**Judicial Commission of New South Wales**

# CRIMINAL TRIAL COURTS BENCH BOOK

**Update 68**

**October 2021**

**SUMMARY OF CONTENTS OVERLEAF**

*Judicial Commission of New South Wales*

*Level 5, 60 Carrington Street, Sydney NSW 2000*

*GPO Box 3634, Sydney NSW 2001*

**SUMMARY OF CONTENTS**

**Update 68**

## Update 68, October 2021

**Closed court, suppression and non-publication orders** has been revised and updated. At **[1-354] Grounds for and content of suppression or non-publication orders**, the commentary concerning whether an order is "necessary" or "otherwise necessary" has been revised to include discussion of *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, *SZH v R* [2021] NSWSC 95 and *Lacey (a pseudonym) v Attorney General for NSW* [2021] NSWCA 27, and discussion of *A Lawyer (a pseudonym) v DPP NSW* [2020] NSWSC 1713 has been added to the commentary concerning s 8(1)(c) *Court Suppression and Non-publication Orders Act* 2010. Reference to *R v Collaery* (No 7) [2020] ACTSC 165 has been added at **[1-358] Closed courts** regarding the operation of s 31 *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth).

**Procedure for fitness** has been revised. *R v Tonga* [2021] NSWSC 1064 and *R v Siemek (No. 1)* [2021] NSWSC 1292 which consider aspects of the transitional provisions for the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 have been added to **[4-302] Application of the Act**. **[4-305] Fitness — federal offences** now includes discussion of the procedure for Commonwealth fitness hearings in accordance with s 20B *Crimes Act* 1914. The table at **[4-320]** Part 4 procedure has been updated to refer to R v Risi [2021] NSWSC 769 where the approach the determination of whether an accused was likely to become fit within 12 months for the purpose of a finding under s 47(1)(b) of the Act was considered.

**Maintain unlawful sexual relationship with a child** has been updated at **[5-920] Notes** to include *JJP v The Queen* [2021] SASCA 53 which confirms that a summing-up for an offence against s 66EA *Crimes Act* 1900 must also address the elements of the offences comprising the alleged unlawful sexual acts underlying the offence. *R v Mann* [2020] SASCFC 69, which considered the meaning of "relationship" for the purposes of the SA equivalent provision, has been added.

A new chapter, **Sexual touching**, has been added at **[5-1770]** for the offences of sexual touching of adults and children under ss 61KC, 61KD, 66DA and 66DB *Crimes Act* 1900. Suggested directions are at **[5-1775] Suggested direction — basic offence (61KC)**, **[5-1785] Suggested direction — aggravated offence (61KD)**, and **[5-1795] Suggested direction — sexually touching a child (s 66DA)**.

**Prospect of disagreement** has been updated at **[8-100] Notes** to refer to *KE v R* [2021] NSWCCA 119, which outlines the approach a trial judge should take to s 55F(2) *Jury Act* 1977 (Note 3). *O'Brien v R* [2019] NSWCCA 187, where observations were made concerning the interplay between ss 56 and 55F(2) of the Act, has been added to Note 8.

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**Update 68**

**October 2021**

**FILING INSTRUCTIONS OVERLEAF**

*Judicial Commission of New South Wales*

*Level 5, 60 Carrington Street, Sydney NSW 2000*

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# FILING INSTRUCTIONS

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# Closed court, suppression and non-publication orders

## [1-349] Introduction

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

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

The onus is on the parties to make an application for appropriate orders at the hearing. Such orders may include an application for a pseudonym order or the suppression of certain evidence, such as evidence related to assistance given during the proceedings: *Darren Brown (a pseudonym) v R (No 2)* [2019] NSWCCA 69 at [13]–[14]. Note the observations of the court concerning the approach usually taken to assistance at [31]–[34], although these must be read in light of *HT v The Queen* [2019] HCA 40: see *Sentencing Bench Book* at **[12-202] Procedure** (in **Power to reduce penalties for assistance to authorities**).

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

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

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

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

### Common law and suppression and non-publication orders

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

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

## [1-350] The principle of open justice

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

*John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 per Spigelman CJ at [18]. However, in appropriate cases courts have jurisdiction to modify and adapt the content of general rules of open justice and procedural fairness and to make non-publication orders for particular kinds of cases: *HT v The Queen* [2019] HCA 40 at [44], [46].

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

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

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

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

The *Suppression Act* confers broad powers on courts to make suppression or non-publication orders: s 7. Such orders may be made at any time during proceedings or after proceedings have concluded: s 9(3).

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

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

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

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

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

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

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

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

In *R v Elmir*, Davies J made suppression orders with respect to protected images, the methods used to obtain those images and a messaging application used during a police

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

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

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

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

In *Lacey (a pseudonym) v Attorney General for New South Wales* [2021] NSWCA 27 the court concluded that the "otherwise necessary" requirement in s (8)(1)(e) could, in circumstances involving cultural issues, operate to extend the effect of s 8(1)(d) to proceedings involving matters other than offences of a sexual nature: at [27]–[31]; [41]–[43]; [85]. The offender, an Aboriginal teenage girl, sought an order prohibiting men from viewing video footage of her being strip-searched. The court found a magistrate may have the power to make such an order.

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

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

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

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

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

**Take-down orders**

A take-down order will fail the necessity test under s 8(1) if it is futile. However, an order will not necessarily be futile merely because the court is unable to remove all offending material from the internet or elsewhere, or the material is available on overseas websites: *AW v R* [2016] NSWCCA 227 at [17]; *Nationwide News Pty Ltd v Quami* (2016) 93 NSWLR 384 at [83]; *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [76]. Where the application for a take-down order relates to proceedings before a jury, the test of necessity will not readily be satisfied without considering whether the jury is likely to abide by the judge's directions to decide the matter only by reference to the evidence: *Fairfax Digital*

at [77]. However, full effect should be given to the received wisdom that jurors act responsibly and in accordance with their oath, including complying with directions of the trial judge: *AW v R* at [16]; *Nationwide News Pty Ltd v Quami* at [90].

**Content of the order**

An order *must* specify:

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

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

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

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

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

**Review and appeals**

Orders made under the Act are subject to review and appeal: ss 13–14. Section 13 is confined to a review by the original court which granted the relevant order while s 14 deals with an appeal by leave, either in respect of the original order or the order of that court on a review: *D1 v P1* [2012] NSWCA 314 at [42]. Given the powers under s 14(5) to admit additional or substituted evidence, together with the fact that, subject to leave, a review under s 13 and an appeal under s 14 appear to be alternatives, the hearing on the appeal is a hearing de novo: *D1 v P1* at [43]; *Fairfax Digital* at [6]. As to who may make an application under s 13 for review of an order see *JB v R* [2019] NSWCCA