or gratification of the accused.

4. **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**]**?
   - 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".

[*If applicable — medical or hygienic purposes exception (s 61HC(3)):*

An act carried out solely for proper [*medical and/or hygienic*] purposes is not a sexual act. The Crown must prove beyond reasonable doubt that the act was not carried out solely for proper [*medical and/or hygienic*] purposes 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 act was also carried out for another purpose, such as sexual gratification or arousal.**]**

[*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".

[5-1270] Notes — sexual act involving/in presence of a child

Last reviewed: December 2025

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].

2. The above directions at **[5-1260]** and **[5-1265]** can be adapted for the offence of aggravated sexual act with/towards/in the presence of a child between 10 and 16 years against s 66DE. The circumstances of aggravation are set out in s 66DE(2).

[5-1280] Suggested direction — sexual act towards a child which is filmed (s 66DF(a))

Last reviewed: July 2026

The following suggested direction is based on the offence in s 66DF(a). For incitement offences see **[5-1290]** **Notes — Incitement offences**.

Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

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.

1. The complainant was a child under 16.

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

A 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".

[*If applicable — medical or hygienic purposes exception (s 61HC(3)):*

An act carried out solely for proper [*medical and/or hygienic*] purposes is not a sexual act. The Crown must prove beyond reasonable doubt that the act was not carried out solely for proper [*medical and/or hygienic*] purposes 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 act was also carried out for another purpose, such as sexual gratification or arousal.**]**

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".

[5-1285] Suggested direction — sexual act in presence of a child which is filmed (s 66DF(a1))

Last reviewed: July 2026

The following suggested direction is based on the offence in s 66DF(a1). For incitement offences see **[5-1290] Notes — Incitement offences**.

Where time is of the essence, the jury should be directed that they must be satisfied beyond reasonable doubt that the alleged offending took place within the timeframe specified in the indictment.

The accused is charged with carrying out a sexual act in the presence of 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 in the presence of the complainant;
3. the act was sexual;
4. the presence of the child was a source of sexual arousal or gratification of the accused,
5. the accused knew the act was being filmed to produce child abuse material.

1. The complainant was a child under 16.

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 in the presence of 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 and the proximity between the accused and the complainant 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]?

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".

[If applicable — medical or hygienic purposes exception (s 61HC(3)):

An act carried out solely for proper [*medical and/or hygienic*] purposes is not a sexual act. The Crown must prove beyond reasonable doubt that the act was not carried out solely for proper [*medical and/or hygienic*] purposes 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 act was also carried out for another purpose, such as sexual gratification or arousal.**]**

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 five 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 a complainant 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 complainant (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.

[The next page is 879/51]

Appendix A: Table — NSW and Commonwealth sexual offence provisions

[5-1300] Table — NSW and Commonwealth sexual offence provisions

Last reviewed: December 2024

The following Table provides information on NSW and Commonwealth sexual offence provisions including the time period the provision was in force (with links to the relevant legislative provisions), the maximum penalty for the offence, and Standard Non-Parole Period (SNPP) (if applicable).

Note: in the tables below, months/years refer to months/years of imprisonment.

Offences under the Crimes Act 1900 (NSW)

***Crimes Act 1900* (NSW)**					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
45	Female genital mutilation[1]		1/5/1995–19/5/2014 20/5/2014–present	7 yrs 21 yrs	
45A	Remove person from State for female genital mutilation		20/5/2014–present	21 yrs	
61B (rep)	Maliciously inflict GBH with intent to have sexual intercourse		14/7/1981–16/3/1991	20 yrs	
61C(1)–(2) (rep)	Maliciously inflict or threaten ABH with intent to have sexual intercourse		14/7/1981–16/3/1991	12 yrs	
61C(3)–(4) (rep)	Maliciously inflict or threaten ABH with intent to have sexual intercourse, in company		21/2/1988–16/3/1991	14 yrs	
61D(1) (rep)	Sexual intercourse without consent with:	Person over 16 yrs	14/7/1981–20/2/1988 21/2/1988–16/3/1991	7 yrs 8 yrs	
		Person under 16 yrs	14/7/1981–16/3/1991	10 yrs	
61D(1A) (rep)	Sexual intercourse without consent, person under 16 yrs and under authority		23/3/1986–16/3/1991	12 yrs	
61D(1B) (rep)	Sexual intercourse without consent, in company	Person over 16 yrs	21/2/1988–16/3/1991	10 yrs	
		Person under 16 yrs	21/2/1988–16/3/1991	12 yrs	
61D(1C) (rep)	Sexual intercourse without consent, in company, person under 16 yrs and under authority		21/2/1988–16/3/1991	14 yrs	
61E(1) (rep)	Indecent assault	Person over 16 yrs	14/7/1981–22/3/1986	4 yrs	
		Person under 16 yrs	14/7/1981–22/3/1986	6 yrs	
		Victim any age	23/3/1986–16/3/1991	4 yrs	
61E(1A) (rep)	Indecent assault where person under 16 yrs and under authority		23/3/1986–16/3/1991	6 yrs	
61E(1B) (rep)	Indecent assault in company		21/2/1988–16/3/1991	6 yrs	
61E(1C) (rep)	Indecent assault where person under 16 and under authority and in company		21/2/1988–16/3/1991	8 yrs	
61E(2) (rep)	Act of indecency or incite act of indecency with person under 16 yrs		14/7/1981–16/3/1991	2 yrs	

1 Amended 27/11/2003 — "a person authorised to practise midwifery under the *Nurses Act 1991*" in s 45(7)(a) replaced with "a midwife within the meaning of the *Nurses and Midwives Act 1991*". Amended 16/6/2010 — inserting new definitions of "authorised professional", "medical practitioner" and "medical student" in s 45(7). Amended 20/5/2014 to omit s 45(2). Amended 8/1/2018 — inserting new definition of "medical student".

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
61E(2A) (rep)	Act of indecency or incite act of indecency with person under 16 yrs and under authority		23/3/1986–16/3/1991	4 yrs	
61F (rep)	Attempt offence under ss 61B, 61C, 61D, or 61E		14/7/1981–16/3/1991	same as principal offence	
61I	Sexual assault		17/3/1991–31/1/2003	14 yrs	
			1/2/2003–present	14 yrs	7 yrs
61J(1)	Aggravated sexual assault[2]		17/3/1991–31/1/2003	20 yrs	
			1/2/2003–present	20 yrs	10 yrs
61JA(1)	Aggravated sexual assault in company[3]		1/10/2001–31/1/2003	Life	
			1/2/2003–present	Life	15 yrs
61K	Assault with intent to have sexual intercourse[4]		17/3/1991–present	20 yrs	
61KC	Sexual touching[5]		1/12/2018–present	5 yrs	
61KD	Aggravated sexual touching[6]		1/12/2018–present	7 yrs	5 yrs
61KE	Sexual act[7]		1/12/2018–present	18 mths	
61 KF	Aggravated sexual act[8]		1/12/2018–present	3 yrs	
61L (rep)	Indecent assault		17/3/1991–30/11/2018	5 yrs	
61M(1) (rep)	Aggravated indecent assault[9]		17/3/1991–31/1/2003	7 yrs	
			1/2/2003–30/11/2018	7 yrs	5 yrs
61M(2) (rep)	Aggravated indecent assault	Person under 16 yrs	1/1/2009–30/11/2018	10 yrs	8 yrs
		Person under 10 yrs	17/3/1991–31/1/2003	10 yrs	
			1/2/2003–31/12/2007	10 yrs	5 yrs
			1/1/2008–31/12/2008	10 yrs	8 yrs
61N (rep)	Act of indecency	Person under 16 yrs[10]	17/3/1991–30/11/2018	2 yrs[11]	
		Person 16 yrs or over	1/7/1995–30/11/2018	18 mths	
61O(1) (rep)	Aggravated act of indecency, person under 16 yrs[12]		17/3/1991–30/11/2018	5 yrs	

2 Amended 15/2/2008 — wording of circumstance of aggravation in s 61J(2) amended from "maliciously" to "intentionally or recklessly". Amended 1/12/2008 — wording in s 61J(2)(g) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/1/2009 — inserted new circumstances of aggravation in s 61J(2)(h) and (i); inserted s 61J(3) defining "building". Amended 22/2/2010 — wording of s 61J(3) amended. Amended 1/6/2022 — wording in s 61J(2) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

3 Amended 15/2/2008 — wording of circumstance of aggravation in s 61JA(2) amended from "maliciously" to "intentionally or recklessly". Amended 1/6/2022 — wording in s 61JA(1)(c) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

4 Amended 15/2/2008 — wording amended from "maliciously" to "intentionally or recklessly".

5 Amended 1/6/2022 — wording amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

6 ibid.

7 ibid.

8 ibid.

9 Amended 1/12/2008 — wording in s 61J(2)(g) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/1/2009 — age changed from 10 yrs to 16 yrs; s 61M(3)(b) omitted.

10 Amended 3/5/1992 — wording amended.

11 Amended 1/7/1995 — s 61N substituted with s 61N(1)–(2).

12 Wording amended 1/9/1999. Wording in s 61O(3) amended 1/12/2008 from "serious intellectual disability" to "cognitive impairment".

Crimes Act 1900 (NSW)				
Section	**Offence**	**Time period**	**Max penalty**	**SNPP**
61O(1A) (rep)	Aggravated act of indecency, person 16 yrs or over[13]	1/7/1995–30/11/2018	3 yrs	
61O(2) (rep)	Aggravated act of indecency, person under 10 yrs[14]	17/3/1991–30/11/2018	7 yrs	
61O(2A) (rep)	Aggravated act of indecency, person under 16 yrs, knowing it to be filmed for producing child pornography/child abuse material[15]	1/1/2009–30/11/2018	10 yrs	
61P (rep)	Attempt to commit offence under ss 61I–61O[16]	17/3/1991–30/11/2018	same as substantive offence in ss 61I–61O	
63 (rep)	Rape[17]	31/10/1900–13/4/1955	Death	
		14/4/1955–13/7/1981	Life	
65 (rep)	Assault with intent to rape	31/10/1900–13/7/1981	14 yrs	
65A(2) (rep)	Sexual intercourse procured by non-violent threats	21/2/1988–31/12/2007	6 yrs	
66 (rep)	Carnal knowledge by false pretence or representation	31/10/1900–12/6/2003	14 yrs	
66A(1)	Sexual intercourse, child under 10 yrs	29/6/2015–present	Life	15 yrs
66A(1) (rep)	Sexual intercourse, child under 10 yrs	1/1/2009–28/6/2015	25 yrs	15 yrs
66A(2) (rep)	Aggravated sexual intercourse, child under 10 yrs	1/1/2009–28/6/2015	Life	15 yrs
66A (rep)	Sexual intercourse, child under 10 yrs	23/3/1986–31/1/2003	20 yrs	
		1/2/2003–31/12/2008	25 yrs	15 yrs
66B	Attempt, or assault with intent, to have sexual intercourse with child under 10 yrs[18]	23/3/1986–31/1/2003	20 yrs	
		1/2/2003–28/6/2015	25 yrs	
		29/6/2015–present	25 yrs	10 yrs
66C(1)	Sexual intercourse, child 10–14 yrs[19]	13/6/2003–28/6/2015	16 yrs	
		29/6/2015–present	16 yrs	7 yrs
66C(1) (rep)	Sexual intercourse, child 10–16 yrs	23/3/1986–12/6/2003	8 yrs	
66C(2)	Aggravated sexual intercourse, child 10–14 yrs[20]	13/6/2003–28/6/2015	20 yrs	
		29/6/2015–present	20 yrs	9 yrs
66C(2) (rep)	Sexual intercourse, child 10–16 yrs by person in authority	23/3/1986–12/6/2003	10 yrs	
66C(3)	Sexual intercourse, child 14–16 yrs[21]	13/6/2003–present	10 yrs	

13 Wording in s 61O(3) amended 1/12/2008 from "serious intellectual disability" to "cognitive impairment".

14 Wording amended 1/9/1999.

15 Section 61O(4) inserted 1/1/2009, defining "child pornography" and meaning of an act of indecency being "filmed" for the purposes of s 61O(2A). Wording amended 17/9/2010 from "pornography" to "abuse material".

16 Expanded 1/10/2001 to include attempt to commit s 61JA offence.

17 Amended 14/7/1981 to "Common law offences of rape and attempted rape abolished". Renumbered 2/7/2018 as s 80AD.

18 Amended 1/12/2018 — wording amended from "another person" to "a child"; wording amended from "any such person" to "a child who is under the age of 10 years".

19 Amended 15/2/2008 — wording of circumstance of aggravation in s 66C(5) amended from "maliciously" to "intentionally or recklessly". Amended 1/12/2008 — wording in s 66C(5) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/1/2009 — inserted s 66C(5)(h) new circumstance of aggravation. Amended 19/5/2009 — inserted new s 66C(5)(i) new circumstance of aggravation. Amended 1/12/2018 — wording in s 66C(1)–(4) amended from "another person" to "a child". Amended 1/6/2022 — wording in s 66C(5) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

20 ibid.

21 ibid.

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
66C(4)	Aggravated sexual intercourse, child 14–16 yrs[22]		13/6/2003–28/6/2015	12 yrs	
			29/6/2015–present	12 yrs	5 yrs
66D	Assault with intent to commit s 66C offence[23]	Attempt assault	23/3/1986–30/11/2018	same as substantive offence in s 66C	
		Assault	23/3/1986–present		
66DA	Sexual touching, child under 10 yrs		1/12/2018–present	16 yrs	8 yrs
66DB	Sexual touching, child 10–16 yrs		1/12/2018–present	10 yrs	
66DC	Sexual act, child under 10 yrs		1/12/2018–present	7 yrs	
66DD	Sexual act, child 10–16 yrs		1/12/2018–present	2 yrs	
66DE	Aggravated sexual act, child 10–16 yrs[24]		1/12/2018–present	5 yrs	
66DF	Sexual act for production of child abuse material, child under 16		1/12/2018–present	10 yrs	
66EA(1)	Persistent sexual abuse of a child[25]		15/1/1999–30/11/2018	25 yrs	
			1/12/2018–present	Life	
66EB(2)	Produce child for unlawful sexual activity[26]	Child under 14 yrs	18/1/2008–28/6/2015	15 yrs	
			29/6/2015–present	15 yrs	6 yrs
		Child under 16 yrs	18/1/2008–28/6/2015	12 yrs	
			29/6/2015–present	12 yrs	5 yrs
66EB(2A)	Meet child following grooming	Child under 14 yrs	1/1/2009–28/6/2015	15 yrs	
			29/6/2015–present	15 yrs	6 yrs
		Child 14–16 yrs	1/1/2009–28/6/2015	12 yrs	
			29/6/2015–present	12 yrs	5 yrs
66EB(3)	Groom child for unlawful sexual activity[27]	Child under 14 yrs	18/1/2008–28/6/2015	12 yrs	
			29/6/2015–present	12 yrs	5 yrs
		Child 14–16 yrs	18/1/2008–28/6/2015	10 yrs	
			29/6/2015–present	10 yrs	4 yrs
66EC	Groom person for unlawful sexual activity with child under the person's authority	Child under 16 yrs	1/12/2018–present	6 yrs	
		Child 14–16 yrs	1/12/2018–present	5 yrs	
66F(2)	Sexual intercourse with person with cognitive impairment by person responsible for care[28]		21/2/1988–present	10 yrs	

22 ibid.

23 Amended 1/12/2018 — substituted with new s 66D offence removing the "attempt" element.

24 Amended 1/6/2022 — wording amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant".

25 Amended 1/10/2001 — wording in s 66EA(12) amended to include s 61JA in definition of "sexual offence". Amended 1/12/2018 — substituted with similar but new offence.

26 Amended 1/1/2009 — s 66EB(1) expanded to include "15A"; wording of s 66EB(6), (8) amended to include s 66EB(2A), (2B).

27 Amended 1/12/2018 — s 66EB(3)(a) amended to insert "or with any financial or other material benefit".

28 Amended 1/12/2008 — wording amended from "serious intellectual disability" to "cognitive impairment". Amended 24/9/2012 — wording of defence in s 66F(7) changed from "an established de facto partner" to "the de facto partner". Amended 1/12/2018 — substituted offence inserting subsections including; s 66F(5) regarding consent not being a defence for sexual intercourse; s 66F(7) inserting defences to s 66F(2) or (3) charges; s 66F(8) requiring Attorney General's approval for prosecution of s 66F(2) or (3) charges.

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
66F(3)	Sexual intercourse with person with cognitive impairment, taking advantage of impairment[29]		1/12/2008–present	8 yrs	
66F(3) (rep)	Sexual intercourse with person with intellectual disability, taking advantage of vulnerability to sexual exploitation		21/2/1988–30/11/2008	8 yrs	
66F(4) (rep)	Attempt to commit offence under s 66F[30]		21/2/1988–30/11/2018	same as substantive offence	
67 (rep)	Carnally know girl under 10 yrs		31/10/1900–13/4/1955	Death	
			14/4/1955–22/3/1986	Life	
68 (rep)	Attempt to carnally know girl under 10 yrs		31/10/1900–22/3/1986	14 yrs	
71 (rep)	Carnally know girl between 10–16 yrs		1/10/1924–22/3/1986	10 yrs	
72 (rep)	Attempt, or assault with intent to carnally know girl between 10–16 yrs		1/10/1924–22/3/1986	5 yrs	
72A (rep)	Carnal knowledge of idiot or imbecile		1/10/1924–20/2/1988	5 yrs	
73(1)	Sexual intercourse with child 16 yrs under special care[31]		13/6/2003–present	8 yrs	
73(2)	Sexual intercourse with child 17 yrs under special care[32]		13/6/2003–present	4 yrs	
73 (rep)	Carnal knowledge by teacher, father, stepfather with girl 10 yrs or over and under 17 yrs who is pupil, daughter, stepdaughter[33]		1/10/1924–22/3/1986	14 yrs	
			23/3/1986–31/8/1987	8 yrs	
			1/9/1987–12/6/2003	8 yrs	
73A	Sexual touching, young person 16–18 yrs under special care[34]	Child 16 yrs	1/12/2018–present	4 yrs	
		Child 17 yrs	1/12/2018–present	2 yrs	
74 (rep)	Attempted carnal knowledge by teacher, father, stepfather with girl 10–16 yrs who is pupil, daughter, stepdaughter[35]		1/10/1924–22/3/1986	7 yrs	
			23/3/1986–12/6/2003	8 yrs	
76 (rep)	Indecent assault, female under 16 yrs		1/10/1924–1/8/1974	5 yrs	
			2/8/1974–13/7/1981	6 yrs	
76A (rep)	Commit act of indecency, girl under 16 yrs		2/8/1974–13/7/1981	2 yrs	
78A(1)	Incest/sexual intercourse with close family member who is of or above 16 yrs[36]		13/6/2003–present	8 yrs	

29 ibid.

30 Amended 1/12/2008 — substituted with similar but new offence.

31 Amended 24/9/2012 — wording of special care in s 73(3)(a) amended. Amended 21/3/2018 — inserted s 73(3)(b) to expand the meaning of "under special care"; inserted definition of "member of the teaching staff" in s 73(6). Amended 1/12/2018 — wording in s 73(1)–(2) amended from "another person" to "a young person"; wording in s 73(3)(a) amended from "foster parent" to "authorised carer". Amended 23/6/2020 — inserted s 73(3)(b)–(b1) and (f)–(g) to expand the meaning of "under special care". Amended 1/6/2022 — wording of s 73(3) amended from "the victim" to "the complainant"; "the offender" to "the accused person".

32 ibid.

33 Amended 23/3/1986 — wording amended from "of or above the age of ten years, and under the age of seventeen years" to "of the age of 16 years". Amended 28/5/1987 — wording amended from "of the age of 16 years" to "of or above the age of 16 years, and under the age of 17 years". Substituted with similar but new offence 13/6/2003.

34 Amended 23/6/2020 — inserted s 73A(3)(b)–(b1) and (f)–(g) to expand the meaning of "under special care". Amended 1/6/2022 — wording of s 73A(3) amended from "the victim" to "the complainant"; "the offender" to "the accused person".

35 Amended 23/3/1986 — wording amended from "of or above the age of ten years, and under the age of seventeen years" to "of the age of 16 years". Amended 28/5/1987 — wording amended from "of the age of 16 years" to "of or above the age of 16 years, and under the age of 17 years.

36 Amended 23/6/2020 — inserted exception to offence under s 78A(1) in s 78A(1A).

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
78A (rep)	Incest/carnal knowledge of child, sibling, parent, grandparent[37]	Victim any age	1/10/1924–22/3/1986	7 yrs	
		Female victim of or above 16 yrs	23/3/1986–12/6/2003	7 yrs	
78B	Attempt offence under s 78A[38]		1/10/1924–present	2 yrs	
78H (rep)	Homosexual intercourse, male under 10 yrs		8/6/1984–11/1/1990	Life	
			12/1/1990–31/1/2003	25 yrs	
78I (rep)	Attempt or assault with intent to have homosexual intercourse, male under 10 yrs		8/6/1984–31/1/2003	14 yrs	
78K (rep)	Homosexual intercourse, male between 10 and 18 yrs		8/6/1984–12/6/2003	10 yrs	
78L (rep)	Attempt, or assault male 10–18 yrs with intention to have homosexual intercourse		8/6/1984–12/6/2003	5 yrs	
78M (rep)	Homosexual intercourse with idiot or imbecile		8/6/1984–20/2/1988	5 yrs	
78N (rep)	Homosexual intercourse by a teacher, father, stepfather, with male 10–18 yrs being pupil, son or stepson		8/6/1984–12/6/2003	14 yrs	
78O (rep)	Teacher, father, stepfather attempt, or assault pupil, etc, between 10 and 18 yrs with intention to have homosexual intercourse		8/6/1984–12/6/2003	7 yrs	
78Q(1) (rep)	Male commit act of gross indecency with male under 18 yrs[39]		8/6/1984–12/6/2003	2 yrs	
78Q(2) (rep)	Solicit, procure, incite or advise male under 18 yrs to commit act of gross indecency[40]		8/6/1984–12/6/2003	2 yrs	
79 (rep)	Buggery		1/10/1924–7/6/1984	14 yrs	
80 (rep)	Attempted buggery[41]		1/10/1924–7/6/1984	5 yrs	
80A(2)	Sexual assault by forced self-manipulation[42]	Victim under 10 yrs	17/3/1991–23/3/2004	20 yrs	
		Victim over 10 yrs	17/3/1991–23/3/2004	14 yrs	
		Age not specified	24/3/2004–present	14 yrs	
80A(2A)	Aggravated sexual assault by forced self-manipulation[43]		24/3/2004–present	20 yrs	
80D(1)	Causing sexual servitude		22/3/2002–present	15 yrs	
80D(2)	Aggravated causing sexual servitude, victim under 18 yrs		22/3/2002–31/12/2008	19 yrs	
			1/1/2009–present	20 yrs	
80E(2)	Aggravated conduct of business involving sexual servitude, victim under 18 yrs		22/3/2002–present	19 yrs	

37 Amended 23/3/1986 — wording amended to insert before "his mother", "a female of or above the age of 16 years who is".

38 Amended 13/6/2003 — wording amended from "whosoever, being a male" to "any person who".

39 Amended 3/5/1992 — wording amended to insert "or towards" after "with".

40 Amended 3/5/1992 — wording amended to insert "or towards" after "with".

41 Amended 6/11/1951 — wording amended to insert "with or without the consent of such person".

42 Amended 19/6/1996 — insert "(including a surgically constructed vagina)" to the wording of s 80A(1). Amended 24/3/2004 — insert definition of "circumstances of aggravation". Amended 15/2/2008 — wording of s 80A(1) amended from "maliciously" to "intentionally or recklessly". Amended 1/12/2008 — wording in s 80A(1)(g) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/6/2022 — wording of s 80A(1) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant"; omit "(including a surgically constructed vagina)".

43 Amended 15/2/2008 — wording of s 80A(1) amended from "maliciously" to "intentionally or recklessly". Amended 1/12/2008 — wording in s 80A(1)(g) amended from "serious intellectual disability" to "cognitive impairment". Amended 1/6/2022 — wording of s 80A(1) amended from "alleged offender" to "accused person"; wording amended from "alleged victim" to "complainant"; omit "(including a surgically constructed vagina)".

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
80G	Incite to commit sexual offence[44]		1/1/2009–present	same as substantive offence	
81 (rep)	Indecent assault upon male		31/10/1900–7/6/1984	5 yrs	
81A (rep)	Act of indecency by male with male		14/4/1955–7/6/1984	2 yrs	
81B(1) (rep)	Solicit or entice offence under ss 79, 81 or 81A		14/4/1955–7/6/1984	1 yr	
85A(1) (now s 86)	Kidnapping[45]		14/12/2001–20/12/2001	14 yrs	
85A(2) (now s 86)	Aggravated kidnapping[46]		14/12/2001–20/12/2001	20 yrs	
85A(3) (now s 86)	Specially aggravated kidnapping[47]		14/12/2001–20/12/2001	25 yrs	
86 (rep)	Abduct woman against will		31/10/1900–20/12/2001	14 yrs	
86(1)	Kidnapping[48]		21/12/2001–present	14 yrs	
86(2)	Aggravated kidnapping		21/12/2001–present	20 yrs	
86(3)	Specially aggravated kidnapping		21/12/2001–present	25 yrs	
87 (rep)	Abduct woman under 21 yrs against the will of parent etc		31/10/1900–20/12/2001	7 yrs	
87(1)–(2)	Abduct child under 12 yrs		21/12/2001–present	10 yrs	
90 (rep)	Abduct girl under 16 yrs		31/10/1900–21/12/2001	3 yrs	
90A (rep)	Kidnapping	Generally	15/12/1961–13/12/2001	20 yrs	
		If person liberated w/o substantial injury	15/12/1961–13/12/2001	14 yrs	
91 (rep)	Take child with intent to steal etc		31/10/1900–21/12/2001	10 yrs	
91A	Procure for prostitution[49]		1/10/1924–present	7 yrs	
91B	Procure person for prostitution by threat, drug etc		1/10/1924–present	10 yrs	
91D(1)	Promote/engage in child prostitution	Child 14 yrs or over	12/2/1989–present	10 yrs	
		Child under 14 yrs	12/2/1989–28/6/2015	14 yrs	
			29/6/2015–present	14 yrs	6 yrs
91E(1)	Obtain benefit from child prostitution[50]	Child 14 yrs or over	12/2/1989–present	10 yrs	
		Child under 14 yrs	1/1/2009–28/6/2015	14 yrs	
			29/6/2015–present	14 yrs	6 yrs

44 Amended 1/12/2018 — amended s 80G(5) regarding offences that do not constitute a s 80G(1) offence when incited.

45 Renumbered 21/12/2001 from s 85A to s 86.

46 Renumbered 21/12/2001 from s 85A to s 86.

47 Renumbered 21/12/2001 from s 85A to s 86.

48 Amended 24/9/2012 — inserted s 86(1)(1a) "with the intention of committing a serious indictable offence, or" into the definition of the basic offence.

49 Amended 2/8/1974 — wording amended from "female under the age of twenty-one years, whether with her consent or not, with intent that some other person may have carnal knowledge of such female" to "person, whether with that person's consent or not, for purposes of prostitution". Amended 1/8/1979 — insert "(not being a prostitute)".

50 Amended 1/1/2009 — inserted "or, if the act of child prostitution involves a child under the age of 14 years, to imprisonment for 14 years" after "10 years" in s 91E(1); inserted s 91E(3).

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
91F(1)	Premises used for child prostitution		12/2/1989–present	7 yrs	
91G(1) (rep)	Child used for pornographic purposes[51]	Child under 14 yrs	12/2/1989–31/12/2004	7 yrs	
		Child 14 yrs or over	12/2/1989–31/12/2004	5 yrs	
91G(1)	Child used for production of child abuse material, child under 14 yrs[52]		1/1/2005–28/6/2015	14 yrs	
			29/6/2015–present	14 yrs	6 yrs
91G(2)	Child used for production of child abuse material, child 14 yrs or over[53]		1/1/2005–present	10 yrs	
91G(3)	Child used for production of child abuse material — circumstances of aggravation[54]		1/1/2022–present	20 yrs	
91H(2)	Produce, disseminate, possess child abuse material[55]		17/9/2010–present	10 yrs	
91H(2) (rep)	Possess, produce, disseminate child pornography		1/1/2009–16/9/2010	10 yrs	
91H(2) (rep)	Produce, disseminate child pornography		1/1/2005–31/12/2008	10 yrs	
91H(3) (rep)	Possess child pornography		1/1/2005–31/12/2008	5 yrs	
91HAA	Administer digital platform used to deal with child abuse material		1/1/2022–present	14 yrs	
91HAB	Encourage use of a digital platform to deal with child abuse material		1/1/2022–present	14 yrs	
91HAC	Provide information about avoiding detection		1/1/2022–present	14 yrs	
91P	Record intimate image without consent		25/8/2017–present	3 yrs	
91Q	Distribute intimate image without consent		25/8/2017–present	3 yrs	
91R	Threaten to record or distribute intimate image		25/8/2017–present	3 yrs	
93AC	Child forced marriage		1/1/2022–present	9 yrs	
316(1)[56]	Conceal serious indictable offence where maximum penalty for the concealed offence is:	General	25/11/1990–27/11/2018	2 yrs	
		Not more than 10 yrs	28/11/2018–present	2 yrs	
		More than 10 yrs but not more than 20 yrs	28/11/2018–present	3 yrs	
		More than 20 yrs	28/11/2018–present	5 yrs	
316(2)[57]	Solicit, agree or accept benefit to conceal serious indictable offence under s 316(1), where maximum penalty for the concealed offence is:	General	25/11/1990–27/11/2018	5 yrs	
		Not more than 10 yrs	28/11/2018–present	5 yrs	
		More than 10 yrs but not more than 20 yrs	28/11/2018–present	6 yrs	
		More than 20 yrs	28/11/2018–present	7 yrs	

51 Amended 25/1/1998 — wording amended in from "employs" to "uses"; amended wording in s 91G(2).

52 Amended 17/9/2010 — wording amended from "for pornographic purposes" to "for the production of child abuse material"; s 91G(3) omitted. Amended 1/12/2018 — inserted s 91G(6) requiring approval of Director of Public Prosecutions to institute proceedings for a s 91G offence against a child or young person.

53 ibid.

54 ibid.

55 Amended 1/12/2018 — inserted s 91H(3) requiring approval of Director of Public Prosecutions to institute proceedings for a s 91H offence against a child or young person.

56 Amended 30/3/1998 to insert s 316(4)–(5). Amended 30/6/1998 to insert new s 316(5). Amended 1/1/2000 to replace "serious offence" with "serious indictable offence". Amended 31/8/2018 — wording in s 316(4), insert s 316(6). Amended 28/9/2020 to insert s 316(1A)-(1B), new definitions in s 316(6). Amended 22/11/2019 to become a prescribed sexual offence.

57 ibid.

Crimes Act 1900 (NSW)					
Section	**Offence**		**Time period**	**Max penalty**	**SNPP**
316A(1)[58]	Conceal child abuse offence, where maximum penalty for the concealed offence is:	Generally	31/8/2018–27/11/2018	2 yrs	
		Less than 5 yrs	28/11/2018–present	2 yrs	
		5 yrs or more	28/11/2018–present	5 yrs	
316A(4)[59]	Solicit, agree or accept benefit to conceal child abuse offence under s 316A(1)	Generally	31/8/2018–27/11/2018	5 yrs	
		Where max penalty for child abuse offence is < 5 yrs	28/11/2018–present	5 yrs	
		Where max penalty for child abuse offence is >/= 5 yrs	28/11/2018–present	7 yrs	
		With prior conviction	23/6/2020–present	7 yrs	2 yrs

Offences under the Criminal Code Act 1995 (Cth)

Note: references to prior convictions mean prior convictions for a child abuse offence. Minimum penalties found in *Crimes Act 1914* (Cth) ss 16AAA–16AAB.

Criminal Code Act 1995 (Cth)					
Section	**Offence**		**Time period**	**Penalty**	
				Max	**Min**
272.8(1)–(2)	Sexual intercourse with child outside Australia		15/4/2010–22/6/2020	20 yrs	
			23/6/2020–present	25 yrs	6 yrs
272.9(1)–(2)	Sexual activity (other than sexual intercourse) with child outside Australia		15/4/2010–22/6/2020	15 yrs	
			23/6/2020–present	20 yrs	5 yrs
272.10(1)	Aggravated sexual intercourse or other sexual activity with child outside Australia[60]		15/4/2010–22/6/2020	25 yrs	
			23/6/2020–present	Life	7 yrs
272.11(1)	Persistent sexual abuse of child outside Australia[61]		15/4/2010–22/6/2020	25 yrs	
			23/6/2020–present	30 yrs	7 yrs
272.12(1)–(2)	Sexual intercourse with young person outside Australia	General	15/4/2010–present	10 yrs	
		With prior conviction	23/6/2020–present	10 yrs	3 yrs
272.13(1)–(2)	Sexual activity (other than sexual intercourse) with young person outside Australia	General	15/4/2010–present	7 yrs	
		With prior conviction	23/6/2020–present	7 yrs	2 yrs
272.14(1)	Procure child to engage in sexual activity outside Australia	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
272.15(1)	Groom child to engage in sexual activity outside Australia	General	15/4/2010–22/6/2020	12 yrs	
			23/6/2020–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
272.15A(1)	Groom person to make it easier to engage in sexual activity with child outside Australia	General	23/6/2020–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
272.18(1)	Benefit from child sex offence outside Australia		15/4/2010–22/6/2020	20 yrs	
			23/6/2020–present	25 yrs	6 yrs

58 Amended 28/11/2018 to insert s 316A(2)(g), new definitions in s 316A(9).
59 ibid.
60 Amended 23/06/2020 — wording of heading amended; s 272.10(1)(b) substituted.
61 Amended 21/9/2019 — reduced the required instances of sexual abuse from 3 or more occasions to 2 or more occasions.

Criminal Code Act 1995 (Cth)					
Section	**Offence**		**Time period**	**Penalty**	
				Max	**Min**
272.19	Encourage child sex offence outside Australia		15/4/2010–22/6/2020	20 yrs	
			23/6/2020–present	25 yrs	6 yrs
272.20(1)	Preparing for or planning offence against ss 272.8–272.11, 272.18	General	15/4/2010–present	10 yrs	
		With prior conviction	23/6/2020–present	10 yrs	3 yrs
272.20(2)	Preparing for or planning offence against ss 272.12–272.13	General	15/4/2010–present	5 yrs	
		With prior conviction	23/6/2020–present	5 yrs	1 yr
273.5(1) (rep)	Possess, control, produce, distribute, or obtain child pornography material outside Australia		15/4/2010–21/9/2019	15 yrs	
273.6(1)	Possess, control, produce, distribute, or obtain child abuse material outside Australia	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
273.7	Aggravated s 273.6 offence		15/4/2010–22/6/2020	20 yrs	
			23/6/2020–present	30 yrs	7 yrs
273A.1	Possess child-like sex dolls	General	21/9/2019–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
273B.4	Fail to protect child at risk of child sexual abuse offence		20/3/2020–present	5 yrs	
273B.5(1)	Fail to report child sexual abuse offence based on reasonable abuse		20/3/2020–present	3 yrs	
273B.5(2)	Fail to report child sexual abuse offence based on reasonable suspicion		20/3/2020–present	2 yrs	
471.16 (rep)	Use postal or similar service for child pornography		15/4/2010–21/9/2019	15 yrs	
471.17 (rep)	Possess, control, produce, supply or obtain child pornography for use via postal or similar service		15/4/2010–21/9/2019	15 yrs	
471.19	Use postal or similar service for child abuse material	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.20	Possess, control, produce, supply or obtain child abuse material for use via postal or similar service	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.22	Aggravated offence — offence involving conduct on 3 or more occasions and 2 or more people		15/4/2010–22/6/2020	25 yrs	
			23/6/2020–present	30 yrs	7 yrs
471.24	Use postal or similar service to procure persons under 16 yrs	General	15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.25(1)–(2)	Use postal or similar service to groom persons under 16 yrs for sexual activity with sender or another person over 18 yrs	General	15/4/2010–22/6/2020	12 yrs	
			23/6/2020–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.25(3)	Use postal or similar service to groom persons under 16 yrs for sexual activity with another person to take place in presence of sender or another person over 18 yrs	General	15/4/2010–22/6/2020	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
471.25A	Use postal or similar service to groom another person to make it easier to procure persons under 16 yrs	General	23/6/2020–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs

Criminal Code Act 1995 (Cth)					
Section	**Offence**		**Time period**	**Penalty**	
				Max	**Min**
471.26	Use postal or similar service to send indecent material to person under 16 yrs	General	15/4/2010–22/6/2020	7 yrs	
			23/6/2020–present	10 yrs	
		With prior conviction	23/6/2020–present	10 yrs	3 yrs
474.17A	Use carriage service to transmit sexual material without consent		3/9/2024–present	6 yrs	
474.17A(1) (rep)	Aggravated s 474.17 offence [use carriage service to menace, harass or cause offence] by sharing private sexual material		1/9/2018–22/1/2022	5 yrs	
			23/1/2022–2/9/2024	6 yrs	
474.17A(4) (rep)	Aggravated s 474.17 offence [use carriage service to menace, harass or cause offence] by sharing private sexual material		1/9/2018–22/1/2021	6 yrs	
			23/1/2022–2/9/2024	7 yrs	
474.17AA(1)	Aggravated s 474.17A offence — where offence committed after 3 or more certain civil penalty orders made		3/9/2024–present	7 yrs	
474.17AA(5)	Aggravated s 474.17A offence — where person responsible for creation or alteration of material		3/9/2024–present	7 yrs	
474.19 (rep)	Use carriage service for child pornography[62]		1/3/2005–14/4/2010	10 yrs	
			15/4/2010–20/9/2019	15 yrs	
474.20 (rep)	Possess, control, produce, supply or obtain child pornography for use through a carriage service		1/3/2005–14/4/2010	10 yrs	
			15/4/2010–20/9/2019	15 yrs	
474.22	Use carriage service for child abuse material[63]	General	1/3/2005–14/4/2010	10 yrs	
			15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.22A	Possess or control child abuse material obtained or accessed using a carriage service	General	21/9/2019–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.23	Possess, control, produce, supply or obtain child abuse material for use through a carriage service	General	1/3/2005–14/4/2010	10 yrs	
			15/4/2010–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.23A	Create, control, promote child abuse material to commit or facilitate offence against ss 474.22(1), 474.22A(1) or 474.23		23/6/2020–present	20 yrs	5 yrs
474.24A	Aggravated offence — offence involving conduct on 3 or more occasions and 2 or more people		15/4/2010–22/6/2020	25 yrs	
			23/6/2020–present	30 yrs	7 yrs
474.25A	Use carriage service for sexual activity with person under 16 yrs		15/4/2010–22/6/2020	15 yrs	
			23/6/2020–present	20 yrs	5 yrs
474.25B	Aggravated s 474.25A offence		15/4/2010–22/6/2020	25 yrs	
			23/6/2020–present	30 yrs	7 yrs
474.25C	Use carriage service to prepare or plan to cause harm, engage in sexual activity or procure persons under 16 yrs to engage in sexual activity		23/6/2017–present	10 yrs	
474.26	Use carriage service to procure persons under 16 yrs	General	1/3/2005–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs

62 Amended 15/4/2010 — s 474.19(1)(a) substituted; s 474.19(2A) inserted. Amended 10/3/2016 — wording amended to "commits" instead of "is guilty of".

63 Amended 15/4/2010 — s 474.22(1)(a) substituted; s 474.22(2A) inserted. Amended 10/3/2016 — wording amended to "commits" instead of "is guilty of".

Criminal Code Act 1995 (Cth)					
Section	**Offence**		**Time period**	**Penalty**	
				Max	**Min**
474.27(1)–(2)	Use carriage service to groom person under 16 yrs to engage in sexual activity with the sender or another adult	General	1/3/2005–22/6/2020	12 yrs	
			23/6/2020–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.27(3)	Use carriage service to groom person under 16 yrs to engage in sexual activity with another child in presence of the sender or another adult	General	1/3/2005–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.27AA	Use carriage service to groom another person to make it easier to procure persons under 16 yrs	General	23/6/2020–present	15 yrs	
		With prior conviction	23/6/2020–present	15 yrs	4 yrs
474.27A	Use carriage service to transmit indecent communication to person under 16 yrs	General	15/4/2010–22/6/2020	7 yrs	
			23/6/2020–present	10 yrs	
		With prior conviction	23/6/2020–present	10 yrs	3 yrs

Offences under the Customs Act 1901 (Cth)

Customs Act 1901 (Cth)			
Section	**Offence**	**Time period**	**Max penalty**
233BAB	Import or export child pornography/child abuse material[64]	26/5/2000–present	10 yrs and/or 2,500 pu

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64 Amended 15/12/2001 — wording in s 233BAB(5)(a), (6)(a) amended from "knowingly or recklessly" to "intentionally"; s 233BAB(5)(b), (6)(b) substituted; s 233BAB(5A), (5B), (6A), (6B) inserted. Amended 1/3/2004 — s 233BAB(3), (4) substituted. Amended 6/3/2015 — s 233BAB(7) substituted. Amended 10/3/2016 — wording amended to "commits" instead of "is guilty of". Amended 21/9/2019 — s 233BAB(4)(g) inserted; s 233BAB(1)(h) omit "child pornography or of"; repeal s 233BAB(3); insert expanded definition of "child abuse material" in s 233BAB(4)(c)–(f).

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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 commenced 1 July 2024 and 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: June 2024

The accused is charged with engaging in a course of conduct against another person that consisted of abusive behaviour, intending to coerce or control the other person 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), 54C.
2. The accused and the other person were **[*or:*** had been**]** intimate partners: ss 54D(1)(b), 54C.
3. The accused engaged in a course of conduct against the other person: 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 other person: 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 other person or another person, or
   (b) a serious adverse impact on the capacity of the other person to engage in some or all of the other person's ordinary day-to-day activities. **[***Omit any of these matters which are not alleged by the prosecution.***]**: s 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 other person were [*or:* had been] intimate partners.**

   The other person will have been an "intimate partner" of the accused if the other person, 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 other person.**

   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 a person, or
   - intimidation of a person, or
   - coercion or control of the person against whom the behaviour is directed: 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 other person, intimidation of the other person or coercion or control of the other person**]**.

5. **The accused intended the course of conduct to coerce or control the other person.**

   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 other person.

   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 other person. 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 other person or another person, or**

   (b) **a serious adverse impact on the capacity of the other person to engage in some or all of the person'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 other person thought, or what was in fact, the effect of the accused's course of conduct. Although there may be evidence from the other person 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: June 2024

1. The coercive control legislation makes reference to "a person", "the person", "another person", "the other person", and "the person against whom the behaviour is directed". Often, but not always, this will be a reference to the complainant. It is preferable to make reference in jury directions to "the complainant" (or the name of the person) rather than to "a person" (etc) where this is appropriate.
2. The above suggested direction should be adapted to the circumstances of the individual case. Section 54F(2) provides a number of examples of conduct that may amount to abusive behaviour (the fourth element of the offence).
3. 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*, 12/10/2022, p 9047.
4. 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).
5. 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.
6. 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]**.

7. 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.

8. Where evidence of other acts of alleged misconduct by the accused towards the other person is led, see **Suggested direction — context evidence** at **[4-238]**.

9. Where evidence of complaint is led, see **Complaint evidence** at **[5-000]**.

10. 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).

[The next page is 893]

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].

[The next page is 911]

Bribery

[5-5200] Introduction

Last reviewed: June 2024

The common law offence of bribery is 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: *R v Glynn* (1994) 33 NSWLR 139 at 144, 146. It can also be intended to influence future conduct; 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

Last reviewed: June 2024

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 them to act contrary to their [*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 their 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 they made the [*offer/payment*].

This involves an inquiry into the state of mind of the accused. Obviously, you cannot look inside their 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 their 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 **[3-200] Intention**.

[5-5220] Notes

Last reviewed: June 2024

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 Div 70 of Ch 4 of the Criminal Code (Cth).
5. Reference to "intention of inducing a foreign public official in order to obtain or retain business" in s 70.2(1)(c)(i) of the Criminal Code (Cth) is not limited to *directly* obtaining or retaining business. The statutory purpose of introducing Div 70 of Ch 4 was to criminalise bribery of a foreign official in a business context and capture the full spectrum of bribes which may be made. That purpose is best given effect by broad construction of the provision: *R v AB* [2023] NSWCCA 168.
6. For an offence under s 70.2(1) of the Criminal Code (Cth), it is not necessary for the Crown to identify, by name or office, the public official whom the accused intended to influence: *R v Dougas (No 4)* [2022] NSWSC 51 at [63].
7. For a survey of the law establishing Parliamentarians as "public officers" for bribery offences, see *R v Obeid (No 2)* [2015] NSWSC 1380 at [33]–[43], [59]–[62]; see also *Obeid v R* [2017] NSWCCA 221; *Macdonald, Ian v R* [2023] NSWCCA 250; *Obeid v R* [2015] NSWCCA 309. For the related common law offence of wilful misconduct in public office, see *R v Obeid (No 2)* [2015] NSWSC 1380, *Blackstock v The Queen* [2013] NSWCCA 172, and *R v Quach* [2010] VSCA 106.
8. See Pt 4A of the *Crimes Act 1900* for offences relating to the corrupt receipt of commissions and other corrupt practices.
9. See Pt 7 of the *Crimes Act 1900* for public justice offences, including corruption of jurors and witnesses.

[The next page is 921]

Conspiracy

[5-5300] Introduction

Last reviewed: September 2026

The offence of conspiracy requires an agreement between two or more persons to do an act that necessarily amounts to a crime: *Obeid v The King* [2026] HCA 1 at [16], [18]. It is the intention to carry out the crime which constitutes the necessary *mens rea* for the offence: *Peters v The Queen* (1998) 192 CLR 493 at [55], [60]–[62], [66]. Recklessness as to the carrying out of an unlawful act is not sufficient, even if recklessness is the mental element of the predicate offence: *The Queen v LK* (2010) 241 CLR 177 at [110]; *Ansari v The Queen* (2010) 241 CLR 299 at [17]–[18].

The precise means or method by which the conspiracy is to be effected do not need to be known or agreed upon by the parties: *Obeid v The King* at [17]; see, for example, *Gerakiteys v The Queen* (1984) 153 CLR 317 at 323. The conspirators must intend to enter into the agreement, and they must intend that it should be carried out, however it is not necessary that the conspirators know that what was agreed was unlawful: *Obeid v The King* at [16]; *The Queen v Rogerson* (1992) 174 CLR 268 at [4].

There must be, "as high a degree of particularity concerning the criminal charge as the subject matter will bear": *Obeid v The King* at [18] quoting *KRM v The Queen* (2001) 206 CLR 221 at [15]. However, there is no requirement that the object of a conspiracy be reduced to specified acts: *Obeid v The King* at [28]; *Elomar v R* [2014] NSWCCA 303 at [603], [608]. The object of a conspiracy can be described by reference to a "class of acts" or acts having particular characteristics. However, the more general the description of a class of acts, the more difficult it may be to prove an agreement, for example, because what is described is so vague that it reveals no meeting of minds. Similarly, it will be more difficult to prove that what was agreed upon necessarily amounted to a crime, because the agreement might embrace acts that do not amount to the predicate offence: *Obeid v The King* at [26]–[29].

Evidence of overt acts may provide a basis for inferring that a conspiracy was formed, but those acts are not themselves elements of the offence: *Obeid v The King* at [16]; *The Queen v Rogerson* at [4].

The elements of conspiracy can be satisfied even where the acts are left to one conspirator: *Obeid v The King* at [16]; *Elomar v The Queen* (2014) 316 ALR 206 at [608]. A conspiracy is complete upon the agreement being made: *Obeid v The King* at [17]; *Truong v The Queen* (2004) 223 CLR 122 at [35].

[5-5310] Suggested direction

Last reviewed: August 2003

The following direction is currently under review. The elements of the offence of conspiracy are set out in *Obeid v The King* at [16].

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*].

In order for you to find any one of those accused "guilty", the Crown must prove beyond reasonable doubt each of the following matters in relation to each accused —

1. there was an agreement between two or more persons to commit … [*short title of the crime*]; and
2. [*name of the accused*], whose case you are considering, participated in that agreement … **[If applicable, add:** *from its outset or because they joined the conspiracy at a later date*] in the sense that —
   (a) they 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, they 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, with 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 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, they 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 actually carried out, but it is necessary for the Crown to prove that the accused intended that it be carried out. 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 their conduct, including any statements they may have made, indicated that they were 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.**]**

In this case, the Crown relies upon acts done and statements made by other persons alleged also to be conspirators, and done or made whilst the conspiracy is still active, as 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 they 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 of whether there was an agreement as alleged by the Crown and also as to the nature of that agreement. If those acts or statements done in their 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 their 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

Last reviewed: September 2026

1. Conspiracy is a continuous crime. It extends over the period of the agreement and lasts as long as it is being performed. It remains a single conspiracy no matter who joins or leaves it, provided that at any one time there are at least two persons acting in combination to achieve the same criminal objective: *R v Masters* (1992) 26 NSWLR 450 at 458; *R v Richards* (1992) 26 NSWLR 450 at 458; *Truong v The Queen* (2004) 223 CLR 122 at [35]. Thus, acts and statements of alleged co-conspirators may be admissible against an accused (subject to the tests in Note 3 below) even if they were done or made after the accused was arrested: *R v Louden* (1995) 37 NSWLR 683.
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 them: *R v Dougas* [2021] NSWSC 682 at [78]; *R v Cosgrove and Hunter* (unrep, 15/08/88, NSWCCA).
3. Before the "co-conspirator 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 other evidence admissible in the ordinary way against that accused) that there is *prima facie* reasonable evidence of participation of that accused in the alleged conspiracy. The jury is not to be told of the trial judge's finding, and there need not be a formal judgment or ruling to that effect, but the trial judge must indicate that they are satisfied that there is such reasonable evidence of participation prior to the summing up. It will usually be prudent for the trial judge to discuss with counsel how the jury will be directed in relation to the evidence of acts or statements of co-conspirators: *R v Masters.*

If there is reasonable independent evidence of an accused's participation, then acts or statements in their absence will be admissible against them 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 Crown alleges that the accused joined the conspiracy after it had commenced, then acts done or statements made prior to their joining the alleged conspiracy are admissible only to prove the existence of the alleged agreement and the nature of it, but not to prove their participation, and the jury should be carefully instructed on the limited way that evidence can be used. See generally: *Ahern v The Queen* (1988) 165 CLR 87; *R v Masters*; *R v Chai* (1992) 27 NSWLR 153; *R v Houlker* (unrep, 19/03/93, NSWCCA); *DPP (Cth) v Kola* (2024) 279 CLR 104 at [44].

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. The admission of this evidence is an exception to the hearsay rule: *Evidence Act*, ss 59(1) and 60(1); *DPP (Cth) v Kola* at [44]. Where evidence is admitted on a provisional basis under s 57(2), 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. Section 87(1)(c) of the *Evidence Act* provides that, for the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find it was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party. Sections 57 and 87 assume the existence of the common law co-conspirators rule but remove the requirement that there be evidence extraneous to the representation to establish the common purpose: *Macdonald v R* [2023] NSWCCA 250 at [148]–[149].

6. It is open to the trial judge in the exercise of their 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 that accused (pursuant to s 135 or s 137 of the *Evidence Act*) and/or to limit the use to which the jury might put such evidence under s 136 of the *Evidence Act*.

7. A warning under s 165 of the *Evidence Act* may be appropriate, for example, in relation to the hearsay nature of evidence of the acts and statements of others in the absence of a particular accused which implicate that accused, particularly if the accused had no opportunity to cross-examine the makers as to the truth of their representations: *R v Chai* (decided under the common law).

8. The common law rule that a husband and wife cannot be found guilty of conspiring together has been abolished: *Crimes Act 1900*, s 580D.

9. The *Criminal Procedure Act 1986*, Sch 3, cl 21 applies to an indictment for conspiracy and provides that it is not necessary to state any overt act of conspiracy. No more than three counts against the same accused person may be inserted in one indictment: Sch 3, cl 21(4). An indictment can allege that the accused conspired "with an unknown person" as Sch 3, cl 21 does not abrogate the common law: *R v Harrison* (1995) 79 A Crim R 149.

10. As to conspiracy to defraud, the jury should be directed that this involves an agreement to use dishonest means to achieve an object, and an agreement to bring about a situation to deprive another person of money or property, or to imperil the other person's rights or interests, knowing that they have no right to deprive that other person of money or property, or imperil that other person's rights or interests. The summing up should identify the dishonest means relied upon by the Crown: *Peters v The Queen* (1998) 192 CLR 493 at [30]–[33]; [72], [83]; *Spies v The Queen* (2000) 201 CLR 603 [77]–[80]. See also **Defraud — Intent to [5-5500]**.

11. Having regard to the definition of "supply" in s 3 of 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 person: *R v Chow* (1987) 11 NSWLR 561; *R v Challita* (1988) 37 A Crim R 175 at 184 (both cases considered the identical definition of "supply" in the *Poisons Act 1966*, now the *Poisons and Therapeutic Goods Act 1966*). Nor does an expectation by a seller that the purchaser of a prohibited drug would on-sell it to others amount to an agreement to establish a conspiracy: *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 a person, or persons not being conspirators with them: *Tannous v The Queen* (1989) 64 ALJR 141. Section 26 of the *Drug Misuse and Trafficking Act* provides that a person who conspires with another person or other persons to commit an offence under Div 2 is guilty of an offence.

12. An accused may be liable for conspiracies to do the factually impossible: *R v El Azzi* [2001] NSWCCA 397 at [34].

[The next page is 931]

Dangerous driving

***Crimes Act 1900* (NSW), s 52A**

[5-5400] Introduction

Last reviewed: April 2026

The offences involving dangerous driving are contained in s 52A *Crimes Act 1900* and pertain to driving a vehicle that is involved in an impact. There are two basic offences depending upon the consequences of the impact:

- s 52A(1) where death is occasioned, and
- s 52A(3), where grievous bodily harm is occasioned.

An inclusive definition of circumstances in which a vehicle is relevantly "involved in an impact" is contained in s 52A(5). Section 52A(6) provides an extension to this definition where a vehicle causes an impact between other vehicles or causes other vehicles to overturn or leave the road.

There are aggravated forms of each of the basic offences. The circumstances of aggravation are set out in s 52A(7).

Section 52A(8) provides defences to each of the offences.

Section 52AA contains various procedural matters, particularly in relation to 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

Last reviewed: April 2026

1. A dangerous driving offence is committed where there is, objectively, a quality in the manner of driving which either intrinsically in all the circumstances, or because of the particular circumstances surrounding the driving, is in a real sense potentially dangerous: *Haynes v R* [2024] NSWCCA 12 at [8]; *McBride v The Queen* (1966) 115 CLR 44 at 49.
2. The test is objective and requires proof that the accused's driving subjected another person or persons to a level of risk greater than that ordinarily associated with the driving of a motor vehicle: *Jiminez v The Queen* (1992) 173 CLR 572 at 579; *King v The Queen* (2012) 245 CLR 588 at [34]; *Haynes v R* at [8]. The manner of driving must be a serious breach of the proper conduct of a vehicle on a roadway, such as to be in a real sense potentially dangerous to others who may be upon, or in the vicinity of, the roadway: *Haynes v R* at [8]; *McBride v The Queen* at 49–50.
3. Generally see *King v The Queen* 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.

4. The offences in s 52A are strict liability (as to which see *Jiminez v The Queen*) and the defence of an honest and reasonable mistake of fact that it was safe to drive may arise.

5. As to causation, in the context of the extended meaning of "involved in an impact occasioning death" under s 52A(6), the Crown must prove the conduct in driving was a substantial or significant cause, or a sufficiently substantial cause of the outcome; it need not be the only operating cause: *Omigie v R* [2024] NSWCCA 205 at [58]. In *Omigie v R* the accused's car itself did not make contact with other vehicles, but his sudden stopping on a busy motorway was the substantial and operating cause for impacts between other vehicles that resulted in a motorist's death: [93].

6. It is for the accused to prove on the balance of probabilities that the impact causing death was not in any way attributable to the fact the accused was under the influence of intoxicants. The defence under s 52A(8) operates by placing a persuasive and not merely evidential burden on the accused: *Irvin v R* [2024] NSWCCA 70 at [22]–[23], [38].

7. 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; 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].

8. 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. *El Seidi v R* [2021] NSWCCA 303 at [14], [16] sets out the appropriate directions to be given in cases where involuntariness, including where the accused suffered an epileptic seizure at the time of impact, is an issue.

9. In *Jiminez v The Queen* at [21]–[22], 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 might honestly have 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, the trial judge must 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, their actions while asleep were not voluntary and could not amount to dangerous driving.

10. 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*.

11. "Dangerous" does not require proof of some species of criminal negligence: *King v The Queen* (2012) 245 CLR 588 at [38].

12. In *Haynes v R*, the offender had a known history of sudden fainting, and had sufficient warning of oncoming loss of consciousness such that the driving was "dangerous".

13. "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 involves 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*.

14. Where a child in utero is injured through impact with a motor vehicle or through impact with any object of a motor vehicle in or on which that child in utero was being conveyed, is subsequently born, lives independently and then dies as a result of the injuries sustained, the child is a person for the purposes of s 52A: *R v F* (1996) 40 NSWLR 245.

15. Where an impact causes a child to be born prematurely, and the child later dies due to complications of prematurity, the impact can be said to have occasioned the death of a person, even though that person was not alive at the time of the impact: *Whelan v R* [2012] NSWCCA 147.

16. Whether an infant has been "born alive" is a question of fact which can be satisfied by any indicia of independent life, such as crying, breathing independently from the mother (including where assisted by mechanical respiration) or having a heartbeat after delivery: *R v Iby* (2005) 63 NSWLR 278.

[5-5420] Suggested direction — dangerous driving occasioning death

Last reviewed: April 2026

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 they drove a vehicle involved in an impact, which caused the death of [*name of deceased*], and that at the time of that impact the accused 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 they have 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 they create 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 deceased*]. 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 they were driving the vehicle in a dangerous manner. Their 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, their experience or inexperience as a driver. A person can be driving dangerously even though that person believes that they are doing their 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, driving in a particular manner at one point in time does not mean that the person is driving in that same manner at another point in 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 their mind to the issue. On the other hand where the accused is driving their 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 their 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 their skill in attempting to overcome the defect.

However, the accused says they had no knowledge at any time that the vehicle was defective even when they were driving it. Their case is that they honestly and reasonably believed it was safe to drive the vehicle. They rely 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 they did not hold such a belief or, if they did, it was not reasonable to hold that belief in all the circumstances as known to them. 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 they believed at the time of driving. You are concerned with what was or was not in their 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 them, 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 them 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 their 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 they 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 they 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 them 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 they were about to lose consciousness. In looking at whether the driving was dangerous you do not consider what the accused believed or thought about their 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 they 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 them to lose control of the vehicle, then you may have no difficulty in finding they were 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 they had no reason to believe they might fall asleep at the point before losing control of the vehicle. The accused contends they 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 they did, it was not reasonable to hold that belief in all the circumstances as known to them. 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 they believed at the time of driving. You are concerned with what was or was not in their 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 them, 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 them 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 their 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 they honestly and reasonably believed that it was safe to drive the vehicle. It is for the Crown to prove beyond reasonable doubt that they did not have that belief. If it is possible they did have such belief, then the Crown must prove that it was not a reasonable belief in the circumstances known to them.

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 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 effect of the alcohol upon the accused, they were 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 their 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 they 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 their 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]

Demand property with intent to steal

***Crimes Act 1900* (NSW), s 99**

[5-5600] Introduction

Last reviewed: September 2025

The following suggested direction deals with demanding property with menaces or by force with intent to steal under s 99 of the *Crimes Act 1900*. It should be adapted where the aggravating form of the offence under s 99(2) (in company) is charged.

[5-5610] Suggested direction — demand property with intent to steal (s 99)

Last reviewed: September 2025

The accused is charged with demanding property [*with menaces/by force*], with intent to steal property.

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 made a demand for property, and
2. The demand was accompanied by [*menaces/force*], and
3. The accused intended to steal the property.

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.

I will now explain to you what each element means.

1. The accused made a demand for property

A demand can be express or implied. In the present case, the Crown alleges the accused made their demand of [*the alleged victim*] expressly by … [*specify the Crown case as to demand*].

[*Alternatively:*

Here the Crown alleges that, although the accused did not make the demand expressly, you would infer from all of the circumstances and what was [*said/done*] to [*the alleged victim*] that the accused was demanding the property from [*the alleged victim*]. [*A direction on the care required in relation to drawing inferences should be considered: see **[3-150]***].**]**

On the other hand, the accused denies that any such demand was made, whether in express words or by inference. The accused says … [*specify defence case as to demand*].

2. Accompanied with menaces/by force

The second element the Crown must prove is that the demand was accompanied [*with menaces/by force*]. [*Where appropriate:* "Menaces" means a threat. Here, the Crown alleges [*specify the threat/force used*]].

The Crown has to prove what the accused actually said or did. When you have decided what the accused has 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 means, you as the jury have to decide whether a person of ordinary firmness of mind would have regarded what the accused [*said/did*] as [*a threat/force*], and would have likely been influenced so as to give in unwillingly to the demand. This is the test to apply, rather than whether the [*alleged victim*] themselves was or would have likely been influenced by it to act in a way contrary to [*the alleged victim's*] wishes. That is what I meant by saying the matter is to be determined objectively, by your assessment of the reaction of a person of ordinary firmness of mind which may or may not have been the reaction of [*the alleged victim*] in this case.

The menace need not involve violence or injury and can be by the accused or any other person. [*Specify how the Crown puts its case in this respect*.]

It is also not necessary that [*the alleged victim*] actually gives way to the threat or the force, or actually hands the property over.

[*Set out the respective Crown and defence cases as to the threat or force*].

3. With the intention to steal

The third element the Crown must prove is that at the time the accused made the demand on [*the alleged victim*] for their property [*as specified in indictment*], they had the intention to steal it. To prove this, the Crown must satisfy you beyond reasonable doubt the accused, when they made the demand, intended to permanently deprive [*the alleged 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.

[*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 the end of **[5-6105]** and may be adapted to suit the circumstances of the case*].

The Crown alleges … [*specify the Crown case on intent to steal*]. On the other hand, the accused says … [*specify the defence case on intent to steal*].

[5-5620] Notes

Last reviewed: September 2025

1. A demand may be explicit or implicit. It is for the jury to determine whether there was a demand in all the circumstances: *R v Collister* (1955) 39 CR App R 100 at 105; cited with approval in *Delaney v R* [2013] NSWCCA 150 at [22]–[25]. For a case where an implicit threat amounted to a menace (and where the prosecution case was the demand itself constituted the threat), see *DPP v Curby* [2000] NSWSC 745.
2. The demand need not be communicated directly to an intended target, but it must be made with the intention that it should be conveyed or communicated to the person to whom it is directed in circumstances which are apt to achieve that end.

This is a question of fact: *Austin v The Queen* (1989) 166 CLR 669 at 674–675; see also discussion of *Austin v The Queen* in *Delaney v R* at [28] and in *Rae v R* (1998) 45 NSWLR 546 at 549–550 (in relation to a use carriage service to menace offence).

3. Subsection (3) was added to s 99 by the *Crimes Amendment Act 2007* which also repealed ss 100–105. Section 105 had provided, "It shall be immaterial whether any such menace or threat, as is referred to in sections 99 to 103 both inclusive, is of violence, or injury, or of an accusation to be caused, or made, by the offender, of by any other person, or whether the accusation, if made, shall purport to be that of the offender, or some other person". This was construed in *DPP v Kuo* (1999) 49 NSWLR 226 at [6] to broaden the scope of the "menaces" so as to include harm done by words as well as by physical force, and harm done by the words of persons other than the person accused. Given this legislative history, it is suggested that s 99(3) should be construed in the same manner. Arguably, it could also be construed as providing it is immaterial whether the threat and the threatened action is by different people. Because s 99(3) is broad and includes possibilities that may be irrelevant to the case at hand, the above suggested direction should be followed by a precise statement of what the Crown case is in the present case.

4. Lord Wright in *Thorne v Motor Trade Association* [1937] AC 797 at 817 stated: "I think the word 'menace' is to be construed liberally and not as limited to threats of violence but as including threats of any action detrimental or unpleasant to the person addressed. It may also include a warning that in certain events such action is intended". The test of whether the threat is a menace is whether it is "of such a nature and extent that the mind of an ordinary person of normal stability and courage might be influenced or made apprehensive so as to accede unwillingly to the demand": *R v Clear* [1968] 2 WLR 122 at 130. It is immaterial whether the menace is of violence or injury by the accused or by any other person: *Crimes Act*, s 99(3). Menaces are not limited to threats of actual physical harm: *Rae v R* at 553–555 (and the cases there cited). It also includes threats to a person's property: *DPP v Kuo* at [6]; cited in *Pellegrino v Harman* [2016] ACTSC 366 at [140]–[141] (in relation to a use carriage service to menace offence).

5. For a case where claim of right was raised in a count for demanding property with menaces with intent to steal, see *R v Bernhard* [1938] 2 All ER 140.

[The next page is 955]

Blackmail

***Crimes Act 1900* (NSW), s 249K**

[5-5650] Introduction

Last reviewed: December 2025

Section 249K of the *Crimes Act 1900* creates a single offence of blackmail, found at Pt 4B. A person is guilty of blackmail if they make an unwarranted demand with menaces with the intention of either obtaining a gain or causing a loss, or influencing the exercise of a public duty: s 249K(1). Section 249K(2) provides an aggravated form of the offence where the unwarranted demand with menaces involves an accusation, or a threatened accusation, that a person has committed a serious indictable offence.

The provision is based on the *Model Criminal Code* offence of blackmail: Second Reading Speech, Crimes Amendment Bill 2007, Legislative Assembly, *Debates,* 25/9/2007, p 2259; see also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code*, Final Report, December 1995, Ch 3, pp 179–192. According to that report, the *Model Criminal Code* blackmail offence was based on the *Theft Act 1968* (UK) offence of blackmail: p 183.

For the purposes of s 249K, "unwarranted demand", "menaces", "obtaining a gain or causing a loss" and "public duty" are defined in ss 249L–249O respectively. "Menaces" is non-exhaustively defined as a threat (see s 249M(1)), however, Cavanagh J in *Petch v R* (2020) 103 NSWLR 1 at [127] observed that it is difficult to anticipate how any other meaning could be given to "menaces" for the purpose of s 294K.

[5-5660] Suggested direction — blackmail (s 249K)

Last reviewed: December 2025

The following direction can be modified where the charge alleges the accused made unwarranted demands with the intention of influencing the exercise of a public duty (s 249K(1)(b)). Modification will also be required in a case in which the Crown alleges the aggravating circumstance in s 249K(2).

The suggested direction assumes the menaces are constituted by a threat, the alleged victim of the demand and alleged victim of the threat are the same individual and the accused intended to carry out the threat themselves. The directions should be adapted appropriately if this is not the case.

The accused is charged with making an unwarranted demand with menaces with the intention of [*obtaining a gain/causing a loss*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following elements:

1. The accused intentionally made an unwarranted demand;
2. The demand was made with menaces;
3. The accused intended the demand be made with menaces that would cause a person of normal stability and courage to act unwillingly in response to the threat;
4. The accused intended to [*obtain a gain/cause a loss*].

If you are not satisfied of any one or more of these elements beyond reasonable doubt, then you must find the accused not guilty of the offence.

I will now explain to you what each of these elements means.

1. The accused intentionally made an unwarranted demand

The first element is that the accused intended to make an unwarranted demand. 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 and from the accused's conduct before, at the time of, or after they made the unwarranted demand.

A demand can be express or implied. In the present case, the Crown alleges the accused made their demand of [*the complainant*] expressly by … [*specify the Crown case as to demand*].

[*Alternatively*:

Here the Crown alleges that, although the accused did not make the demand expressly, you would infer from all of the circumstances and what was [*said/done*] to [*the complainant*] that the accused was demanding the property from them. **[***a direction on the care required in relation to drawing inferences should be considered: see* ***[3-150]/]***

A demand is unwarranted unless the accused believes that there are reasonable grounds for the making of the demand and they reasonably believe that the use of the menaces is a proper means of reinforcing the demand.

2. The demand was made with menaces

The second element the Crown must prove is that the demand was made with menaces. Menaces include an express or implied threat of any action detrimental or unpleasant to another person.

A threat is not a menace unless:

- the threat would cause a person of normal stability and courage to act unwillingly in response to the threat; or
- the threat would cause the particular person to act unwillingly in response to the threat and the accused was aware of the vulnerability of the particular person to the threat.

3. The accused intended the demand be made with menaces by way of a threat

The third element is that the accused intended the demand be made with menaces by way of a threat.

4. The accused intended to [*obtain a gain/cause a loss*]

Finally, the Crown must prove the accused intended to [*obtain a gain/cause a loss*].

[*Where the charge specifies a gain:*

The Crown must prove the accused intended to obtain a gain. A "gain" means gain in money or other property, whether temporary or permanent, and includes keeping what one has. "Obtaining a gain" means obtaining a gain for oneself or for another, in this case [*the complainant/another*].

It is not necessary for the accused to know the amount of the gain when the demand was made.**]**

[*Where the charge specifies a loss:*

The Crown must prove the accused intended to cause a loss. A "loss" means loss in money or other property, whether temporary or permanent, and includes not getting what one might get. "Causing a loss" means causing a loss to another, in this case [*the complainant/another*]**.**

It is not necessary for the accused to know the amount of the loss when the demand was made.**]**

[5-5670] Notes

Last reviewed: December 2025

1. While the directions are based on the language of the statute, the commentary at **[5-5600]**ff in relation to s 99 offences (demand property with menaces) and the common law may provide assistance.
2. In the Second Reading Speech, the Attorney General described "menaces" as "a well-known term at law. It is not confined to threats of harm or violence, and will be defined, non-exhaustively, in the legislation to include express or implied threats of detrimental action": Second Reading Speech, Crimes Amendment Bill 2007, Legislative Assembly, *Debates*, 25/9/2007, p 2259. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code*, Final Report, December 1995, Ch 3, p 185.
3. "Menaces" includes an express or implied threat of any action detrimental or unpleasant to another person (s 249M(1)(a)), and a general threat of detrimental or unpleasant action that is implied because the person making the unwarranted demand holds a public office (s 249M(1)(b)). A threat that would cause *either* an ordinary individual of normal stability and courage, *or* the particular victim, where the accused is aware of their vulnerability to the threat, to act unwillingly, is a menace: s 249M(2) (see s 249M(3) for equivalent provision in relation to threats against a government or body corporate).
4. The accused must intend to make a threat and intend to cause the person subject to that threat to act unwillingly in response to it: *Petch v R* [2020] NSWCCA 133 at [47]. Accordingly, the jury must be directed that the offence is only established if it is proved the accused intended to make an unwarranted demand with menaces which requires (amongst other things) proof that they intended to make a threat. No particular form of words is required but it must be made clear, especially in the case of an implied threat, that the accused intended to make an unwarranted demand, intended the demand to be with menaces and that this involves an intention to make a threat: *Petch v R* at [49]; cf Cavanagh J at [124]–[155] who held there was no requirement for the Crown to prove an intent to menace.
5. A threat characterised as an inducement will not constitute a menace. For example, in *Petch v R* the Crown was granted leave to amend the original indictment that alleged the unwarranted demand was made to improve the complainant's job prospects, so that the menaces was particularised in terms that the complainant's

job prospects would be adversely affected if she did not comply with unwarranted demand: [19]; see also the discussion in *R v Jessen* [1997] 2 Qd R 213 at 220–221 (in relation to a similar Queensland provision).

6. For an offence alleging the accused intended to obtain a gain, there is no requirement for the amount of the *"gain"* to be quantified; nor does the prosecution have to prove that the accused knew the amount of gain when the demand was made: *R v Barrett (No 4)* [2021] NSWSC 365 at [19]. The same reasoning would apply to an intention to cause a loss.

[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.

[The next page is 981]

Fraud — Part 4AA Crimes Act 1900

[5-5900] Introduction

Last reviewed: December 2025

Part 4AA was inserted into the *Crimes Act 1900* with effect from 22 February 2010 by the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009*.

[5-5910] Definitions

Last reviewed: December 2025

Dishonesty — Dishonesty means "dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people": s 4B. It is a question of fact: s 4B(2). For claim of right, see **Larceny** at **[5-6110]** and the Suggested direction at **[5-6105]**.

Deception — Deception means any deception, by words or other conduct, as to fact or as to law: s 192B. It must be either reckless or intentional: s 192B(2). See further below.

Recklessness — The element of recklessness may also be established by proof of intention or knowledge": s 4A.

Obtaining property belonging to another — defined in s 192C.

Property — defined in s 4.

Financial advantage or disadvantage — undefined in the *Crimes Act*, but it is a simple concept, expressed by the use of common words each of clear meaning, not requiring a narrow construction: *R v Walsh* (1990) 52 A Crim R 80 at 81; *Elias v The Director of Public Prosecutions (NSW)* [2012] NSWCA 302 at [41]; *Re Robert Burton* [2021] NSWCCA 87 at [81]. A financial advantage or disadvantage may be permanent or temporary: s 192D.

"Obtaining" a financial advantage or "causing" a financial disadvantage — defined in s 192D. A person obtains a financial advantage by proffering a valueless cheque in payment of an outstanding debt: *R v Vasic* [2005] VSCA 38. The advantage may be the retention of funds for a longer period, deferral of any steps which might be taken by the creditor to enforce the debt or an opportunity to seek finance. A similar analysis may be applied where the advantage is the retention of an asset the value of which would be diminished absent the deception: *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [657].

[5-5920] Section 192E — fraud

Last reviewed: December 2025

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. "Deception" and "dishonestly" are separate elements which the prosecution must prove.

The obtaining of property 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 offence must be committed both "by deception" and "dishonestly".

An accused can commit the offence "by deception" either intentionally *or recklessly*, recklessly meaning with foresight of a (real) possibility about a state of affairs or a consequence: *Bazouni v R* [2021] NSWCCA 256 at [81].

The *lesser* state of mind of recklessness is sufficient to prove the element of "by deception". But the *greater* state of mind of knowledge is necessary to prove the element of "dishonestly". Except in most unusual circumstances, it will be necessary to direct the jury about those two mental elements separately: *Bazouni v R* at [82]–[83].

The definition of "deception", in s 192B, does not require the deception to induce a false belief in the recipient of information. Rather, the relevant effect is prescribed by the element of obtaining any financial advantage or causing financial disadvantage: *Dimitriou v R* [2025] NSWCCA 18 at [95]; *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [647].

Further, the phrase "by deception", in s 192E(1), requires a causal connection between the deception and the relevant effect: *Dimitriou v R* at [95], [97]–[98]; *Duncan v Independent Commission Against Corruption* at [352]; *Flack v R* [2011] NSWCCA 167 at [37]; *R v Ho* (1989) 39 A Crim R 145 at 147. That does not require the deception be the sole cause of the outcome, but is satisfied where the deception substantially or significantly contributed to the outcome: *Dimitriou v R* at [96]; *Re Robert Burton (a pseudonym)* [2021] NSWCCA 87 at [63]–[64]; *Flack v R* at [37]. *Flack v R* and *R v Ho*, which relate to predecessor s 178BA, are "equally applicable" to current s 192E: *Re Robert Burton* at [63]. Causation can still be established if there is another "step along the way" to the outcome which severs the causal chain between the deception and the outcome: *Re Robert Burton* at [77]. It is a question of fact for the jury, unless there is no evidence sufficient to support that causal connection: *Re Robert Burton* at [64]–[65].

The prosecution must prove that the deception caused the financial advantage to be obtained (or financial disadvantage suffered) or was the effective cause of the financial advantage being obtained (or the financial disadvantage being suffered): *Re Robert Burton* at [63].

It is not necessary to show that the person deceived suffered the loss or obtained the advantage: *R v Ho* at 147; *Flack v R* at [36]–[37]; *Duncan v Independent Commission Against Corruption* at [350].

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: *R v SKL* [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. However, 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: *R v SKL* at [62], [74]–[75]; *Hughes v R* [2021] NSWCCA 238 at [47], [49], [50].

The mental element necessary for proof of dishonesty has two components. The first is proof beyond reasonable doubt that ordinary persons applying their own standards would regard the alleged acts of the accused as dishonest. The second is proof beyond reasonable doubt that the accused *knew* ordinary persons would make that assessment. The mental element of dishonesty can be thought of as a *subjective* state of mind of knowledge, on the part of the accused, about an *objective* norm that sits outside their own assessment and is reposed in ordinary members of the community: *Bazouni v R* at [75]–[78].

In *Dimitriou v R*, the Court set out the elements of the offence (at [75], [88], [94]–[103]) and rejected the applicant's submission that there was a further fault element attaching to the consequence element (i.e. that "the causing of a financial disadvantage was intentional or reckless").

The term "financial advantage" should be given its ordinary meaning: *R v Walsh* (1990) 52 A Crim R 80 at 81; see also **Definitions** at **[5-5910]**.

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)–(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) regarding the treatment of property as the accused's own regardless of the complainant's rights. Therefore the directions below should be modified to accommodate other forms of the offences where necessary.
The headings in the below direction are not intended to be read out to the jury by the trial judge.

[5-5925] Section 192E(1)(a) — Suggested direction — fraud by dishonestly obtaining property

The accused is charged with dishonestly obtaining property being [*the nature of the property*] that belonged to [*the complainant*] by deception.

The Crown alleges that the property belonged to [*the complainant*] because they had possession of the property.

The Crown alleges that the accused obtained the property by obtaining possession of the property for themself.

To prove the accused guilty, the Crown must prove beyond reasonable doubt each of the following elements:

1. The accused obtained the property with the intent to permanently deprive the complainant of it,
2. The accused intended to carry out the deceptive conduct, or was reckless in that regard,
3. The property was obtained as a result of the accused's deceptive conduct,
4. In deceiving [*the complainant*] the accused acted dishonestly.

1. Obtained property with intention to permanently deprive

The Crown must prove that the accused obtained the property in the manner alleged and did so intending to permanently deprive [*the complainant*] of the property; that is, they did not intend that the property would be returned to [*the complainant*].

[*If necessary, add:*

Merely borrowing the property or lending 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.]

2. The accused intended to carry out the deceptive conduct to obtain the property, or was reckless in that regard

The deception that the Crown alleges — and that must be proved — is that the accused [*the nature of the deception alleged*]. 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 they foresaw the possibility of [*the complainant*] being deceived by their conduct and parting with the property but they nevertheless continued with their course of conduct.

3. The property was obtained as a result of the accused's deceptive conduct

You must also be satisfied that as a result of that deceptive conduct the accused obtained the property the subject of the charge.

4. In deceiving [*the complainant*] the accused acted dishonestly

The Crown must prove that the accused acted dishonestly in their deceptive conduct. Dishonest in this context means dishonest according to the standards of ordinary people. You, as ordinary members of the community, determine what is dishonest. You must be satisfied both:

- that the accused, in deceiving [*the complainant*], acted dishonestly according to the standards of ordinary people; **and**
- that the accused knew their conduct was dishonest according to the standards of ordinary people.

[*If necessary, add:*

A person may obtain property dishonestly even if they were willing to pay for the property.]

[If a claim of right is raised as a response to an allegation of dishonesty: see **Larceny** at **[5-6110]** and **[5-6105]**.]

[5-5930] Section 192E(1)(b) — Suggested direction — fraud by dishonestly obtaining financial advantage

Last reviewed: December 2025

The accused is charged with dishonestly [*obtaining a financial advantage for themselves*/*keeping a financial advantage they had*] by deception.

To prove the accused guilty, the Crown must prove beyond reasonable doubt each of the following elements:

1. The accused obtained a financial advantage,
2. The accused intended to carry out the deceptive conduct, or was reckless in that regard,
3. The financial gain was obtained as a result of the accused's deceptive conduct,
4. In deceiving [*the complainant*], the accused acted dishonestly.

1. The accused obtained a financial advantage

The Crown must prove the accused obtained a financial advantage. The Crown alleges the financial advantage was [*set out financial advantage*]. [*If relevant:* It does not matter whether the financial advantage was permanent or temporary.]

2. The accused intended to carry out the deceptive conduct, or was reckless in that regard

The Crown alleges that the deception perpetrated by the accused was [*set out the deception*]. It must also prove 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, the accused would [*obtain a financial advantage*/*retain the financial advantage that they had*] but went on to act as they did despite that possibility.

[*If relevant:* However, the Crown does not need to prove a particular person was deceived.]

3. The financial gain was obtained as a result of the accused's deceptive conduct

The Crown must also prove that the financial advantage was obtained as a result of that deception. It is not necessary for the Crown to establish that the deception was the sole cause of the financial advantage, although it must establish that the deception substantially or significantly contributed to it.

4. In deceiving [*the complainant*], the accused acted dishonestly

The Crown must prove that the accused acted dishonestly in their deceptive conduct. Dishonest in this context means dishonest according to the standards of ordinary people. You, as ordinary members of the community, determine what is dishonest. You must be satisfied both:

- that the accused, in deceiving [*the complainant*], acted dishonestly according to the standards of ordinary people; **and**
- that the accused knew their 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 **[5-6110]** and **[5-6105]**.]

[5-5935] Section 192E(1)(b) — Suggested direction — fraud by dishonestly causing financial disadvantage

Last reviewed: December 2025

The accused is charged with dishonestly causing a financial disadvantage to another person namely [*the complainant*] by deception.

To prove the accused guilty, the Crown must prove beyond reasonable doubt each of the following elements:

1. The accused caused a financial disadvantage,
2. The accused intended to carry out the deceptive conduct, or was reckless in that regard,

3. The financial disadvantage was caused by the accused's deceptive conduct,
4. In deceiving [*the complainant*], the accused acted dishonestly.

1. The accused caused a financial disadvantage

The Crown contends that the financial disadvantage is [*set out the financial disadvantage*]. [*Where relevant:* It does not matter whether the financial disadvantage was permanent or temporary.]

2. The accused intended to carry out the deceptive conduct, or was reckless in that regard

The Crown alleges that the deception perpetrated by the accused was [*set out the deception*]. It must also prove 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, they would [*cause a financial disadvantage to ...*] but went on to act as they did notwithstanding that possibility.

[*Where relevant*: However, it is not necessary for the Crown to prove a particular person was deceived.]

3. The financial disadvantage was suffered as a result of that deception

The Crown must also prove the financial disadvantage suffered by [*the complainant*] was caused by the deception. It is not necessary for the Crown to establish that the deception was the sole cause of the financial disadvantage, although it must establish that the deception substantially or significantly contributed to it.

4. In deceiving [*the complainant*], the accused acted dishonestly

The Crown must prove that in deceiving [*the complainant*] the accused acted dishonestly. Dishonest in this context means dishonest according to the standards of ordinary people. You, as ordinary members of the community, determine what is dishonest. You must be satisfied both:

- that the accused, in deceiving [*the complainant*], acted dishonestly according to the standards of ordinary people; **and**
- that the accused knew that their 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 **[5-6110]** and **[5-6105]**.]

[5-5940] Section 192F — intention to defraud by destroying or concealing records

Last reviewed: December 2025

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.

As to dishonesty see **[5-5910]** and s 4B.

As to property, see **[5-5910]** and s 4.

As to destroy, "destroy" includes "obliterate": s 192F(2).

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]**) and should be modified to accommodate other forms of the offences where necessary. It can be easily adapted for offences of destroy or conceal records with intent to obtain financial advantage (s 192F(1)(b)),and destroy or conceal records with intent to cause financial disadvantage (s 192F(1)(c)).

The terms of s 192F, unlike s 192E, do not require financial advantage actually be obtained but rather that there be an intention to obtain such an advantage: *Dimitriou v R* [2025] NSWCCA 18 at [97]; *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [350]; *Hughes v R* [2021] NSWCCA 238 at [29].

[5-5945] Section 192F(1)(a) — Suggested direction — destroy or conceal records with intent to obtain property

Last reviewed: December 2025

The accused has been charged with dishonestly [*destroying/concealing*] accounting records being [*set out the records alleged*] with the intention of obtaining property belonging to [*the complainant*].

To prove the accused guilty, the Crown must prove beyond reasonable doubt each of the following elements:

1. The accused [*destroyed/concealed*] accounting records,
2. The accused intended to obtain property belonging to [*the complainant*],
3. In [*destroying/concealing*] those records, the accused acted dishonestly.

1. The accused destroyed or concealed accounting records

The Crown must prove that the accused did [*destroy/conceal*] the accounting records belonging to another person. Property belongs to another person if that person has possession of the property.

2. The accused intended to obtain property

The Crown must also prove the accused had the intention of obtaining property belonging to [*the complainant*]. This means the accused intended to obtain possession of the property for themself and deprive [*the complainant*] permanently of the property.

[*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 complainant*]. But the offence will be made out if the Crown proves that the accused intended to treat the property as if it were their own and to dispose of it regardless of [*the complainant's*] rights to the property. Borrowing or lending the property to another may amount to an intention to disregard [*the complainant'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.]

3. In destroying those records, the accused acted dishonestly

It must also prove that in [*destroying/concealing*] those records they acted dishonestly. Dishonest in this context means dishonest according to the standards of ordinary people. You, as ordinary members of the community, determine what is dishonest. You must be satisfied both:

- that the accused, in [*destroying/concealing*] the records, acted dishonestly according to the standards of ordinary people; **and**
- that the accused knew that their conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response: see **Larceny** at **[5-6110]** and **[5-6105]**.]

[5-5950] Section 192F(1)(b) — Suggested direction — destroy or conceal records with intent to obtain financial advantage

Last reviewed: December 2025

The accused has been charged with dishonestly [*destroying/concealing*] accounting records being [*set out the records alleged*] with the intention of [*obtaining a financial advantage for themself/ keeping a financial advantage they have*].

To prove the accused guilty, the Crown must prove beyond reasonable doubt each of the following elements:

1. The accused [destroyed/concealed] accounting records,
2. The accused intended to obtain a financial advantage,
3. In [*destroying/concealing*] those records, the accused acted dishonestly.

1. The accused destroyed or concealed accounting records

The Crown must prove that the accused did [*destroy/conceal*] the accounting records belonging to another person. Property belongs to another person if that person has possession of the property.

2. The accused intended to obtain a financial advantage

The Crown must prove that the accused had the intention of obtaining a financial advantage from [*the complainant*]. The financial advantage alleged here is [*set out the financial advantage*]. It does not matter whether the financial advantage is permanent or temporary.

3. In [*destroying/concealing*] those records, the accused acted dishonestly

It must also prove that, in [*destroying/concealing*] those records, the accused acted dishonestly. Dishonest in this context means dishonest according to the standards of ordinary people. You, as ordinary members of the community, determine what is dishonest. You must be satisfied both:

- that the accused, in [*destroying/concealing*] those records, acted dishonestly according to the standards of ordinary people; **and**
- that the accused knew that their conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response: see **Larceny** at **[5-6110]** and **[5-6105].**]

[5-5960] Section 192G — intention to defraud by false or misleading statement

Last reviewed: December 2025

Section 192G makes it an offence to dishonestly make, publish or concur in making or publishing, a statement (whether or not in writing) that is false or misleading in a material particular with the intention of obtaining property property belonging to another or obtaining a financial advantage or causing a financial disadvantage.

Definitions

As to obtaining property, see **[5-5910]** and s 192C.

As to obtaining a financial advantage, see **[5-5910]** and s 192D.

As to dishonesty, see **[5-5910]** and s 4B.

As to property, see **[5-5910]** and 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* (1995) 79 A Crim R 199 at 202, applying *Minister for Immigration, Local Government & Ethnic Affairs v Dela Cruz* (1992) 34 FCR 348 at 352.

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 at 204.

Note: The terms of s 192G, unlike s 192E, do not require financial advantage actually be obtained but rather that there be an intention to obtain such an advantage: *Dimitriou v R* [2025] NSWCCA 18 at [97]; *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [350]; *Hughes v R* [2021] NSWCCA 238 at [29].

The suggested directions below do not cover or describe every permutation of the offences and should be modified to accommodate other forms of the offences where necessary.

[5-5965] Section 192G(a) — Suggested direction for obtaining property belonging to another — intention to defraud by false or misleading statement

Last reviewed: December 2025

The accused has been charged with dishonestly [*making/publishing/concurring 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 complainant*].

To prove the accused guilty, the Crown must prove beyond reasonable doubt each of the following elements:

1. the accused [*made/published/concurred in the making/publishing of*] the statement alleged in the charge;
2. The accused knew the statement was false or misleading;
3. The falsity or misleading nature of the statement was a material particular;

4. The accused [*made/published a statement/concurred in the making/publishing of a statement*] intending to obtain property belonging to another;
5. The accused did these things dishonestly.

1. The accused [*made/published/concurred in the making/publishing of*] the statement alleged

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 that the accused [*made/published/concurred in the making/publishing of*] the statement alleged in the charge.

2. The accused knew statement was false or misleading

The Crown must prove that the accused knew that this statement was false or misleading in the way alleged by the Crown.

3. The falsity or misleading nature was a material particular in the statement

The Crown must prove 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*].

4. 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 the intention with which the accused [*made/published the statement/concurred in the making/publishing of the statement*]. The charge alleges that [*the statement was made/published by the accused or 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 themself.

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 complainant*]. 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 their own and to dispose of it regardless of [*the complainant's*] rights to the property. Borrowing or lending the property to another may amount to intention to disregard [*the complainant'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. The accused acted dishonestly

The Crown must prove that the accused did these things dishonestly. Dishonestly in this context means dishonest according to the standards of ordinary people. You, as ordinary members of the community, determine what is dishonest conduct. You must be satisfied both:

- that the accused acted dishonestly in their involvement with a false or misleading statement in order to obtain another person's property; **and**
- that the accused knew their conduct was dishonest according to the standards of ordinary people.

[If necessary, give a direction on claim of right: see **Larceny** at **[5-6110]** and **[5-6105]**.]

[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

Last reviewed: December 2025

The accused has been charged with dishonestly [*making/publishing/concurring 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*].

To prove the accused guilty, the Crown must prove beyond reasonable doubt each of the following elements:

1. the accused [*made/published/concurred in the making/publishing of*] the statement alleged in the charge;
2. The accused knew the statement was false or misleading;
3. The falsity or misleading nature of the statement was a material particular;
4. The accused [*made/published a statement/concurred in the making/publishing of a statement*] intending to obtain a financial advantage/ cause a financial disadvantage;
5. The accused did these things dishonestly.

1. The accused [*made/published/concurred in the making/publishing of*] the statement alleged in the charge

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 that the accused [*made/published/concurred in the making/publishing of the statement*] alleged in the charge.

2. The accused knew the statement was false or misleading

The Crown must also prove that the accused knew that this statement was false or misleading in the way alleged by the Crown.

3. The falsity or misleading nature of the statement was a material particular

Finally, the Crown must prove 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*].

4. The accused intended to obtain a financial advantage/cause a financial disadvantage

[*If the Crown alleges an intention to obtain a financial advantage, add*:

The Crown must prove that the accused acted as they did with the intention of [*obtaining a financial advantage for themselves/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 that the accused acted as they 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.**]**

5. The accused acted dishonestly

Finally, the Crown must prove that the accused did these things dishonestly. Dishonest in this context means dishonest according to the standards of ordinary people. You, as ordinary members of the community, determine what is dishonest. You must find be satisfied both:

- that the accused acted dishonestly in their involvement with a false or misleading statement in order to [*obtain a financial advantage/cause a financial disadvantage*], **and**
- that the accused knew their conduct was dishonest according to the standards of ordinary people.

[If a claim of right is raised as a response: see **Larceny** at **[5-6110]** and **[5-6105]**.]

[5-5980] Section 192H — intention to deceive by false or misleading statement of officer of organisation

Last reviewed: December 2025

The offence against s 192H 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 offence and should 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 statement of officer of organisation

Last reviewed: December 2025

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 their knowledge was or might have been [*false/misleading*] in a material particular.

To prove the accused guilty, the Crown must prove beyond reasonable doubt each of the following elements:

1. The accused was an officer of an organisation;
2. The accused [*made/published a statement or concurred in the making/publishing of a statement]*;
3. The accused knew that the statement was or may have been [*false/misleading*] in a material particular;
4. 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 organisation's affairs;
5. The accused acted dishonestly.

1. The accused was an officer of an organisation

Firstly, the Crown must prove 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 they are a member of that organisation and are concerned in its management or are 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*].

2. The accused [*made/published a statement or concurred in the making/publishing of a statement*]

The second fact the Crown must prove 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.

3. The accused knew the statement was or may have been [*false/misleading*] in a material particular

The third fact the Crown must prove is that, when acting in respect of that statement as the Crown alleges the accused did, they 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*].

4. 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 organisation's affairs

The fourth fact the Crown must prove is 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 organisation's 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 if 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.**]**

5. The accused acted dishonestly

The final fact that the Crown must prove is that in acting the way the Crown alleges that the accused did, they acted dishonestly. Dishonest in this context means dishonest according to the standards of ordinary people. You, as ordinary members of the community, determine what is dishonest. You must be satisfied both:

- that the accused acted dishonestly in their involvement with a false or misleading statement in order to deceive; and
- that the accused 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 **[5-6110]** and **[5-6105]**.]

[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, Div 5**

[5-6100] Introductory note

Last reviewed: December 2024

This direction covers all elements of the offence. In most cases it will be unnecessary to refer in detail to them all. For an analysis of the common law requirements for larceny see *Ilich v The Queen* (1987) 162 CLR 110 at 124.

[5-6105] Suggested direction

Last reviewed: April 2026

The accused is charged with stealing [*identify the property*]. 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 property belonged to someone other than the accused;
2. the property was taken and carried away;
3. the property was taken without the consent of the owner.
4. the property was taken with the intention of permanently depriving the owner of it; and
5. the property was taken dishonestly.

The last two elements are concerned with the accused's state of mind. You are concerned with what that state of mind was at the time the property was taken.

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 you must find the accused not guilty.

The property belonged to someone other than the accused

The second element is simply that the property did not belong to the accused but to someone else. The Crown alleges that the property belonged to [*name*]. There is no dispute about this.

[*If appropriate add:*

In certain contexts the law differentiates between possession, control and ownership.

For example, if you were to legally buy a ring from a jeweller, the moment you took physical possession of it, you would not only have possession of it but you would also have control of it and you would own it.

If, however, you put the ring in a safety deposit box at the bank, you would no longer have possession of it — the bank would — but you would continue to have control and ownership of it.

All that is required is that, at the time the property was taken, it was owned, controlled or possessed by someone other than the accused.**]**

The property was taken and carried away

There must be some physical movement of the property, no matter how slight, by the accused **[*if appropriate:*** or someone acting on their behalf**]**.

The property was taken without the consent of the owner

The Crown must prove the property was taken without the [*owner's*] consent.

The accused intended to permanently deprive the owner of it

The Crown must prove that the accused intended or believed that the property was not taken only for a temporary purpose, but there was an intention to permanently deprive the owner of the property.

[*If appropriate:* If you find on the evidence the accused took the property but intended to restore it at a later time (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 the accused intended to take the property to use for [*their own benefit/benefit of another*], even if they intended eventually to return the property, then this does not prevent you from finding the accused had an intention to permanently deprive the owner of their property at the time it was taken.**]**

The property was taken dishonestly

The Crown must prove the property was taken dishonestly. That is, the accused knew the property belonged to another person. Whether they were acting dishonestly is for you to determine, applying the current standards of ordinary decent people.

[*If claim of right is raised on the evidence:*

The accused says they had a genuine and honest belief at the time that they took the property that they had a lawful right to do so. If a person is acting under such a belief, which is genuinely and honestly held, then it cannot 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 doesn't matter whether in law there was no such right, or whether the accused mistakenly believed that they had such a right, or whether they had any reasonable grounds for such a belief. If that belief existed at the time the property was taken, then the state of mind of the accused would not have been dishonest. The Crown must prove that at the time the property was taken, the accused did not genuinely believe they had a legal right to it.**]**

[5-6108] Notes

Last reviewed: December 2024

1. Dishonesty is an element of the offence of larceny: *Ilich v R* (1987) 162 CLR 110 at 123; *R v Weatherstone* (unrep, 20/8/87, NSWCCA). Whether the accused was acting dishonestly is determined applying the current standards of ordinary decent people: *Peters v The Queen* (1998) 192 CLR 493 at 542, and *R v Glenister* (1980) 2 NSWLR 597.

2. Larceny is an offence against possession, not against ownership. A person lawfully in possession of property cannot be guilty of larceny of it: *Ilich v R* at 123–124, 134–135.

[5-6110] Notes — claim of right

Last reviewed: December 2024

The authorities relating to a claim of right are reviewed in *R v Fuge* (2001) 123 A Crim R 310 at 314–315; see also *Liristis v DPP* (NSW) [2016] NSWCA 66 at [62]–[63]. The following principles (omitting citations) apply —

(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. Where the belief is not reasonable, this may go to its plausibility (*Liristis v DPP* at [62]–[63]).

(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.

Where dishonesty is a specific element of the offence, a claim of right direction is unnecessary and inappropriate. An adequate direction as to dishonesty is sufficient as proof of dishonesty negates a bona fide claim of right: *Sigalla v R* [2021] NSWCCA 22 at [85]ff (in the context of Commonwealth offences); *Macleod v The Queen* (2003) 214 CLR 230 at [39]–[49]; [107]. Where appropriate the jury should be directed that the Crown will not have proved dishonesty if it fails to prove the accused did not honestly (even if mistakenly) have a belief they were entitled to the property.

[5-6115] Suggested direction — intention to restore

Last reviewed: December 2024

The following direction, based on *Foster v The Queen* (1968) 118 CLR 117, is suggested where the evidence raises an intention to restore the property under s 118 of the *Crimes Act 1900*.

If you find on the evidence the accused took the property but intended to restore it at a later time (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 the accused intended to take the property to use for [*their own benefit/benefit of another*], even if they intended eventually to return the property, then this does not prevent you from finding the accused had an intention to permanently deprive the owner of their property at the time it was taken.

[5-6120] Special verdict of "larceny or receiving"

Last reviewed: December 2024

Section 121 of the *Crimes Act 1900* permits a jury to deliver a special verdict in certain circumstances where both larceny and receiving are charged.

The special verdict only arises where —

(i) a person is charged with both larceny and receiving; and

(ii) the jury is not satisfied beyond reasonable doubt that the property was stolen or received because the evidence is consistent with both offences having been committed; and

(iii) the jury are unanimously satisfied that —

(a) the accused either stole or unlawfully received the property; and

(b) in either case it is the same property; but

(c) they are unable to say which.

[5-6125] Suggested direction on special verdict — after directions on larceny and receiving

Last reviewed: December 2024

The Crown has suggested you might have a reasonable doubt about whether the accused is guilty of each of those charges in that for larceny, you might think there is a possibility that the accused did not steal the property but received it knowing it had been stolen, and for receiving, you might think there is a possibility the accused did not receive it knowing that it was stolen but actually stole it. To cater for this possibility of a jury having a reasonable doubt about the two charges when considered individually, but being satisfied beyond reasonable doubt that the accused is guilty of one or the other but is unable to say which, the law provides that you may return what is called the "special verdict".

If you are unanimously satisfied beyond reasonable doubt that the accused did steal the property, you should return a verdict of "guilty" on the first charge and you would not be asked for a verdict on the alternative charge.

If you are unanimously satisfied that the Crown has not proved that the accused stole the property, you should find the accused "not guilty" on the first charge and you will be asked for a verdict on the alternative charge.

If you are unanimously satisfied beyond reasonable doubt that the accused received the property, you should return a verdict of "guilty" on the alternative charge.

If you are unanimously satisfied that the Crown has not proved that the accused received the property, you should find the accused "not guilty".

If you return verdicts of "not guilty" to each of the larceny and receiving charges you will then be asked if you return the special verdict which is that you are unanimously satisfied beyond reasonable doubt that the accused either stole the property or received it knowing it had been stolen but you are unanimously unable to say which. Your answer should be "Yes" if you are all satisfied of that beyond reasonable doubt and "No" if you are not.

If one or more of you is satisfied that the evidence proves that the accused stole the [*property*] or that the accused received the [*property*], then you cannot bring in a special verdict (because you would not be unanimous that you could not say which).

[5-6128] Notes

Last reviewed: December 2024

1. The special verdict permitted in s 121 of the *Crimes Act 1900* usually arises where 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 (they are mutually inconsistent offences): *R v Nguyen* (unrep, 20/2/1997, NSWCCA). This commonly arises where the Crown relies

upon the accused's possession of recently stolen property from which it may be inferred the accused was either the thief or the receiver of the property: see **[4-000] Recent possession**.

2. Section 121 only applies where it is the same property alleged to have been either stolen or received: *R v Clarke* (1995) 78 A Crim R 226 at 228–229. If multiple items of property are alleged to have been stolen or received, the jury will need to be directed that they must be satisfied unanimously that all of the items were either stolen or received but they are unable to say which. Where there is scope for dispute as to whether all of the items were recently stolen or were in the accused's possession, the better course may be for the Crown to aver multiple counts of stealing and receiving.

3. The return of verdicts of not guilty and thereby acquittal of both larceny and receiving are pre-conditions to the return of the special verdict: *R v Cassidy* (1919) SR 48; *R v Scott Ferguson* (unrep, 8/5/1986, NSWCCA); *R v Saleam* (1989) 41 A Crim R 108; *R v Clarke* at 229.

4. In order to return the special verdict the jury must be unanimously satisfied beyond reasonable doubt of both (1) the accused either stole or received the property, and (2) they are unable to say which. It is not a compromise verdict: *R v Nguyen* (unrep, 20/2/1997, NSWCCA). The special verdict is not available where there has been compromise such as where some jurors decide the accused is guilty of larceny, some decide the accused is guilty of receiving, and the balance are satisfied the accused is guilty of one or the other but cannot say which: *R v Campbell* at [29].

5. The Crown should raise the availability of the special verdict in opening or closing address: *R v Walters* (unrep, 13/5/1992, NSWCCA).

[5-6130] Suggested written directions

Last reviewed: December 2024

(A) Verdict as to the charge of larceny

1. If you are unanimously satisfied that the Crown has proved its case of larceny beyond reasonable doubt — return a verdict of "guilty of larceny". Go no further.

2. If you are unanimously satisfied that the Crown has not proved its case of larceny beyond reasonable doubt — return a verdict of "not guilty". [*Go to **(B) Verdict as to the charge of receiving***].

(B) Verdict as to the charge of receiving

1. If you are unanimously satisfied that the Crown has proved its case of receiving beyond reasonable doubt — return a verdict of "guilty". Go no further.

2. If you are unanimously satisfied that the Crown has not proved its case of receiving beyond reasonable doubt — return a verdict of "not guilty". [*Go to **(C) Special verdict***].

(C) Special verdict

1. If you are unanimously satisfied that the Crown has not proved its case of larceny; and
2. You are unanimously satisfied that the Crown has not proved its case of receiving; but
3. You are unanimously satisfied that the Crown established beyond reasonable doubt that the accused either stole or received the same property, but you are unable to say which, you may bring in a special verdict of guilty of either stealing or receiving but you are unable to say which.

[5-6145] Suggested written direction — taking the verdict

Last reviewed: December 2024

When you have indicated that you have reached a verdict, your foreperson will be asked —

1. As to the larceny charge is the accused "guilty" or "not guilty"?

   If the answer is "guilty" that will be the end. If the answer is "not guilty" your foreperson will be asked:
2. As to the receiving charge, is the accused "guilty" or "not guilty"?

   If the answer is "guilty" that will be the end. If the answer is "not guilty" your foreperson will be asked:
3. Do you return the special verdict that "the accused is guilty of either stealing or receiving but we are unable to say which"? The answer will be either "Yes" or "No".

[5-6150] Larceny of motor vehicles

Last reviewed: December 2024

Section 154A(1)(a) of the *Crimes Act 1900* makes it an offence where a person, without the consent of the owner or person in lawful possession of a conveyance, takes and drives it, or takes it for the purpose of:

(i) driving it; or

(ii) secreting it; or

(iii) obtaining a reward for its restoration or pretended restoration; or

(iv) for any other fraudulent purpose.

It is an offence under s 154A(1)(b) 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.

"Conveyance", as defined in s 154A(2), includes, inter alia, motor car, bicycles, trailers, tractors or ships used for navigation, and "drive" is construed accordingly (see further below).

All the offences under s 154A are deemed to be larcenies (see s 116) and an accused may be indicted as such for the offence of larceny. There is a distinct offence in s 154F

of "stealing" a motor vehicle, vessel or trailer. The word "steals" in s 154F requires proof of an intention permanently to deprive the owner or person in possession of the motor vehicle, vessel or trailer: *Ilich v R* (1987) 162 CLR 110 at 124; *Schoffel v R* [2023] NSWCCA 88 at [118].

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): *Hampson v Martin* (1981) 2 NSWLR 782 at 795–796. However in *R v Affleck* (1992) 65 A Crim R 96 at 98 and *Williams v R* [2012] NSWCCA 286 at [58]–[65] it was accepted that having control over the means of propulsion (in terms of accelerating and braking) was sufficient.

Note, s 4(1) of the *Road Transport Act 2013* defines "drive" as including "be in control of the steering, movement or propulsion of a vehicle" but this definition has not been imported into the *Crimes Act*. As to the meaning of "drive" see also notes 6 and 7 in **[5-5410] Dangerous driving**.

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" (in s 154A(1)(a)), 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 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 especially 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 and **[5-6110] Notes — claim of right** above.

[5-6155] Suggested direction — taking and driving (s 154A(1)(a))

Last reviewed: December 2024

The accused is charged with taking and driving a [*specify conveyance*] without the consent of the owner (or person in lawful possession).

The Crown must prove beyond reasonable doubt that the accused drove the [*specify conveyance*] in the sense that they moved it, having control over its means of propulsion.

[*If appropriate:* To "drive" means exercise control at least over the means of propulsion. By "means of propulsion" I mean accelerating and braking.**]**

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*.]

[5-6160] Suggested direction — taking the vehicle for the purpose of driving it

Last reviewed: December 2024

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 to the accused's state of mind and the Crown must prove that when they took the [*specify conveyance*], they took it with that purpose in mind.

You should have regard to all the relevant circumstances before, at the time of and even after, the alleged taking. As there is no direct evidence of the accused's state of mind at the relevant time, it will be a matter of you drawing an inference or conclusion about the accused's statement of mind and purpose, taking into account all the surrounding circumstances.

[*if in issue, canvass the evidence for the Crown and the accused and opposing submissions*. *See suggested direction on inferences at [3-150]*].

[5-6165] Suggested direction — taking for the purpose of secreting, or obtaining a reward for its restoration or pretended restoration, or for any other fraudulent purpose

Last reviewed: December 2024

[*Where the charge is one of secreting*

The Crown alleges that the accused had the purpose of hiding the [*specify conveyance*] from [*its owner/person in lawful possession*] [*indicate the Crown case and deal with evidence on the issue and opposing submissions*]**]**.

OR

[*Where the charge is one of obtaining a reward for its restoration*

The Crown alleges that the accused's purpose in taking the [*specify conveyance*] was to obtain a reward for its [*restoration/pretended restoration*] [*deal with evidence for the Crown and accused on this issue and the opposing submissions*].**]**

It is not enough for the Crown to prove that the accused took the [*specify conveyance*] for the purpose alleged. The Crown must also establish that, in doing so, the accused acted fraudulently, that is to say, dishonestly.

In order to establish that they acted dishonestly, the Crown must prove that they had a dishonest state of mind at the time of the alleged taking.

In determining whether their state of mind was dishonest, you should apply the current standards of what is regarded as dishonest by ordinary decent people in the community.

If you accept that the accused took the [*specify conveyance*] without the consent of the [*owner/person in lawful possession*] for the purpose of hiding it from [*its owner/lawful possessor/insurance company agent/ etc*] then it would be open to you to infer from those circumstances that they took the [*specify conveyance*] dishonestly.

[*Deal with evidence for the Crown, and the accused and submissions*].

[*If the accused raises a claim of right, add*

The accused says they had a genuine and honest belief at the time that they took the [*specify conveyance*] that they 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 doesn't matter whether in law there was no such right, or whether the accused mistakenly believed that they had such a right, or whether they had any reasonable grounds for such a belief. If that belief existed at the time the [*specify conveyance*] was taken, then, the state of mind of the accused would not have been dishonest. The Crown must prove that at the time the [*specify conveyance*] was taken, the accused did not genuinely believe they had a legal right to it.

[*Canvass evidence for Crown and the accused on the issue of claim of right and of dishonesty generally, and the opposing submissions*].**]**

[5-6175] Suggested direction — s 154A(1)(b): driving or allowing oneself to be carried in a conveyance knowing it had been taken without the consent of the owner or person in lawful possession

Last reviewed: December 2024

[*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 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 themself 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, voluntarily entered [*in/on*] the [*specify conveyance*] and permitted themself 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*].

[*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.*] **]**

[5-6180] Notes

Last reviewed: December 2024

1. Section 125 of the *Crimes Act 1900* provides that a bailee of any property who fraudulently takes or converts that property to their own use, or the use of any person other than the owner, shall be deemed guilty of larceny. The relevant elements of the offence under s 125 are that the accused: (i) was in possession of property as a bailee; (ii) took or converted the property to their own use; and (iii) did so fraudulently: *Liristis v DPP (NSW)* [2016] NSWCA 66 at [4]–[5]. A person in lawful possession of something can steal it by fraudulently converting it to his or her own use; that is, by dealing with the property in a manner inconsistent with the rights of the owner: *Liristis v DPP* at [6]; *Ilich v The Queen* (1987) 162 CLR 110 at 124.
2. If an accused is in possession of property recently stolen, this may be evidence the accused stole or received the property: *R v Bellamy* [1981] 2 NSWLR 727; *Saleam v R* (1989) 39 A Crim R 406; *R v Cross* (1995) 84 A Crim R 242; *R v Mahoney* [2000] NSWCCA 256. For further discussion, see **[4-000] Recent possession**.
3. Section 10F of the *Crimes Act* provides that offences of larceny committed outside NSW may be prosecuted in NSW if the offence was committed by a "public official" and involves public money of the State or property held by the public official for or on behalf of the State of NSW.
4. Where a serious offence is charged, a lesser alternative offence should generally be left to jury where it is a viable outcome on the evidence. See **[5-6640] Alternative verdicts for robbery and stealing from the person** and **[2-200]—[2-210] Alternative verdicts**.

[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 their 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

Last reviewed: April 2024

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]. Causation can be established where the acts or omissions accelerate death, even where the deceased's death was inevitable from pre-existing conditions: *Baker v R* [2023] NSWCCA 262 at [55], [58]. See also **[2-305] Causation generally**.

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 the deceased 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 the accused 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 they 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 the accused to the deceased. The Crown alleges that the accused [*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 themself 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 their experience and [*training*] and with their 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 they owed the deceased. It does not matter whether the accused knew that they were breaching their duty of care, or whether the accused believed that they were acting in an appropriate way in the circumstances which they faced. You are not concerned with the accused's personal beliefs about the correctness or appropriateness of their 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 they knew which contributed to their opinion that they were 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 their 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 them 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 themself 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) 262 CLR 268 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: *Robinson v R* (2006) 162 A Crim R 88 at [157].

The Crown has to prove beyond reasonable doubt that, at the time they 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 them, 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 they 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 they 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 they 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 their 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 they 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 them.

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*], they 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 they were 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 they believed only that really serious bodily harm might result from their 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 their 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 they 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 they contemplated or intended when [*the act causing death*] was committed.

[5-6320] Constructive (felony) murder

Last reviewed: September 2024

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) 262 CLR 268.

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] NSWCCA 252 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 their 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.

A defence of self-defence is not available to constructive murder where the act done is done for the purposes of both carrying out the foundational offence and from a genuine belief the act is necessary to defend oneself or another: *Coskun v R* [2024] NSWCCA 67 at [68]; see also *R v Burke* [1983] 2 NSWLR 93 at 101–104.

For commentary on the operation of principles of complicity to the doctrine of constructive murder, see **Suggested direction — accessory before the fact** at **[2-710]** and **Suggested direction — application of joint criminal enterprise to constructive murder** at **[2-770]** and accompanying Notes.

[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) 262 CLR 268.

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 their 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* (1992) 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, 1/10/93, NSWCCA).

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), s 94**

Section 94 provides for offences of "robbery", "assault with intent to rob" and "steal from the person".

[5-6600] Elements of the offence of robbery

Last reviewed: April 2026

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 possession thereof: *R v Salameh* (1986) 26 A Crim R 353 at 358; *R v Donnelly* (1779) 168 ER 199. The property must be taken without the consent of the latter, and by force or by threat (putting that person in fear of violence): *R v Hickman* (1784) 168 ER 241.
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 person in possession in fear of actual violence. *R v Foster* (1995) 78 A Crim R 517; *R v Donnelly*.

[5-6610] Suggested direction

Last reviewed: April 2026

The accused is charged with robbery. 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 five elements:

1. the accused intentionally took and carried away property;
2. the accused intended to permanently deprive the owner [*or person in possession*] of the property;
3. the property was taken from/in the presence of/from the immediate personal care and protection of another;
4. the property was taken dishonestly; and
5. the property was taken or carried away by force or through fear.

1. Intentional taking or carrying away of property

The first matter which the Crown must prove is that there was a taking and carrying away by the accused of the property of another.

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*].

2. Intention to permanently deprive

The Crown must prove that the accused (at that time) had the intention to permanently deprive the [*owner/possessor*] of the property… [*adapt the direction given as to* ***Intention*** *at* ***[3-210]***].

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.*]

[*Give suggested direction on* ***Inferences*** *at* ***[3-150]*** *or remind jury if already provided.*]

3. Property taken from/in the presence of/from the immediate personal care and protection of another

The Crown must next prove that the property was taken from [*another person*] [*or from the presence of that person or from their immediate personal care and protection*]. [*Summarise evidence relied upon by the Crown and by the accused if the matter is in issue*].

4. Property taken dishonestly

The Crown must prove the property was taken dishonestly. That is, the accused knew the property belonged to another person. Whether the accused was acting dishonestly is for you to determine, applying the current standards of ordinary decent people.

[*If claim of right is raised on the evidence:*

The accused says they had a genuine and honest belief at the time that they took the property that they had a lawful right to do so. If a person is acting under such a belief, which is genuinely and honestly held, then it cannot be said that that person was dishonest in taking the thing in question, even if it was without the consent of the [*owner/possessor*].

It doesn't matter whether in law there was no such right, or whether the accused mistakenly believed that they had such a right, or whether they had any reasonable grounds for such a belief. If that belief existed at the time the property was taken, then the state of mind of the accused would not have been dishonest. The Crown must prove that at the time the property was taken, the accused did not genuinely believe they had a legal right to it.**]**

5. By force or through fear

The Crown must prove that the property was taken without the consent of [*the owner/possessor*] by [*force/putting the person in fear*].

[*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/possessor 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*]. There must be violence or a threat of violence at the time of the taking which causes the person to part with the property.

[5-6620] Suggested direction — "assault with intent to rob"

Last reviewed: April 2026

The accused is charged with assault with intent to rob. 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 elements:

1. the accused assaulted [*the complainant*]; and
2. the accused did so with the intention of robbing [*the complainant/another person*].

1. The accused assaulted [*the complainant*]

The Crown must prove, that there was an assault. An assault may, but need not, involve an actual application of force by the accused to another person. It is an act which intentionally or recklessly causes another person to apprehend immediate and unlawful violence… [*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 threat of force, add

The Crown must prove that in so threatening [*the complainant*], the accused intended to raise in the mind of that person an apprehension that actual force or violence (no matter how slight) would be inflicted. There need be no injury inflicted upon [*the complainant*] 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.**]**

2. With the intent to rob

The Crown must prove that the act was done with the intent to rob [*the complainant/another person*] … [*as to which, see suggested directions under* ***[5-6610]***].

As to the accused's intention…[*adapt the suggested directions at* ***[3-210]*** *to the particular circumstances of the case at hand*].

[*If there is an issue as to the matter, summarise evidence relied upon by the Crown and the accused.*]

You will recall the direction I gave to you about the care that needs to be applied to the drawing of inferences which included that you must consider whether there might be alternative explanations for the evidence. You should bear in mind those directions in deciding whether you can draw the inferences contended for by the Crown. [*see also* ***[3-150]*** ***Inferences***].

[5-6630] Suggested direction — "steal from the person"

Last reviewed: April 2026

The accused is charged with steal from the person. 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 elements which make up the offence:

1. the property belonged to someone other than the accused;
2. the accused took and carried away the property;
3. the property was taken without the consent of the [*owner/possessor*];
4. the property was taken dishonestly;
5. the accused intended to permanently deprive the [*owner/possessor*] of the property; and
6. the stealing was "from the person" of another.

1. The property belonged to someone other than the accused

The Crown must prove that at the time the property was taken, it was owned, controlled or possessed by someone other than the accused.

2. The accused took and carried away the property

The Crown must prove there was some physical movement of the property, no matter how slight, by the accused **[*if appropriate:*** or someone acting on their behalf**]**.

3. The property was taken without the consent of the owner/possessor

The Crown must prove that the property belonged to [*name of owner/possessor*]. You must then be satisfied that the property was taken without [*owner's/possessor's*] consent.

4. The property was taken dishonestly

The Crown must prove the property was taken dishonestly. That is, the accused knew the property belonged to another person. Whether the accused was acting dishonestly is for you to determine, applying the current standards of ordinary decent people.

5. The accused intended to permanently deprive the owner/possessor of the property

The Crown must prove that the accused intended to permanently deprive the [*owner/possessor*] of the property. It is insufficient if the accused intended to only deprive the [*owner/possessor*] temporarily.

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.*]

[*Give suggested direction on* ***Inferences*** *at* ***[3-150]*** *or remind jury if already provided.*]

6. The stealing was "from the person" of another

The Crown must prove the stealing was "from the person" of another. "From the person" means taking something that is on the actual person of the complainant or in their immediate presence and control. There must be complete removal of the property.

[*It may be necessary to direct the jury as to other issues such as claim of right, depending on the circumstances of the particular case: see* ***[5-6105]*** ***Larceny — Suggested direction*** *.*]

[5-6640] Alternative verdicts for robbery and stealing from the person

Last reviewed: April 2026

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*. Where the charge is under s 95 of the *Crimes Act*, alleging robbery etc in circumstances of aggravation, an alternative verdict under s 94 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.

See further **Alternative verdicts** at **[2-200]–[2-210]**.

[5-6650] Notes

Last reviewed: April 2026

1. For robbery, there must be violence or a threat of violence which causes the complainant 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 or occur simultaneously with the taking, the complainant need not be shown to be physically present when the taking occurs: *Smith v Desmond* [1965] AC 960.
4. "From the person" in the offence of steal from the person means taking something that is on the actual person of the complainant or in their immediate presence and control: *Delk v R* (1999) 46 NSWLR 340 at [21], [30]. There must be complete removal, though partial removal may sustain an alternative verdict of guilty of larceny or attempted stealing from the person: *R v Thompson* (1825) 168 ER 1192.
5. Recent possession may apply, as to which see **[4-000] Recent Possession**.

6. Intoxication may raise doubt as to intention to rob. The effect of a substance on the accused is a question relating to the formation of the requisite intent (not the "capacity" to form that intent). In *R v Makisi* [2004] NSWCCA 333, the court held that directions referring to the accused's capacity to form an intent while intoxicated are unnecessary and confusing: [12].
7. Judges sitting in judge-alone trials should ensure all the essential legal elements of the offence are set out in their reasons, *even if* they are not in dispute: *Schoffel v R* [2023] NSWCCA 88 at [79]. In *Schoffel v R*, the trial judge's judgment did not outline all the elements of robbery, including the taking of property with an intention to deprive the complainant of it permanently: [71].
8. As to the admission of coincidence evidence in respect of multiple charged acts of robbery see *Glover v R* [2015] NSWCCA 285 at [41]–[50].
9. As to the elements of the offence for a joint criminal enterprise to rob in company, see *Youkhana v R* [2015] NSWCCA 41 at [9], [15].

[The next page is 1081]

Supply of prohibited drugs

[5-6700] Introduction

Last reviewed: April 2026

[5-6700.10] Supply

The offence of supply of a prohibited drug is found in 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.

For commentary on the offence of knowingly take part in supplying a prohibited drug, see **Knowingly take part in supply** at **[5-6755]ff** below.

[5-6700.20] 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 in Column 1 of Schedule 1 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. Under s 29(a), the whole of the amount of a prohibited drug is deemed to be in the person's possession for the purposes of supply: *Barber v R* [2025] NSWCCA 179 at [27].

The concept of possession involves the intentional exercise of physical custody or physical control over something: *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 537; *Huynh v R* [2020] NSWCCA 202 at [21]. The very notion of possessing something implies that others are excluded from having that thing so that "exclusiveness is essential": *Moors v Burke* (1919) 26 CLR 265 at 271; *English v R* [2025] NSWCCA 184 at [19]. However, this does not mean several persons may not, in concert, have and exercise that exclusive possession as against the rest of the world. The word "exclusive" does not mean truly exclusive, that is, excluding all others: *Moors v Burke* at 271; *Lee v R* [2013] NSWCCA 68 at [281]; *R v Amanatidis* [2001] NSWCCA 400 at [9]; *English v R* at [19]–[21].

See generally, *Criminal Practice and Procedure NSW* at [10-s 29] and annotations; *Criminal Law NSW* at [DMTA.29.20].

[5-6700.30] "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. In *Alliston*, McClellan CJ at CL (Fullerton J agreeing) held 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 but guilty of a lesser offence such as supplying a commercial quantity: [34]–[35], [154].

[5-6700.40] Knowledge of the prohibited drug

The accused must know or believe the substance in their possession is *a* prohibited drug. It is not necessary to prove they knew the particular drug supplied. Both usages

of "prohibited drug" in s 25(2) refer to the *actual* prohibited drug the accused has supplied or has knowingly taken part in the supply of and not to a prohibited drug that the accused mistakenly believed was involved: *Salameh v R* [2024] NSWCCA 239 at [14], [30], [126], [152]; *Kural v The Queen* (1987) 162 CLR 502 at 507, 512; *Dunn v The Queen* (1986) 32 A Crim R 203 at [29]; *Tabe v The Queen* (2005) 225 CLR 418 at 424.

Intent to supply a prohibited drug can be inferred where it is established the accused knew or believed or was aware of the likelihood, in the sense of there being a significant or real chance, that what was being supplied was a prohibited drug: *Kural v The Queen* (applied in the NSW drug supply context in *Fung v R* [2002] NSWCCA 479 at [36]); see also *Smith v The Queen* (2017) 259 CLR 291 at [59].

[5-6700.50] Amount of the drug

The Crown does not need to prove the precise amount but it must prove beyond reasonable doubt that the amount falls within the alleged range, for example, that the amount is not less than a large commercial quantity: *Alliston* at [130]. An issue may arise where the drug is in more than one place or package as was the case in *Alliston*.

Amounts constituting not less than a "large commercial quantity" or "commercial quantity" are relevant to the nature of the supply and are to be proved by the Crown as part of the charge: see s 25(2). The "traffickable quantity" in s 29 is an evidentiary provision that operates to place an onus on the accused.

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.

The Crown must prove the accused knew (in the accepted *He Kaw Teh* sense) that the quantity of the drug in fact in their possession is of the order of the quantity which the law identifies as a commercial quantity (or large commercial quantity) of the prohibited drug the subject of the charge. The Crown does not need to prove the accused had knowledge or belief as to the actual drug, or the legal significance of the quantity: *Salameh v R* at [30], [126]. As set out later in the suggested direction at **[5-6710]**, the Crown prove beyond reasonable doubt that the accused knew or believed or was aware of the likelihood, in the sense of there being a significant or real chance at the time they supplied the drug, that it was an amount which was not less than the [large] commercial quantity.

[5-6700.60] 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).

[5-6700.70] 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.20].

[5-6700.80] Drug exhibits

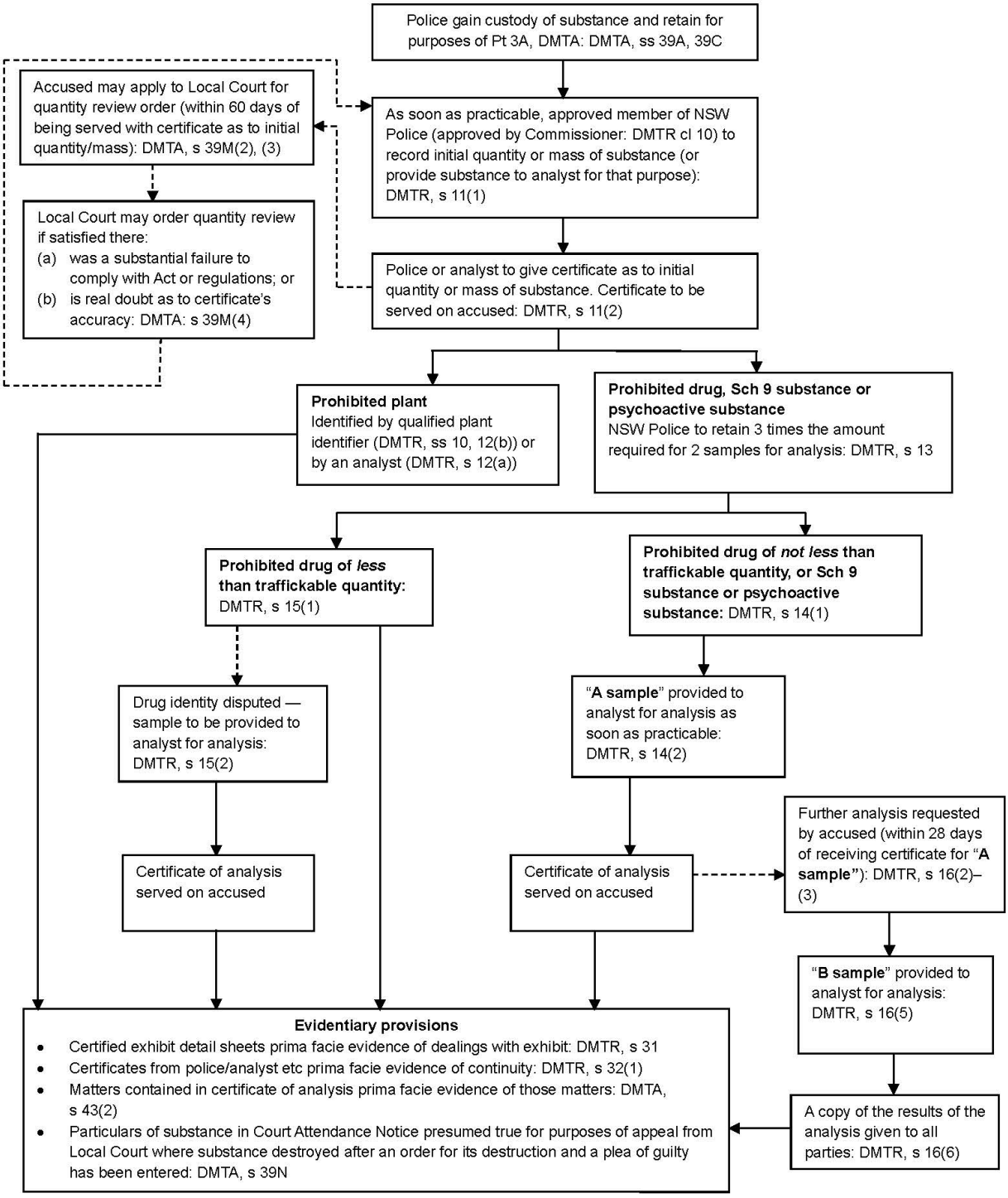
Last reviewed: September 2026

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.

Procedures for analysis of substances in the custody of NSW Police

DMTA: *Drug Misuse and Trafficking Act 1985* DMTR: *Drug Misuse and Trafficking Regulation 2021*



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[5-6700.90] Jurisdiction

Prosecutions for offences involving a "small quantity" or "indictable quantity" of a prohibited drug may proceed on indictment if an election is made, pursuant to s 30 or s 31: see also *Criminal Procedure Act 1986* Schedule 1, Table 1, item 29A.

[5-6710] Suggested direction — actual supply

Last reviewed: April 2026

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. It will have done so if it proves that they intentionally gave or provided the substance, 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.

   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 they supplied the substance to the other person that it was a prohibited drug. The Crown does not have to prove they knew the drug was the particular one

specified in the charge, but it does have to prove they 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.

**[*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. If you are satisfied the accused was aware there was a significant or real chance the substance was a prohibited drug it would be open to you to draw the inference that this element has been proved. 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.**]**

[*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

Last reviewed: April 2026

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. 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

Last reviewed: April 2026

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 they 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 what the law prescribes as a [*large*] commercial quantity. It *does* have to prove that the accused knew or believed the quantity was … grams or more.

[*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. If you are satisfied the accused was aware there was a significant or real chance the quantity of drug was of the order of the [*large*] commercial quantity [*insert quantity*] then it would be open to you to draw the inference that this element has been proved.

Because of the requirement that the Crown proves this element 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 themself had this knowledge or belief, at the time they 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 them 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"

Last reviewed: April 2026

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] NSWCCA 225 at [14].

Where the only issue is whether the accused knew they had a [large] commercial or commercial quantity of drug in their 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 law is that the Crown does not have to prove that the accused actually supplied that drug.

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 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, that [*specify drug*], is a prohibited drug.

   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**

The Crown must prove that the accused intentionally had the substance in their 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. I direct you, that several persons together may have and exercise possession, excluding the rest of the world. Whether the Crown has proved that that in fact occurred in this case is for you to decide.]

[*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 they had access and might go to obtain physical custody or control of it to the exclusion of any other person.]

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 they had custody or control of was a prohibited drug.

[*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. If you are satisfied the accused was aware there was a significant or real chance the substance was a prohibited drug it would be open to you to draw the inference that this element has been proved. 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 their custody or control. However, I must stress that what you are concerned with is whether you are satisfied that the accused themself had this knowledge or belief that the substance was *a* prohibited drug.

[*If appropriate*: It is not necessary for the Crown to prove the accused knew the particular type of drug possessed for the purpose of supply; it is enough that they knew they were supplying *a* prohibited drug.]

[*Canvass evidence on the issue of knowledge, etc and opposing submissions.*]]

3. **For the purpose of supply**

The Crown must prove that the accused had the substance in their 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.

I direct you that, "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.

The law says that if an accused has in their possession a specified quantity or more of a prohibited drug, then they are 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 [*specify drug*], such a quantity is [*state traffickable quantity*].

If you are satisfied the Crown has proved beyond reasonable doubt that 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 they had the drug in their 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 etc.*]

Supply here means to give or to provide the drug to somebody else, whether by way of sale or otherwise. What the accused needs to prove is that they had the drug in their possession for some purpose other than to give it, or provide it, to somebody else. The accused's case is that they had the drug [*specify defence case, for example, all the drug for their own use, or the Carey defence.*]

While the onus of proving this rests on the accused, they do 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. 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 they had the drug in their 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 their 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 that you are satisfied, beyond reasonable doubt, as to the matters which the Crown must prove.

[*Review evidence and submissions.*]

[5-6750] Suggested direction — supply of [large] commercial quantity based upon s 29 DMTA "deemed supply"

Last reviewed: April 2026

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**

   The Crown must prove 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 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 Crown must prove that the accused knew or believed at the time they 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 the accused knew what the law prescribes as a [*large*] commercial quantity. It *does* have to prove that the accused knew or believed that the quantity was … grams or more.

[*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. If you are satisfied the accused was aware there was a significant or real chance the quantity of drug was of the order of the [*large*] commercial quantity [*insert quantity*] then it would be open to you to draw the inference that this element has been proved.

Because of the requirement that the Crown proves this element 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 themself had this knowledge or belief, at the time they supplied the drug, that it was in the order of an amount which was not less than the [*large*] commercial quantity.

[*Canvass evidence on the issue of knowledge etc, and opposing submissions*.]**]**

Alternative verdicts

[*For a charge of supplying a large commercial quantity*]:

The Crown case is that the accused supplied [*more than*] [*set out the prescribed large commercial quantity*] of [*specify drug*], which is the amount prescribed by the law as a large commercial quantity. If you are not satisfied that the quantity supplied was at

least [*set out the prescribed large commercial quantity*], but you are satisfied that the Crown has proven these last two elements with respect to a quantity of at least [*set out the prescribed commercial quantity*], which is the amount prescribed by law as a commercial quantity of [*specify drug*], 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 supplying a commercial quantity of 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 supplying a commercial quantity".

[*For a charge of supplying a large commercial quantity or supplying a commercial quantity*]:

If the Crown fails to prove these last two elements concerned with the quantity of the drug being at least the commercial quantity but proves 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".

[5-6755] Knowingly take part in supply

Last reviewed: April 2026

Section 6 DMTA defines to "take part in" for the purposes of the Act as relevantly being where a person takes, participates or causes any step in the process of supply; provides or arranges finance for such a step; or provides premises for, or suffers, or permits such a step being taken in the premises of which the person owns, leases, occupies, or participates in the management. For a discussion on what amounts to "suffers or permits" see *Rabieh v R* [2024] NSWCCA 154 at [8]–[10]. See also *Criminal Practice and Procedure NSW* at [10-s 6] and especially [10-s 6.15]; *Criminal Law NSW* at [DMTA.6.20].

Neither suffering nor permitting a step to be taken (s 6) can occur without a mental element. Whilst "suffering or permitting" involve similar concepts, the latter may involve more active involvement. One cannot permit an activity over which one has no control: *Rabieh v R* at [8].

Joint occupation of premises may be relevant to "suffering or permitting" a step to be taken (s 6) where there is evidence of opposition by one to the criminal conduct of another (the antithesis of willing participation in the conduct), or of lack of physical or persuasive capacity to resist the continuing criminal conduct of a spouse or close relation: *Rabieh v R* at [48]. Where the question is one of control, the circumstances of the case will be of critical importance, making it unlikely prior cases will provide useful guidance: *Rabieh* at [12]; *R v Tao* [1977] QB 141. There is no legal ruling that a joint tenant has no legal power to control activities of another tenant or prevent another tenant from inviting third persons onto, and conducting illegal activities on, the premises: *Rabieh* at [19]–[22], [49], discussing *R v Lonie & Groom* [1999] NSWCCA 319 at [97]–[98] and *R v Sheen* [2007] NSWCCA 45 at [21].

[5-6757] Suggested direction — knowingly take part in supply

Last reviewed: April 2026

The accused is charged with knowingly taking part in 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 knowingly took part in supplying a substance
2. the substance was a prohibited drug, and
3. the accused knew that what was supplied was a prohibited drug.

1. Knowingly take part in supply

The Crown must prove that the accused knowingly took part in supplying a substance to another person. It will have done so if it establishes that they 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.*]

[*Only direct on the form of "knowingly takes part in" on which the Crown relies]*

"Knowingly takes part in" means a person intentionally takes a step in the process of supply; provides finance for a step in the process; or provides premises, or suffers or permits any step in that process in the premises of which the person is an owner, lessee or occupier.

[*Where appropriate, add*

Joint occupation of premises may be relevant to whether the accused has "suffered or permitted" a step to be taken in the process of supply. For example, evidence of opposition to the criminal conduct of a joint occupier, or evidence of a lack of physical or persuasive capacity to resist the continuing criminal conduct of a spouse or close relation, may be relevant to whether the accused willingly took part in the supply. Whether the Crown has proved that the accused in this case [*suffered/permitted*] a step to be taken on the premises is a matter of fact for you to decide**.]**

2. Prohibited drug

The Crown must prove that the substance supplied was a prohibited drug. Here the Crown alleges that the substance supplied was [*specify drug*]. I direct you that if you accept the evidence relied on by the Crown that the substance is or includes [*specify drug*], then that substance is a prohibited drug.

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].*]

3. Knowledge

The Crown must prove that the accused knew or believed, at the time they knowingly took part in supplying the substance to the other person, that it was a prohibited drug.

The Crown does not have to prove the accused knew the drug was the particular one specified in the charge, but it does have to prove they 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.

[*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. If you are satisfied the accused was aware there was a significant or real chance the substance was a prohibited drug it would be open to you to draw the inference that this element has been proved. 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.**]**

[*Where appropriate, add*

4. **[Large] commercial quantity**

The Crown must prove 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 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 Crown must prove that the accused knew or believed at the time they 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 the accused knew what the law prescribes as a [*large*] commercial quantity. It *does* have to prove that the accused knew or believed that the quantity was … grams or more.

[*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. If you are satisfied the accused was aware there was a significant or real chance the quantity of drug was of the order of the [*large*] commercial quantity [*insert quantity*] then it would be open to you to draw the inference that this element has been proved.

Because of the requirement that the Crown proves this element 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 themself had this knowledge or belief, at the time they supplied the drug, that it was in the order of an amount which was not less than the [*large*] commercial quantity.**]**

[*Canvass evidence on the issue of knowledge etc and opposing submissions*.]

Alternative verdicts

[*For a charge of supplying a large commercial quantity*]:

The Crown case is that the accused supplied [*more than*] [*set out the prescribed large commercial quantity*] of [*specify drug*], which is the amount prescribed by the law as a large commercial quantity. If you are not satisfied that the quantity supplied was at least [*set out the prescribed large commercial quantity*], but you are satisfied that the Crown has proven these last two elements with respect to a quantity of at least [*set out the prescribed commercial quantity*], which is the amount prescribed by law as a commercial quantity of [*specify drug*], 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 supplying a commercial quantity of 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 supplying a commercial quantity".

[*For a charge of supplying a large commercial quantity or supplying a commercial quantity*]:

If the Crown fails to prove these last two elements concerned with the quantity of the drug being at least the commercial quantity but proves 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".

[*Substitute references to "growing plant" and "prohibited plant" for "substance" and "prohibited drug" if necessary.*]

[5-6760] Suggested direction — ongoing supply

Last reviewed: April 2026

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**

   [*The suggested direction for "actual supply" at [5-6710] should be used and adapted where appropriate.*]

   The Crown is required to prove 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 they 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 of at least the same three occasions.**]**

2. **The occasions all occurred within a period of 30 consecutive days**

   The Crown must prove 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*].

   [*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 Crown must prove 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 themself received a financial or material reward. Here the Crown alleges that [*refer to evidence*].

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

Last reviewed: March 2026

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

Alibi

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Duress

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Defence of mental health impairment or cognitive impairment

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Necessity

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Provocation/extreme provocation

Introduction ..... [6-400]

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Self-defence

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Substantial impairment because of mental health impairment or cognitive impairment

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[The next page is 1205]

Alibi

[6-000] Suggested direction

Last reviewed: April 2025

The accused has tendered evidence intended to show that at the time the offence was being committed, they were 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

Last reviewed: April 2025

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) 64 NSWLR 257 at [135] and was approved in *MKR v R* [2025] NSWCCA 1 at [57].

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: July 2026

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, see **[9-130.40] Circumstances involving external factors**.

[6-160] Suggested direction

Last reviewed: June 2024

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 their 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 themself or a member of their family;
- those threats were 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 them.

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 they did because the accused genuinely believed that if they did not act in this way, [*they/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 they believe that [*they or their family*] would be killed or seriously injured if they did not do what they said was demanded of them.

   [*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 themself.

   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 they would respond to threats in the circumstances the accused said they 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 themself 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 they believe will be carried out unless they commit a crime, they are not acting under duress if they 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 they did because of threats of death or really serious injury to [*themself/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 they did;

   or

3. The accused could have rendered the threat ineffective by doing something else instead of doing what they did.

[6-170] Notes

Last reviewed: July 2026

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. It was confirmed in *The King v Anna Rowan – A Pseudonym* [2024] HCA 9 that duress of circumstances was not part of the common law in Australia: [47]–[49] and [83]–[86], [88]. See and compare **Necessity** at **[6-350]**.

3. For a discussion of what constitutes a relevant "threat" for duress at common law, see *The King v Anna Rowan – A Pseudonym* [2024] HCA 9 at [37]–[43]. The High Court upheld the Victorian Court of Appeal's decision 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.

4. 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].

5. "Battered woman syndrome" may be relevant to a defence of duress: *R v Runjanjic* (1991) 56 SASR 114.

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) 181 A Crim R 72 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.

10. As to duress for Commonwealth cases, see **[9-130.40] Circumstances involving external factors**.

[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

Last reviewed: September 2025

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 to "both" in s 28 (and in the test for fitness in s 36) "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(1) and 5(1) of the Act respectively (and in identical terms in ss 4C and 23A of the *Crimes Act*). A non-exhaustive list of disorders/conditions from which "mental health impairment" and "cognitive impairment" may arise are contained in ss 4(2) and 5(2) of the Act. A "mental health impairment" caused solely by the temporary effect of ingesting a substance, or by a substance use disorder is excluded: s 4(3).

In *R v DB*, the majority held that under the common law, the acts of a person who is asleep and engaging in somnambulistic activity are not willed acts: at [43]. The accused was not legally responsible for them and would be entitled to an outright acquittal. The Act did not alter this position as there was no mental health impairment because 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): at [64].

The "caused solely by" test in s 4(3) cannot be equated with a "but for" test where it would be sufficient to prove that but for the ingestion of drugs the psychosis or impairment would not have occurred: *Delaney v R* [2025] NSWCCA 76 at [66]; *R v Patterson (No 6)* [2024] NSWSC 458 at [16]. An accused does not need to prove they were not taking drugs at the time of the offence, nor do they have to exclude the effect of drug consumption as a contributing factor. The jury need only be satisfied on all the evidence that the impairment at the time was not solely caused by the temporary effect of ingesting drugs. If so satisfied, the jury must then consider whether the mental health impairment had either of the effects set out in s 28: *Delaney v R* at [71].

In *Delaney v R*, the Court observed that where the accused raises the issue of mental health impairment, the onus of proof of demonstrating a mental health impairment within s 4(1) lies on the accused but if the evidence discloses matters in s 4(3) and the Crown seeks to argue that s 4(3) applies, the onus lies on the Crown to satisfy the "solely caused by" test: at [74]; *R v Miller* [2022] NSWSC 802 at [53]–[62] (approved in *Delaney v R* at [88]). Where an accused relies on a mental health impairment and the Crown relies on s 4(3), the preferred directions are those set out in *Patterson (No 6)* at [3]: as approved in *Delaney v R* at [88].

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: *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

Last reviewed: July 2026

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: see

R v Bugmy (No 2) [2026] NSWSC 70 at [57]. 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].

There is no statutory requirement in s 31 for an accused to have received advice, nor for the presiding judge to be satisfied in relation to this: *R v Bugmy (No 2)* at [55]. If an accused is advised by their lawyers that the proposed evidence establishes a defence under s 28, there is no reason why it should be presumed by a court that the accused is incapable of accepting such advice. The fact the accused is unfit to be tried is presumed not to be an impediment to their representation: *R v Bugmy (No 2)* at [56]; s 56(4) of the Act.

Section 31 is not confined to normal criminal trials; it applies where the accused is unfit or a special hearing has been ordered: *R v Bugmy (No 2)* at [57].

[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

Last reviewed: September 2025

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 they have a mental health impairment which had the effect that they:

(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 them 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 their

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:

And the Crown does not satisfy you, on the balance of probabilities, that the impairment was caused solely:

(a) by the temporary effect of ingesting a substance, or

(b) a substance use disorder (which is not the same thing as substance induced mental 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 them 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 them. It is only necessary for you to be satisfied that it is more probable that they did than that they 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*] they had a mental health impairment that had the effect upon them 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 themself 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 them. 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: December 2024

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.

Self-defence can operate in cases based on joint criminal enterprise or extended joint criminal enterprise. A joint criminal enterprise is dependent on both the formation of an agreement and participation in it. If an accused's participation is based on a lawful justification, or partial justification, they are not liable, or wholly liable for their participation: *Robertson v R* [2024] NSWCCA 99 per Dhanji J at [144], [147]–[149]; see also Harrison CJ at CL at [30]–[34]; *Osland v The Queen* (1998) 197 CLR 316.

[6-452] Raising/leaving self-defence

Last reviewed: December 2024

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: December 2024

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 R* (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: December 2024

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: December 2024

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: December 2024

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: December 2024

[*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: December 2024

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: December 2025

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) 76 ALJR 628. 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].
14. The principles governing the obligations of a trial judge when summing up are set out in *Odisho v R* [2018] NSWCCA 19 at [97]–[104] and applied in *White v R* [2025] NSWCCA 141 at [72].

[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 2026

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 their 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) 76 ALJR 628 at [18]. How a judge structures the summing up and the extent to which they remind the jury of the evidence, are matters for individual judgment to be exercised in accordance with a number of factors including the complexity of the issues, the length of the trial and the conduct of the respective cases by the parties: *Odisho v R* [2018] NSWCCA 19 at [99].

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: *Robinson v R* (2006) 162 A Crim R 88 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]. In *Elkerdi v R* [2026] NSWCCA 96, the trial judge's sarcastic treatment of the co-accused's evidence and positing of arguments not raised by the Crown amounted to an exercise in persuading the jury of the accused's guilt: at [106]–[112], [125].

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]. For example, where there are a number of possible explanations why a matter was not put to a witness by defence counsel, and in cross-examination the Crown impugns the accused's credit, the trial judge should warn the jury about any assumption made by the cross-examiner, draw attention to the possible reasons why the matter has not been put and direct the jury as to whether any inferences are available: *Hofer v The Queen* (2021) 274 CLR 351 at [34]–[37], cited in *Douglas v R* [2026] NSWCCA 85 at [8]–[9].

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]

Recommended steps — State offences where majority verdict(s) available ..... [8-030]

Prospect of Disagreement

Introduction ..... [8-050]

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] NSWCCA 65 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) 81 NSWLR 181 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) 6 VR 569 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) 81 NSWLR 181 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: July 2026

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) 81 NSWLR 181 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) 109 NSWLR 288, 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*). See also *Profilio v R* [2024] NSWCCA 219 at [75]–[79], [87].

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]

Commonwealth offences — procedures and elements

Commonwealth offences — procedures and elements
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Commonwealth offences — procedures and elements

The following introduction contains an overview of the Commonwealth criminal law framework (**[9-000]**–**[9-010]**), the jurisdiction of NSW courts and applicable procedural and evidence law to trials of Commonwealth offences (**[9-020]**–**[9-040]**) and the general principles of criminal responsibility (**[9-090]**–**[9-140]**). Unless otherwise stated, references to sections are to the *Criminal Code Act 1995* (Cth).

The Attorney-General's Department's *The Commonwealth Criminal Code: A Guide for Practitioners* may be useful further reading for practitioners.

[9-000] Key Commonwealth criminal legislation

Last reviewed: July 2026

The key statutes comprising Commonwealth criminal law are the *Crimes Act 1914* (Cth) (the *Crimes Act*) and the *Criminal Code Act 1995* (Cth). The former contains the mechanics for the investigation of offences matters concerning bail, fitness to plead, not guilty pleas due to mental illness, sentencing and parole. The latter contains the *Criminal Code* (the *Code*) in the Schedule, which includes the offence-creating provisions and details the elements required to be proved.

[9-010] Codification of Commonwealth criminal law

Last reviewed: July 2026

Section 1.1 of the Code provides that the only Commonwealth offences are those created by or under the authority of the Code or any other Commonwealth Act. As such, the Code introduces new offences, and takes over from the limited number of Commonwealth offences previously existing under common law.

[9-010.10] Relevance of the common law to Commonwealth criminal law

Last reviewed: July 2026

The common law retains a role in interpreting the Code: see *The Queen v LK* (2010) 241 CLR 177 at [107]. Many parts of the Code were derived from the common law, and codification "does not mean that all preceding court-made law will be irrelevant to interpretation of the Code": Explanatory Memorandum to the Criminal Code Bill 1994 (Cth) at 2. Resort to the common law is required:

- for the principles of statutory interpretation applying to the Code;
- where the Code employs a particular technical legal term, or phrase which has a well-known meaning elsewhere;
- where there is ambiguity: *Vallance v The Queen* (1961) 108 CLR 56 at 75; *R v JS* [2007] NSWCCA 272 at [149]–[150]; *The Queen v LK*; *Ansari v The Queen* (2010) 241 CLR 299; *DPP (Cth) v Ingram* (2025) NSWLR 485 at [101]–[107]; and
- in sentencing for Commonwealth offences: see *Sentencing Bench Book* at **[16-000] Crimes Act 1914 (Cth) — sentencing Commonwealth offenders**; **[17-700] Commonwealth child sex offences**; **[65-100] Commonwealth drug offences**; **[67-000] Commonwealth terrorism offences**.

[9-010.20] Interpretation of codified Commonwealth offences

Last reviewed: July 2026

In *The Queen v Barlow* (1997) 188 CLR 1, Kirby J set out principles relevant to the construction of a code (although dealing with the *Criminal Code Act 1899* (Qld), these principles also apply to the Code) at 31–32, including:

- A code is to be interpreted by its language without reference to the pre-existing law, except where the meaning is unclear or the language used has a technical or special meaning. If the code employs words conventionally used to express a common law principle, it is permissible to interpret them in light of decisions expounding the common law, including those subsequent to the code's enactment and in non-code jurisdictions.
- Where there is ambiguity and alternative constructions of a code are arguable, the court will ordinarily favour the meaning which achieves consistency with like language in the codes of other Australian jurisdictions, and with the common law.

Where the ordinary meaning of a code's terms is clear, the common law will likely prove irrelevant: *Pickett v Western Australi*a (2020) 270 CLR 323 at [92] (in relation to the *Criminal Code Act Compilation Act 1913* (WA), though it also applies to the Code).

[9-020] Interaction between State and Commonwealth provisions

[9-020.10] Overlap between State and Commonwealth offences

Last reviewed: July 2026

The same conduct may constitute both Commonwealth and State offences. For instance, certain fraud offences have both Commonwealth and State counterparts and there is overlap in drug supply and possession offences: *R v Liang* (1995) 82 A Crim R 39; *Pantazis v R* (2012) 38 VR 446; *Momcilovic v The Queen* (2011) 245 CLR 1; *Buckman v R* [2013] NSWCCA 258. Section 4C(2) of the *Crimes Act* ensures an offender is not punished for a Commonwealth offence if they have already been prosecuted under equivalent State laws. The effect of s 4C(2) is to "roll-back" or "withdraw pro tanto" the Commonwealth criminal law to avoid the injustice of double punishment where a single act involves the commission of both Commonwealth and State crimes: *Momcilovic v The Queen* at [254].

[9-020.20] Jurisdiction of State courts over Commonwealth offences

Last reviewed: July 2026

The federal judicial system with respect to criminal matters relies on State and Territory courts, which are given federal jurisdiction, as permitted under s 77(iii) of the Constitution and conferred under ss 39 and 68(2) *Judiciary Act 1903* (Cth) (the *Judiciary Act*). Pursuant to s 68(2), NSW courts exercising jurisdiction with respect to summary convictions, committals, trials and convictions on indictment and related appeals for NSW offences have like jurisdiction for Commonwealth offences. When exercising "like jurisdiction", the Court applies the relevant procedural laws of the State "by analogy": see *Williams v The King (No 2)* (1934) 50 CLR 551 at 561; *Peel v R* (1971) 125 CLR 447 at 469; *Solomons v District Court of NSW* (2002) 211 CLR 119 at [99]; *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at [45], [61].

Trials of Commonwealth indictable offences are constitutionally mandated to be held in the State where the offence was committed: the Constitution, s 80. Section 70

of the *Judiciary Act* enables trials of offences committed across States or Territories to be tried in either jurisdiction: see also the Constitution, s 80. Section 70A permits trials of indictable Commonwealth offences which are not committed in any State, but rather in the "extended geographical jurisdiction" (see **[9-220]**), to be held in any Australian State or Territory.

Note: The Federal Court has limited original jurisdiction to hear Commonwealth criminal matters, primarily for offences listed in s 67G *Judiciary Act*, including offences relating to bribery of foreign public officials, forgery, identity crime, money laundering, computer crime, financial information and accounting records in the Code.

[9-030] Commonwealth procedure and evidence

[9-030.10] Procedure and evidence law applicable to trials of Commonwealth offences

Last reviewed: July 2026

The administration of Commonwealth criminal law is organised on a State-by-State basis: *Leeth v Commonwealth of Australia* (1992) 174 CLR 455 at 467. A Commonwealth offence prosecuted in NSW will apply the *Criminal Procedure Act 1986* (NSW) and the *Evidence Act 1995* (NSW). This is subject to two exceptions: where there are inconsistent Commonwealth laws (see **[9-030.20]**) and inconsistent constitutional requirements (see **[9-040]**).

The *Judiciary Act*, particularly ss 68(2) and 79, provides the mechanism by which NSW law applies to the administration of Commonwealth criminal law. Its purpose includes "ensuring that accused persons in each State are … the subject of incidents of a criminal trial which are the same for Commonwealth offences as they are for State offences": *R v JS* [2007] NSWCCA 272 at [115]. Both the *Judiciary Act* and the Commonwealth's use of State courts reflect an intention to have procedural uniformity when dealing with both State and Federal offences: *Williams v The King (No 2)* (1934) 50 CLR 551 at 558, 560; *The Queen v Gee* (2003) 212 CLR 230 at [7].

Section 68(1) provides that NSW laws concerning procedure apply to persons charged with Commonwealth offences in respect of whom jurisdiction is conferred on NSW courts. Such laws do not apply of their own force in NSW courts exercising Commonwealth jurisdiction. rather, they are "picked up" and applied by virtue of s 68(1) as Commonwealth laws.

In *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341, a High Court majority held that provisions of the *Crimes (Appeal and Review) Act 2001* (NSW) relating to holding an inquiry into a conviction or sentence could be picked up and applied as federal laws under s 68(1) to operate in relation to Commonwealth offences.

In *McGregor v R* (2024) 116 NSWLR 81 at [61], a five-judge bench summarised propositions emerging from *Attorney-General (Cth) v Huynh* as follows:

- Section 68(1) does not pick up and apply State law to the extent that doing so would be inconsistent with the Constitution or another federal law.
- Section 68(1) applies the text of State laws without altering its meaning, subject to the following.
- The State law presumptively would not have intended to address its application by s 68(1) in relation to dealing with federal laws and may be beyond its powers in

some respects: see *Seaegg v The King* (1932) 48 CLR 251 at 255. That being so, the content of the State law is not being applied directly but is applied as federal law by analogy to the State provision.

- Proceeding by analogy means that s 68(1) may involve a potential extension of the operation of State law but that is not taken to give the State law altered meaning merely because it evinces an intention to apply only to State offences. The meaning and scope of application of the law's text can be extended in a limited way from State circumstances to federal circumstance, without changing its essential meaning or giving it a substantively different legal operation. A degree of translation of the law from State to federal level may be required but, in some cases, that degree may be "too great".
- In some instances, s 68(1) may pick up some but not all relevant parts of a State law. That approach is not possible if it would alter the substantive legal operation of the law.

The High Court referred to these principles, with implicit approval, in *The King v McGregor* [2026] HCA 3 at [16]–[19].

In *Solomons v District Court of NSW* (2002) 211 CLR 119 at [19], the High Court noted that s 68 distinguishes between the jurisdiction granted to the State court on one hand and the powers and procedures on the other. Section 68(2) is concerned with the ambit of jurisdiction, rather than the content of the powers to be exercised under it. Section 68(1) provides for the State laws with respect to procedure to apply so far as applicable.

Section 68 is supported by a more general provision in s 79(1) which makes all State laws, including relating to procedure, evidence and competency of witnesses, binding on all State courts exercising federal jurisdiction. That is unless they are inapplicable or contrary to the Constitution or other Commonwealth laws.

The High Court stressed in *Solomons v District Court of NSW* at [21] that such State laws do not apply of their own force, but rather, applied through s 79(1) "as federal law", citing *Pedersen v Young* (1964) 110 CLR 162 at 165.

In *Rizeq v Western Australia* (2017) 262 CLR 1 at [23], a resident of NSW was convicted by majority verdict in WA for offences against WA's drug law. As the matter was between a State and an inter-state resident (within s 75(iv) of the Constitution), the WA court was exercising federal jurisdiction. The appellant argued that because the State court was exercising federal jurisdiction, the WA law was incapable of valid application and was instead applied as a Commonwealth law by virtue of s 79. The High Court rejected that argument , holding that s 79 had no role to play in "picking up" the WA law as federal law since the WA law was squarely within State legislative competence. The section is limited to making State laws apply where necessary to facilitate dealing with Commonwealth laws. Therefore, because the trial was for State offences, not indictable Commonwealth offences, s 80 of the Constitution had no application and the majority verdict was valid.

Note: For the procedures applicable to special hearings see Pt IB, Div 6 *Crimes Act* and **[4-305] Fitness — federal offences**.

[9-030.20] Inconsistent Commonwealth and NSW procedural and evidence law

Last reviewed: July 2026

Although, generally, NSW procedural and evidentiary laws apply by virtue of the *Judiciary Act* , this is subject to other inconsistent Commonwealth laws: s 109, the Constitution.

Inconsistency, for the purposes of s 109, only arises if the Commonwealth law "covers the field" to the exclusion of the NSW law, but not where the Commonwealth law was intended to be supplementary to or cumulative upon the NSW law. Inconsistency does not lie in the mere co-existence of two laws which are susceptive to simultaneous obedience, but rather, an intention of the Commonwealth Parliament to completely, exhaustively, or exclusively express what shall be the law: *Ex parte McLean* (1930) 43 CLR 472 at 483.

The *Evidence Act 1995* (Cth) does not purport to cover the field, as s 4(1) makes express that it only applies to proceedings in a federal court or ACT court. Therefore, despite the existence of the Commonwealth version, the NSW equivalent applies (thought it makes little practical difference since they are essentially identical). However, the *Evidence Act 1995* (Cth) contains several provisions which can apply in addition to the NSW Act: see, for example, ss 150, 153–155A, 157–159 relating to the admissibility of Commonwealth records and documents.

In addition, the *Crimes Act* contains some provisions dealing with summary offences and the disposal of indictable offences triable summarily: see, for example, ss 4J, 4JA. These will apply in place of any inconsistent provisions of the *Criminal Procedure Act 1986*.

Further, the Commonwealth has its own evidentiary rules relating to vulnerable witnesses in Commonwealth criminal proceedings, contained in Pt IAD *Crimes Act*: see at **[1-378]**.

The Commonwealth also has its own scheme for sentencing Commonwealth offences. See the *Sentencing Bench Book* at **[16-000]**ff.

[9-040] Specific procedures for Commonwealth offences

Last reviewed: July 2026

The application of NSW procedural law to trials of Commonwealth offences is also subject to the Constitution which imposes overriding procedural requirements.

[9-050] Jury procedures

[9-050.10] Requirement for trial by jury

Last reviewed: July 2026

Section 80 of the Constitution provides for trial by jury for any indictable offence against any Commonwealth law. Section 68 of the *Judiciary Act* vests State courts with jurisdiction to run trials for Commonwealth offences but is limited to "trial … by jury".

The provisions of the *Criminal Procedure Act 1986* (NSW) which provide for judge alone trials have been held to be inconsistent with s 80 of the Constitution. Therefore, trials on indictment for offences against Commonwealth law can only be by jury:

Alqudsi v The Queen (2016) 258 CLR 203 at [82]–[83]; [146]; [210]–[212], [221]; see also *Cheng v The Queen* (2000) 203 CLR 248; *Brown v The Queen* (1986) 160 CLR 171.

Section 80 is not applicable to summary offences: *Kingswell v The Queen* (1985) 159 CLR 264.

Offences punishable by imprisonment for a period exceeding 1 year are indictable offences, unless the contrary intention appears: s 4G, *Crimes Act.* However, indictable offences may be dealt with summarily if punishable by imprisonment for a period not exceeding 10 years, or where punishable by fine only, unless contrary intention appears: ss 4J(1), 4JA(1), *Crimes Act.*

[9-050.20] Number of jurors

Last reviewed: July 2026

The number of jurors in a criminal trial is determined by s 19 *Jury Act 1977* (NSW). Subject to s 22 of that Act, the jury is to consist of 12 persons, or 12 persons with additional jurors as ordered by the court under s 19(2): s 19(1). The court may order up to three additional jurors be selected if:

- it is necessary because of the nature, likely duration or complexity of the proceedings, or any other factor that may result in a juror being discharged during the trial of the proceedings including, for example, where a trial involves distressing or sensitive material: s 19(2)(a); or
- the court estimates the trial to take two weeks or longer: s 19(2)(b); *Jury Regulation 2022*, cl 5.

Such an order is only available where the court is satisfied the selection of additional jurors is an appropriate means of ensuring there will be sufficient jurors remaining when they are required to consider their verdict and appropriate facilities are available to accommodate them: s 19(3). Section 19 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 also applies to a trial of Commonwealth offences: *Brownlee v The Queen* (2001) 207 CLR 278; *Petroulias v R* (2007) 73 NSWLR 134. In *Brownlee v The Queen*, the High Court held that a jury constituted of 10 members in accordance with NSW law (s 22(a)(i) *Jury Act*), did not infringe s 80 of the Constitution as the number of jurors was not an "essential feature" of "trial … by jury". However, in obiter, Gaudron, Gummow and Hayne JJ indicated that legislation authorising trials with fewer than 10 jurors may be constitutionally invalid: see at [71]–[73]. In *Ng v The Queen* (2003) 217 CLR 521, the High Court held the essential features of a jury trial are to be ascertained by considering the purpose s 80 was intended to serve and the constant evolution of the characteristics of a jury trial: see also [36]–[38] for a list of essential and non-essential features of trial by jury.

[9-050.30] Suggested direction — summing-up (commencement)

Last reviewed: July 2026

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".

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.**]**

[9-050.40] Suggested direction — final directions

Last reviewed: July 2026

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 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 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.*]

[9-050.50] Suggested (*Black*) direction — Commonwealth offences — unanimity required

Last reviewed: July 2026

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:*

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.

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?

[9-050.60] Discharging and challenging jurors

Last reviewed: July 2026

Given there is no inconsistency with the Constitution, the *Jury Act* applies to such trials, particularly Pts 6, 7 and 8 which govern rights to challenge and discharge jurors (s 53B) and discharge a jury (s 53C). A Court, presiding over a trial by jury for a Commonwealth offence, can discharge a juror and proceed to verdict with less than 12 members of the jury. It is desirable that a judge makes two separate and explicit orders: one relating to the issue of discharging a juror, and one relating to the issue of whether the trial should proceed with the remaining jurors: *Wu v The Queen* (1999) 199 CLR 99 at [8], [103].

[9-060] Verdicts

[9-060.10] Requirement for unanimous verdict

Last reviewed: July 2026

Section 80 has also been interpreted as requiring verdicts for Commonwealth offences to be unanimous: s 55F(4), *Jury Act 1977* (NSW) ("*Jury Act*"); s 80; *Cheatle v The Queen* (1993) 177 CLR 541 at 562; *Brownlee v The Queen* (2001) 207 CLR 278 at [5]. Majority verdicts are not available.

See **[9-050.50] Suggested (Black) direction — Commonwealth offences — unanimity required**.

[9-060.20] Procedure for receipt of verdict

Last reviewed: July 2026

Recommended steps

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 them. 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 they 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 their 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* (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*.

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.

[9-070] Commonwealth closed court, suppression and non-publication orders

Last reviewed: July 2026

The relevant Commonwealth provisions governing closed court, suppression and non-publication orders 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.

The *Crimes Act* and *Criminal Code* 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 members of the public 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 *Collaery v The Queen (No 2)* [2021] ACTCA 28 at [96]–[106], [120]–[126].

Section 15MK *Crimes Act* 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].

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

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.

[9-080] Evidence by alternative means

Last reviewed: July 2026

Part IAD of the *Crimes Act* provides protective measures for vulnerable witnesses in Commonwealth criminal proceedings. The *Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Act 2024* (Cth) commenced on 11 December 2024 and amended Pt IAD to expand these protections.

The Commonwealth offences to which Pt IAD applies include war crimes, slavery, trafficking in persons, child sexual offences outside Australia, offences involving child abuse material outside Australia, torture, and offences relating to the use of postal or carriage services involving sexual activity with children. The full list of relevant offences is at s 15Y(1) and (2). Proceedings relating to such offences are called a "child proceeding" where they involve a child complainant (s 15Y(1)) or a "vulnerable adult proceeding" where they involve an adult complainant (s 15Y(2)): s 15YA.

A "child complainant" or "child witness" includes a person who was aged under 18 years at the time of the of alleged offence, but does not include a person now aged 18 years or over if they inform the court they do not wish to be treated as a child complainant or child witness: s 15YAC and s 15YAD, respectively.

A "vulnerable adult complainant" is one who is alleged to be a victim in a s 15Y(2) vulnerable adult proceeding, unless they inform the court they do not wish to be treated as a vulnerable adult complainant: s 15YAA.

A court may declare a person to be a "special witness" if satisfied they are unlikely to be able to satisfactorily give evidence in the ordinary manner due to a disability, or due to intimidation, distress or emotional trauma arising from age, cultural background, relationship to a party to the proceedings, the nature of the evidence or some other relevant factor: s 15YAB. In a special witness proceeding, the court may order that specific protective measures under Pt IAD are to apply to a special witness: s 15YAB(3).

Child complainants, child witnesses, vulnerable adult complainants and special witnesses are all classed within the term "vulnerable person" and each of the protective measures under Pt IAD apply to this category of witness.

Measures	Section	Additional provisions	Jury direction
Evidence in chief may be given by way of witness's recorded interview with police	s 15YM(1)	If recording admitted, witness must be available for cross-examination and re-examination: s 15YM(4) Admissibility of the evidence given by the recording is not affected by the fact that it is evidence of previous representations: s 15YN(1). But the court may refuse to admit the recording adduced under s 15YM: s 15YN(3)	No warning to be given to jury that the law requires greater or lesser weight to be given to the evidence because it is given via recording: s 15YQ(1)(c)

Measures	Section	Additional provisions	Jury direction
May be permitted to have their evidence (evidence in chief, cross-examination and re-examination) recorded at an "evidence recording hearing"	s 15YDB(1)	Witness may give their evidence via CCTV from another room: s 15YDC(2)(a) Recording of evidence must be admitted as the witness's evidence at the hearing of the proceeding: s 15YDD(2). Court may refuse to admit the recording: s 15YDE If recording admitted, witness not compellable to give further evidence unless it is necessary to clarify the evidence, give proper consideration to new information, or in the interests of justice: s 15YDG(1)	n/a
Evidence must be given by CCTV	s 15YI	Exception: if witness is at least 16 years of age and chooses not to; if there are no CCTV facilities available; or if the court orders it is not in the interests of justice: s 15YI(1), (2)	No warning to be given to jury that the law requires greater or lesser weight to be given to the evidence because it is given via CCTV: s 15YQ(1)(b)
Alternative measures of screens in court or planned seating arrangements must be made available if evidence is not to be given via recorded evidence hearing or CCTV	s 15YL(1), (2)	A witness aged 16 years or over may choose not to give evidence under these alternative arrangements: s 15YL(3)	No warning to be given to jury that the law requires greater or lesser weight to be given to the evidence because it is given via alternative arrangements: s 15YQ(1)(b)
Witness may be permitted to have a support person if giving evidence outside the courtroom	s 15YJ(1)(c)	Court may order a person be present to act as an interpreter, to assist witness with any difficulties in giving evidence associated with a disability, or to provide other support: s 15YJ(1)(c)	n/a
Witness may be permitted to have support person if giving evidence in person or at an evidence recording hearing	s 15YO	Court may determine it is not appropriate for the selected person to accompany the witness as a support person: s 15YO(2) Support person must not influence witness's answers or disrupt the questioning: s 15YO(4)	No warning to be given to jury that the law requires greater or lesser weight to be given to the evidence because there is a support person: s 15YQ(1)(d)

Measures	Section	Additional provisions	Jury direction
No cross-examination by unrepresented accused or child complainants or vulnerable adult complainants	s 15YF(1) (child complainants) s 15YFA(1) (vulnerable adult complainants)	Witness may be examined by a person appointed by the court: s 15YF(2), s 15YFA(2)	n/a
No cross-examination by unrepresented accused of vulnerable persons unless court gives leave	s 15YG(1)	Court must be satisfied vulnerable person's ability to give evidence under cross-examination will not be adversely affected: s 15YG(2)	n/a
No cross-examination that is inappropriate or unnecessarily aggressive	s 15YE(1)	Court to have regard to witness's personal characteristics (age, culture, mental capacity, gender) in determining if question is inappropriate or unnecessarily aggressive: s 15YE(2)	n/a
Evidence given in person must be recorded	s 15YLA(1)	Court must be satisfied the evidence could be used in another proceeding and the witness consents to the recording: s 15YLA(1)	n/a
Witness's recorded evidence from "original proceedings" may be admitted in a new trial (where new proceedings are ordered after the original proceedings are discontinued or successfully appealed)	s 15YNA, s 15YNB	Prosecutor to give written notice to accused and court at least 21 days before new trial: s 15YNB(1) If recording admitted, witness not compellable to give further evidence in new trial unless it is necessary to clarify the evidence, give proper consideration to new information, or in the interests of justice: s 15YNC(1)	No warning to be given to jury that the law requires greater or lesser weight to be given to the recorded evidence: s 15YNE

The statutory requirements regarding warnings or directions to juries in Commonwealth proceedings are limited, but do not appear to preclude giving directions in the terms suggested for NSW proceedings at **[1-382]**–**[1-402]** when particular alternative measures are employed.

[9-080.10] Support persons

Last reviewed: July 2026

While vulnerable persons in Commonwealth proceedings are permitted to have support persons present when they are giving evidence, there is no statutory requirement for a jury direction or warning to be given regarding this measure in the way it is required for "vulnerable persons" under the *Criminal Procedure Act 1986* (NSW).

For consistency and to avoid jury speculation, it may be considered appropriate to adapt a direction in such cases that corresponds with the suggested direction for "vulnerable persons" — children and cognitively impaired persons in NSW proceedings at **[1-400]**.

[9-080.20] Self-represented accused

Part 1AD *Crimes Act* places constraints on the cross-examination of certain witnesses by a self-represented accused. The Part applies to various offences, including child sex tourism, slavery, sexual servitude and human trafficking: s 15Y(1). Under ss 15YF–15YFA, a self-represented accused is prohibited from cross-examining a child complainant in a child proceeding or vulnerable adult complainant in a vulnerable adult proceeding, and a person appointed by the court is to ask the complainant any questions sought to be put by the accused.

Part IAD does not require a direction to be given to the jury regarding the appointment of persons to ask questions on behalf of a self-represented accused. However, it would be prudent to adapt the suggested direction at **[1-405]** for relevant Commonwealth proceedings.

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 1986* (NSW), although it may be prudent to give a warning in such terms for these matters: see **[1-850] Suggested information and advice to accused in respect of a "prescribed sexual offence".**

[9-080.30] Evidence by Audio Visual link

Last reviewed: July 2026

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.

Terrorism and related offences

Part IAE *Crimes Act* 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* [2006] NSWSC 587 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.

Child sexual offences outside Australia and related offences

In addition to the alternative measures under Pt IAD of the *Crimes Act* available for child complainants and child witnesses in Commonwealth proceedings involving offences such as slavery, trafficking in persons and child sexual offences outside Australia, there are also provisions for witnesses in such proceedings to give their evidence via audio-visual link from an overseas location under Div 279 of the Code. 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, or 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.

Directions

If evidence is given by way of video link under s 15YV *Crimes Act* 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* [2006] NSWSC 587, Whealy J said at [67]:

> Section 15YZ 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.

[9-090] Principles of criminal responsibility

Last reviewed: July 2026

The elements of Commonwealth offences, available defences, extensions of criminal liability, proof of criminal responsibility and the geographical jurisdiction of the Code are set out in Ch 2. Those provisions codify all the general principles of criminal responsibility: s 2.1; see *R v Saengsai-Or* (2004) 61 NSWLR 135 at [37]–[43]. They apply to Code offences and other Commonwealth offences committed after 15 December 2001, except where there is an express provision to the contrary: s 2.2.

[9-100] Elements of Commonwealth offences — generally

Last reviewed: July 2026

Chapter 2 of the Code is headed "General Principles of Criminal Responsibility." Commonwealth offences consist of physical elements and fault elements: s 3.1. As set out in *R v LK* (2010) 241 CLR 177 at [125]–[126], Pt 2.2 of Ch 2 deals with the elements of offences. The analysis that it provides is generally consistent with the common law in that criminal liability is dependent upon proof of physical elements and accompanying subjective, fault, elements (subject to the provision for offences of absolute and strict liability in Div 6 of Pt 2.2). A physical element of an offence may be:

- conduct,
- a result of conduct, or
- a circumstance in which conduct, or a result of conduct, occurs.

A fault element for a particular physical element of an offence may be:

- intention,
- knowledge,
- recklessness, or
- negligence.

These terms import the common law concepts of actus reus and mens rea respectively. The law creating an offence may provide there are no fault elements for one or more physical elements: s 3.2; see ss 6.1 (strict liability offences) and 6.2 (absolute liability offences).

The prosecution must prove beyond reasonable doubt each physical element together with the applicable fault element for each physical element: ss 3.2, 13.1, 13.2. The relevant fault element must exist at the time of the commission or existence of the physical element to which it attaches: *Campbell v R* (2008) 73 NSWLR 272 at [44].

Where elements of an offence are unclear, the judge should require the Crown to particularise both the elements and the manner in which the offence is alleged arise. All offences should be closely analysed to identify precisely what the Crown must prove and it should not be assumed that the Crown's analysis is either the only available one, or the correct one: see *Li v Chief of Army* (2013) 250 CLR 328 at [24]–[29].

[9-110] Physical elements

Last reviewed: July 2026

A physical element may be:

- conduct;
- a result of conduct; or
- a circumstance in which conduct, or a result of conduct, occurs: s 4.1.

Conduct means an act, an omission to perform an act, a state of affairs: s 4.1(2).

The term "state of affairs" is not defined. In *Agius v The Queen* (2013) 248 CLR 601 at [42], the High Court majority confirmed that its ordinary meaning is "the way in

which events or circumstances stand at a particular time or within a particular sphere", which includes continuing offences, such that participation in an ongoing conspiracy may constitute a state of affairs and therefore conduct for the purposes of the Code.

Conduct must be voluntary, meaning the product of the person's will: s 4.2(1), (2). An omission or a state of affairs will only be voluntary if it was within the person's capacity to perform the omitted act or to control the relevant state of affairs: s 4.2(4), (5). Unwilled bodily movement like spasms, or acts performed during sleep, unconsciousness or impaired consciousness are not voluntary: s 4.2(3). Self-induced intoxication cannot be considered in determining voluntariness: s 4.2(6).

An omission constitutes a physical element where the law creating the offence expressly makes it so; or impliedly provides it is committed by an omission to perform an act that there is a relevant statutory or common law duty to perform: s 4.3. The duty must exist at the time of the omission, such that criminal responsibility is confined to a failure to do a thing that, at that time, the law requires the person to do; the obligation must be coincident with the failure to discharge it: *DPP (Cth) v Keating* (2013) 248 CLR 459 at [49].

[9-120] Fault elements

Last reviewed: July 2026

Section 5.1 of the Code provides that a fault element for a particular physical element may be intention (s 5.2), knowledge (s 5.3), recklessness (s 5.4) or negligence (s 5.5). However, the law creating an offence may provide a different fault element for a physical element of the offence: s 5.1(2).

The fault elements descend in order of culpability: *Ansari v The Queen* (2010) 241 CLR 299 at [59].

The relevant fault element is identified by first determining the physical element of the offence. In *R v McIvor* [2009] NSWCCA 264, although the judge identified intention as the relevant fault element, it was an error to instruct the jury on the three alternative ways in which intention could be established—intention to engage in *conduct*, belief that a *circumstance* existed or awareness that a *result* would occur—where intention as to conduct was the only relevant one: at [25].

Default fault elements

Where the law creating the offence does not specify a fault element for a physical element (and does not specify that there is no fault element), s 5.6 provides a default fault element, which is:

- Where the physical element is only conduct — intention; or
- where the physical element is a circumstance or result — recklessness.

See *Li v Chief of Army* (2013) 250 CLR 328 at [20]–[22].

No fault elements

Where no fault element is stated for any of the physical elements of the offence, the offence is one of strict liability (s 6.1) or absolute liability (s 6.2). In either case, the prosecution is not required to prove a fault element in relation to the physical element/s in question.

For strict liability offences, the defence of mistake of fact under s 9.2 is available: s 6.1(1)(b). For absolute liability offences, no such defence applies; once the proscribed physical element is proved beyond reasonable doubt, guilt is established: s 6.2(1)(b).

[9-120.10] Intention

Last reviewed: July 2026

A person has intention with respect to:

- conduct if they mean to engage in that conduct: s 5.2(1)
- a circumstance if they believe that it exists or will exist: s 5.2(2); and
- a result if they mean to bring it about or is aware that it will occur in the ordinary course of events: s 5.2(3).

Where the physical element is the existence of a state of affairs, knowledge or belief may be relevant to intention: *The Queen v Tang* (2008) 237 CLR 1 at [47]; *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 568.

A jury may be directed that the Crown may establish intent by inferential reasoning: *R v Saengsai-Or* (2004) 61 NSWLR 135 at [74]; *Smith v The Queen* (2017) 259 CLR 291 at [61], [85]. Applying *Kural v The Queen* (1987) 162 CLR 502 at 504–505, the High Court in *Smith v The Queen* at [64] confirmed that where a criminal act is done in circumstances where it appears beyond reasonable doubt that the accused knew or was aware of the likelihood, in the sense that there was a significant or real chance, that their conduct involved that act, and nevertheless persisted in that conduct, the jury may infer intent, although the phrase "nevertheless persisted" is not utilised by the High Court in the suggested directions in *Smith v The Queen* at [69].

Directions should, where possible, reflect the statutory definition of intent in s 5.2, and be tailored to the issues, facts and circumstances of the case: *Smith v The Queen* at [68]; *R v Saengsai-Or* at [74]. The jury must be directed that to draw an inference of intent they must be satisfied beyond reasonable doubt of the facts and circumstances from which the inference is drawn, and that the inference of intent is the only reasonable inference open on those facts. Further, that an awareness of a real and significant chance that the conduct involved the importation of the substance would not of itself be sufficient to draw the necessary inference but that it must also be proved beyond reasonable doubt that the accused nevertheless persisted with the conduct notwithstanding the awareness or belief : *Ko v R* [2025] NSWCCA 129 at [125]–[126] (note: special leave to appeal to the High Court was granted on 4 December 2025: *The King v Ko* [2025] HCADisp 305).

See suggested directions in *Smith v The Queen* at [69].

[9-120.20] Knowledge

Last reviewed: July 2026

A person has knowledge of a circumstance or a result if they are aware that it exists or will exist in the ordinary course of events: s 5.3.

[9-120.30] Recklessness

Last reviewed: July 2026

A person is reckless with respect to a circumstance or result if:

- they are aware of a substantial risk the circumstance exists or will exist, or the result will occur; and
- having regard to the circumstances known to them, it is unjustifiable to take the risk: s 5.4(1)–(2).

Whether taking a risk is unjustifiable is a question of fact and requires an assessment of the likelihood of the risk eventuating according to its nature and in the circumstances, if the act is done, and whether the risk is one that should have been taken: s 5.4(3); *Lustig v R* [2009] NSWCCA 143 at [74]. Such an inquiry calls for a "moral or value judgment concerning the accused's advertent disregard of the risk": *R v Saengsai-Or* (2004) 61 NSWLR 135 at [70]; *Lustig v R* at [74].

A "substantial risk" is an awareness of a real and substantial possibility, chance or likelihood of a fact: *Hann v DPP (Cth)* (2004) 88 SASR 99 at 107.

The accused must be aware of the substantial risk at the time of the conduct, that is, there must be a consciousness of the risk at the moment of the alleged offence: *Hann v DPP (Cth)* at 107; *R v Hanna* [2019] QCA 274 at [10].

Where recklessness is a fault element, proof of intention or knowledge will also satisfy that fault element: s 5.4(4); see *Ansari v The Queen* (2010) 241 CLR 299 at [59], the reason being that intention and / or knowledge are more serious fault levels and if it was possible to make out either of those more serious levels, it follows that recklessness would also be made out.

[9-120.40] Negligence

Last reviewed: July 2026

A person is negligent with respect to a physical element if their conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment: s 5.5.

Proof of negligence requires an overall assessment, not a separate analysis of distinct elements, though regard must be had to the whole description of negligence: *White v Patterson* [2009] QCA 320 at [31].

[9-130] Circumstances in which there is no criminal responsibility

Last reviewed: July 2026

See the following under Pt 2.3, discussed below:

- circumstances involving lack of capacity: Div 7
- intoxication: Div 8
- circumstances involving mistake or ignorance: Div 9
- circumstances involving external factors: Div 10.

[9-130.10] Lack of capacity

Last reviewed: July 2026

Children

A child under 10 is not criminally responsible for an offence: s 7.1.

A child aged between 10 and 14 is criminally responsible for an offence only if the child knows that their conduct is wrong: s 7.2(1). Whether the child had that knowledge is a question of fact: s 7.2(2).

The prosecution must prove beyond reasonable doubt that the child understood the conduct was seriously wrong in a moral sense: ss 7.2(2), 13.1(1); *RP v The Queen* (2016) 259 CLR 641 at [36]; *RYE v Western Australia* [2021] WASCA 43 at [35]–[36]; *BDO v The Queen* (2023) 277 CLR 518 at [14], [55]; *R v IP* [2023] NSWCCA 314 at [25]. See the *Children's Court of NSW Resource Handbook* at **[9-1140]**, **[12-2000]** and **[12-2500]**.

Mental impairment

Section 7.3(1) provides a person is not criminally responsible for an offence if, at the time of the conduct, they had a mental impairment with the effect that they:

- did not know the nature and quality of the conduct; or
- did not know that the conduct was wrong; or
- were unable to control the conduct.

Mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder: s 7.3(8). ***Mental illness*** refers to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur: s 7.3(9).

It is presumed a person was not suffering from a mental impairment, unless either the prosecution or defence prove, on the balance of probabilities, otherwise: s 7.3(3). Unlike other provisions in Pt 2.3, the burden of proof on the prosecution is also on the balance of probabilities, not beyond reasonable doubt, but there is no evidential burden: s 13.3(2).

A person cannot rely on mental impairment to deny voluntariness or the existence of a fault element: s 7.3(6).

A special verdict that a person is not guilty because of mental impairment must be returned if and only if, the fact finder is satisfied that the person is not criminally responsible only because of a mental impairment: s 7.3(7).

[9-130.20] Intoxication

Last reviewed: July 2026

A person is not criminally responsible if their conduct constituting the offence was the result of intoxication that was not self-induced: s 8.5.

Intoxication is self-induced unless it came about involuntarily or as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force: s 8.1. Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed, that is, intention for a physical element consisting only of conduct: ss 8.2(1)–(2). Such evidence may be relevant for determining whether the conduct was accidental (s 8.2(3)) or whether the accused held a mistaken belief of fact (s 8.2(4)).

[9-130.30] Mistake or ignorance

Last reviewed: July 2026

A person is not criminally responsible for an offence with a fault element (other than negligence) if:

- at the time of the conduct, they had a mistaken belief about, or are ignorant of, facts: s 9.1(1)(a); and
- the existence of that mistaken belief or ignorance negates the relevant fault element: s 9.1(1)(b).

The belief must be honest: *R v Navarolli* [2010] Qd R 27 at [73].

A person is not criminally responsible for a strict liability offence if:

- at or before the time of the conduct, they considered whether certain facts existed, and held a mistaken but reasonable belief that they did; and
- had those facts existed, the conduct would not have constituted an offence: s 9.2(1).

The mistake must amount to an affirmative belief as to the relevant fact; mere inadvertence or failure to turn one's mind to the issue is insufficient: *Mei Ying Su v Australian Fisheries Management Authority (No 2)* [2008] FCA 1485 at [98].

Mistake as to, or ignorance of, the law creating an offence does not negate criminal liability, unless that law expressly provides otherwise: ss 9.3, 9.4.

A person is not criminally responsible for an offence (other than offences relating to the use of force against a person) in certain circumstances where there is a mistaken belief as to a proprietary or possessory right: s 9.5.

[9-130.40] Circumstances involving external factors

Last reviewed: July 2026

A person is not criminally responsible for an offence if:

- in the case of strict and absolute liability offences, the physical element was brought about by a person or non-human act or event over which the person had no control and could not reasonably be expected to guard against: s 10.1;
- the conduct was carried out under duress: s 10.2(1). The person must reasonably believe that a threat will be carried out unless an offence is committed, there is no reasonable way the threat can be rendered ineffective, and the conduct is a reasonable response: s 10.2(2); see *Oblach v R* (2005) 65 NSWLR 75 at [55]–[60]. If adapting the suggested direction at **[6-160]** provided for duress with respect to NSW offences, it is important that regard is had to the precise terms of s 10.2 and

also s 13.3 of the Code: see *Mirzazadeh v R* [2016] NSWCCA 65 and *Oblach v R* at [66]. As to the operation of s 13.3 see *The Queen v Khazaal* (2012) 217 CLR 96 at [74]–[78].

- the conduct was in response to circumstances of sudden or extraordinary emergency: s 10.3(1). The person must reasonably believe that such circumstances exist and committing the offence is the only reasonable way to deal with the emergency, and the conduct is a reasonable response: s 10.3(2); see *Warnakulasuriya v R* [2012] FLR 260;
- the conduct was in self-defence: s 10.4(1). The person must believe the conduct is necessary to defend themselves, prevent or terminate unlawful imprisonment, protect property, prevent criminal trespass, or remove a criminal trespasser, and the conduct is a reasonable response in the circumstances as they perceive them: s 10.4(2);
- the conduct is justified or excused by or under law: s 10.5.

[9-140] Extensions of criminal liability (Pt 2.4)

Last reviewed: July 2026

Part 2.4 sets out provisions extending criminal liability in certain circumstances, including attempt (s 11.1), complicity and common purpose (s 11.2), joint commission (s 11.2A), commission by proxy (s 11.3), incitement (s 11.4) and conspiracy (s 11.5).

See Pt 2.5 for attaching criminal responsibility to corporations.

[9-150] Attempt (s 11.1)

Last reviewed: July 2026

Under s 11.1, a person who attempts to commit an offence is punishable as if the offence had been committed.

For a person to be guilty, the conduct must be more than merely preparatory to the commission of the offence, which is a question of fact in light of all the circumstances of the case: s 11.1(2); see *Situ v R* [2008] NSWCCA 161 at [28]. Conduct is more than merely preparatory when it is "immediately connected with the commission of that crime, having no reasonable purpose other than its commission.": *Inegbedion v R* [2013] NSWCCA 291 at [17].

Section 11.1(3) provides that intention and knowledge are the relevant fault elements in relation to each physical element of the offence attempted, such that recklessness or negligence is insufficient, except:

- where a special liability provision applies: s 11.1(3A), (6A); *Barker v R* [2012] WASCA 51 at [27]; or
- for certain drug importation offences, where s 300.6 states recklessness is the applicable fault element for offences of attempting to commit offences against Pt 9.1.

In *Onuorah v R* (2009) 76 NSWLR 1, the Court held that, for an attempt to commit a drug importation offence, it is sufficient that the accused intended each element of the relevant crime to occur, including the importation of a substance believed to be a

border-controlled drug; it is not necessary that the drug exist in fact: at [30]; see *Britten v Alpogut* [1987] VR 929; *R v Mai* (1992) 26 NSWLR 371 at 381–382. A person may be found guilty of attempt even if the commission of the offence is impossible; or if the offence is in fact completed: s 11.1(4). A person convicted of attempting to commit an offence cannot subsequently be charged with the completed offence: s 11.1(5). See also *R v Nguyen* [2026] QCA 38 at [29]–[62], and *Suppressed Decision* [2024] WASCA 151 which sets out at the elements and suggested jury directions for an offence of attempting to possess a commercial quantity of border controlled drug, contrary to ss 11.1(1) and 307.5 of the *Code* at [616] and [625] respectively (cited in *R v Nguyen* at [55] and [59]).

Note: any defences, procedures, limitations, qualifying or special liability provisions that apply to an offence also apply to the offence of attempting to commit that offence: s 11.1(6)–(6A).

It is also an offence to attempt to commit an offence against s 11.4 (incitement), but it is not an offence to attempt to commit an offence against ss 11.2 (complicity), 11.2A (joint commission), 11.3 (commission by proxy) or 11.5 (conspiracy) (see below): s 11.1(7).

[9-160] Complicity and common purpose (s 11.2)

Last reviewed: July 2026

A person (the accomplice) who aids, abets, counsels or procures the commission of an offence by another person (the principal offender) is taken to have committed that offence and will be charged under that offence provision and s 11.2: s 11.2(1).

Although not defined in the Code, the words "aids, abets, counsels or procures" bear their common law meanings: *Handlen v The Queen* (2011) 245 CLR 282 at [6]; *Campbell v R* (2008) 73 NSWLR 272 at [155]. They are alternative expressions which together describe conduct that brings about the commission of an offence: *Giorgianni v The Queen* (1985) 156 CLR 473 at 493.

To establish liability, the prosecution must prove:

- the principal offender committed the offence (s 11.2(2)(b); *R v Kaldor* [2004] NSWCCA 425 at [77]; *The Queen v Holliday* (2017) 260 CLR 650 at [68]; and
- the accused engaged in conduct that aided, abetted, counselled or procured the commission of the offence (s 11.2(2)(a); *Handlen v The Queen* at [46]).

Constructive presence may suffice where the accomplice is not physically present at the scene. However, mere presence, whether actual or constructive, is not sufficient to establish aiding or abetting: *R v Wong* [2005] VSC 96 at [62]; see *R v Nolan* (2012) 83 NSWLR 534 at [44].

Section 11.2(3) provides for two alternative fault bases. The prosecution must prove that the accomplice intended their conduct would aid, abet, counsel or procure either:

- the commission of any offence (including its fault elements) of the type the principal committed: s 11.2(3)(a); or
- the commission of an offence and was reckless about the commission of the offence (including its fault elements) the principal in fact committed: s 11.2(3)(b).

See *R v Pong Su (No 12)* (2005) 159 A Crim R 300 at [42]–[48] for discussion of the distinction between s 11.2(3)(a) and (b). In relation to s 11.2(3)(a), common law authorities assist in determining whether a principal offence is of a "type" that the accused did aid, abet, counsel or procure: see *Giorgianni v The Queen* at [481], [505]; *Ancuta v R* (1990) 49 A Crim R 307 at [313].

Under s 11.2(4), an accomplice cannot be found guilty if, before the offence is committed, they:

- terminated their involvement; and
- took all reasonable steps to prevent the offence being committed.

What is reasonable is a question of fact and depends on the circumstances of the case. Such steps may include undoing the effects of the earlier act of participation, communicating withdrawal to the other parties or taking some other positive step, such as informing the police: *White v Ridley* (1978) 140 CLR 342 at 350–351; *R v Tietie* (1988) 34 A Crim R 438 at 446–447; *R v Jensen* [1980] VR 194 at [200](5)(a). In *White v Ridley*, reasonable steps would have involved informing the airline that the package contained cannabis so urgent steps could be taken to prevent its importation: at 352. The accused bears the evidential burden in relation to s 11.2(4): s 13.3.

[9-170] Joint commission (s 11.2A)

Last reviewed: July 2026

Under s 11.2A(1), as with joint criminal enterprise and extended common purpose, a person is taken to have committed a joint offence if:

(a) they agree with at least one other to commit an offence (s 11.2A(1)(a)); and

(b) either an offence is committed:

  (i) in accordance with the agreement (see s 11.2A(1)(b)(i)). This requires one or more parties commit an offence of the same type as the offence agreed to: s 11.2A(2); *Tartaglia v The Queen* (2022) 141 SASR 142; or

  (ii) in the course of carrying out the agreement (see s 11.2A(1)(b)(ii)). This requires the accused be reckless about the commission of an offence that another party in fact committed in the course of carrying out the agreement (s 11.2A(3)).

See also *Romolo v R* [2018] NSWCCA 3 at [52]–[53].

The accused and at least one other party to the agreement must have intended that an offence would be committed under the agreement: s 11.2A(4).

The agreement may consist of a non-verbal understanding and be entered into before, or at the time as, the conduct constituting the physical elements was engaged in: s 11.2A(5). The agreed conduct must be capable of definition with some degree of certainty: *Xia Weng v The Queen* (2013) 236 A Crim R 299 at [71]; *R v France (No 2)* (2013) 37 VR 101 at [22].

An accused *cannot* be found guilty if, before the conduct constituting any of the physical elements of the joint offence, they terminated their involvement and took all reasonable steps to prevent that conduct from being engaged in: s 11.2A(6); see also **[9-160]** and **[9-200]**.

A person *may* be found guilty even if:

(a) another part to the agreement has not been prosecuted or found guilty; or

(b) the accused was not present while any of the conduct constituting the offence charged was engaged in: s 11.2A(7).

A person cannot be prosecuted for attempting to be part of a joint commission: s 11.1(7). However, s 11.2A allows for liability for the joint attempt of a substantive offence where a person enters into an agreement with one other to commit an offence (eg to import a border-controlled drug) but is interrupted before its completion: *Franze v The Queen* (2014) 248 A Crim R 63 at [1]–[3], [101].

[9-180] Commission by proxy (s 11.3)

Last reviewed: July 2026

A person is taken to have committed an offence if they have:

(a) a fault element applicable to each physical element of an offence; and

(b) procured conduct of another that (whether or not together with the conduct of the procurer) would have constituted an offence on part of the procurer if they had engaged in it: s 11.3.

The common law principle of innocent agency is not to be imported into the Code despite the original heading for the provision being "Innocent agency": *DPP (Cth) v Ingram* (2025) NSWLR 485 at [108], [128], [171]; see also *The Queen v LK* (2010) 241 CLR 177; *Vallance v The Queen* (1961) 108 CLR 56; *Brennan v The King* (1936) 55 CLR 253 at [263]; *Stuart v The Queen* (1974) 134 CLR 426 at 437, 453.

Section 11.3 does not require the prosecution to prove the proxy is innocent of the completed offence. The question is whether the proxy's conduct was procured by the person charged. The provision is silent as to the proxy's state of mind, and prima facie, applies in its terms indifferently to the proxy's ignorance or suspicion or knowledge or belief: *DPP (Cth) v Ingram* at [95]–[98], [171].

The prosecution has wide discretion to charge in the alternative. Where the jury is unpersuaded of the accused's guilt by reason of their own conduct, the prosecution may seek to rely on s 11.3 in its application to a co-accused as a proxy, even where that co-accused is charged as a principal offender: *DPP (Cth) v Ingram* at [81], [172].

Special liability provisions likely apply despite s 11.3 not expressly referring to them as s 11.3(a) refers to "a fault element applicable to that physical element".

[9-190] Incitement (s 11.4)

Last reviewed: July 2026

A person who urges the commission of an offence may be found guilty of incitement if they intended the offence incited be committed, and even if committing the offence incited is impossible: s 11.4(1)–(2), (3). Incitement has its own penalty regime at s 11.4(5).

Note that any defences, procedures, limitations, qualifying or special liability provisions that apply to the offence incited also apply to the offence of incitement: s 11.4(4)–(4A).

[9-200] Conspiracy (s 11.5)

Last reviewed: July 2026

A person who conspires with another to commit an offence which is punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, commits the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed: s 11.5(1).

For a person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement: s 11.5(2).

Note: Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence: s 11.5(7A).

The single physical element of conduct — "conspires … to commit an offence" — requires proof of the agreement and its subject matter: *Ansari v R* (2007) 70 NSWLR 89 at [63]; *Ansari v The Queen* (2010) 241 CLR 299 at [21]; *The Queen v LK* (2010) 241 CLR 177 at [131]–[132]. The default fault element is intention: s 11.5(2)(b); *The Queen v LK* at [141]. A person cannot enter into a conspiracy under the Code without knowing the facts that make the agreed conduct unlawful, nor if they are reckless as to whether the agreement would result in an offence being committed: *The Queen v LK* at [72]; *Ansari v R* at [67]; *Giorgianni v The Queen* (1985) 156 CLR 473 at 506.

Note: the precise means by which the conspiracy is to be effected need not be agreed upon: *Obeid v The King* [2026] HCA 1 at [17].

The overt act must be proved beyond reasonable doubt but carries no separate fault element*: The Queen v LK* at [141]; *Quaid v R* [2011] WASCA 141 at [168]. An "overt act" requires establishing beyond reasonable doubt that the act was intended to advance the conspiracy: *DPP (Cth) v Fattal* [2013] VSCA 276 at [21].

Evidence of the acts and declarations of each co-conspirator in a conspiracy, even if engaged in each other's absence, is admissible to prove by inference the existence, nature and scope of the conspiratorial agreement: *DPP (Cth) v Kola* (2024) 279 CLR 104 at [44], consistently with the common law approach in *Ahern v The Queen* (1988) 165 CLR 87.

A person *may be found guilty* of conspiracy to commit an offence even if:

(a) committing the offence is impossible; or

(b) the only other co-conspirator is a body corporate; or

(c) the only other co-conspirator is their spouse: *Namoa v The Queen* [2021] HCA 13; or

(d) each other co-conspirator is not criminally responsible or a person for whose benefit or protection the offence exists; or

(e) all other parties to the agreement have been acquitted of the conspiracy, unless a finding of guilt would be inconsistent with their acquittal: s 11.5(3).

A person *cannot be found guilty*:

- if they are a person for whose benefit or protection the offence exists: s 11.5(4)(b); or
- if before the commission of an overt act pursuant to the agreement, they:
  - withdrew from the agreement; and
  - took all reasonable steps to prevent the commission of the offence (unless there were no reasonable steps they could have taken): s 11.5(5); *Miller v Miller* (2011) 242 CLR 446 at [104].

Also important is that:

- A court may dismiss a charge if the interests of justice require it to do so (eg where the Crown should have sought conviction for the substantive offence): s 11.5(6); *The Queen v Hoar* (1981) 148 CLR 32 at 38. Relevant factors in considering the appropriateness of a conspiracy charge include the likely complexity of the trial, whether a conspiracy charge better reflects the criminality involved and whether adverse consequences as to sentencing or other potential injustices to the accused might arise: *R v Baladjam* (No 4) [2008] NSWSC 726 at [38]–[39]; *Elomar v R* [2014] NSWCCA 303 at [483]–[505].
- Any defences, procedures, limitations, qualifying or special liability provisions that apply to an offence also apply to the conspiracy offence: s 11.5(7)–(7A).
- Commencement of conspiracy proceedings requires the consent of the Director of Public Prosecutions: s 11.5(8).

[9-210] Proof of criminal responsibility (Pt 2.6)

Last reviewed: July 2026

Burden of proof – prosecution

The prosecution bears a legal burden of proof, which requires it to:

1. Prove every element of an offence relevant to the guilt of the defendant, and
2. Disprove any matter in relation to which the defendant has discharged an evidential burden of proof: s 13.1.

A legal burden of proof must be discharged beyond reasonable doubt, unless the law creating the offence states otherwise: s 13.2.

In the exercise of federal jurisdiction conferred by s 68(2), *Judiciary Act 1903* (Cth), the laws of a State respecting procedure for trial and conviction on indictment may be

picked up and applied to Commonwealth offences pursuant to s 68(1)(c), provided they are not inconsistent with Commonwealth law. Where a State procedural law merely provides for the standard of proof beyond reasonable doubt to be explained, such as by permitting a direction that a reasonable doubt is not "an imaginary or fanciful doubt or an unrealistic possibility*":* (*Jury Directions Act 2015* (Vic), ss 63(1), 64(1)(e)), it is not inconsistent with s 13.2 because it explains, rather than alters or diminishes, the criminal standard of proof: *Farshchi v The King* [2025] HCA 46 at [15]; [28]–[31].

Burden of proof – defence

Subject to s 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only: s 13.3(1). The evidential burden may be discharged so long as a defendant provides "no more than slender evidence" suggesting a reasonable possibility that a matter exists or does not exist: s 13.3(6); *The Queen v Khazaal* (2012) 217 CLR 96 at [74]; *Mirzazadeh v R* (2016) 312 FLR 1 at [70].

Care should be taken to ensure a provision actually engages s 13.3 and places an evidential burden on a defendant: see *Jones v R* [2025] NSWCCA 38 at [49]–[50], [60], where the relevant provision was not a defence but rather a means of proof for the Crown.

[9-220] Geographical jurisdiction (Pt 2.7)

Last reviewed: July 2026

If the following jurisdiction provisions apply to an offence, proceedings must not be commenced without the Commonwealth Attorney-General's written consent if the conduct occurred wholly in a foreign country and, at the time of the alleged offence, the accused was neither an Australian citizen nor Australian body corporate: s 16.1(1). Section 16.2 sets out when conduct occurs partly in Australia.

Division 14 provides for "standard geographical jurisdiction". However, a Commonwealth law may provide that it has "extended geographical jurisdiction", of which there are four categories set out in Div 15 (see Table 1 below).

Table 1. Categories of geographical jurisdiction

Category of geographical jurisdiction	When it applies	What jurisdictional defences are available
Standard (s 14.1)	The conduct, or a result thereof, occurs: • wholly or partly in Australia, or • wholly or partly on an Australian aircraft or ship. See also s 14.1(2) for ancillary offences (ancillary being an offence against ss 11.1, 11.4 or 11.5, or via the operation of ss 11.2, 11.2A or 11.3).	There is a defence where: • the conduct occurs wholly in a foreign country, and • only a result occurs in Australia, and • there is no foreign law creating a corresponding offence.
Extended – Category A (s 15.l)	As above, or if at the time of the alleged offence the person was an Australian *citizen or corporation*. See also s 15.1(1)(d) for ancillary offences.	There is a defence where: • the conduct occurs wholly in a foreign country, and • only a result occurs in Australia, and • *the offender is not an Australian citizen or body corporate*, and • there is no foreign law creating a corresponding offence.
Extended – Category B (s 15.2)	As above, or if at the time of the alleged offence the person was a *resident* of Australia. See also s 15.2(1)(d) for ancillary offences.	There is a defence where: • the conduct occurs wholly in a foreign country, and • only a result occurs in Australia, and • *the offender is not an Australian citizen or body corporate*, and • there is no foreign law creating a corresponding offence.
Extended – Category C (s 15.3)	The conduct, or a result thereof, occurs wholly in a foreign country (unrestricted).	There is a defence where: • the conduct occurs wholly in a foreign country, and • only a result occurs in Australia, and • *the offender is not an Australian citizen or body corporate*, and • there is no foreign law creating a corresponding offence.
Extended – Category D (s 15.4)	The conduct, or a result thereof, occurs wholly in a foreign country (unrestricted and with no foreign law defence).	No jurisdiction defence provided.

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Miscellaneous

para

Non-publication paper .....[10-530]

[The next page is 1751]

[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)

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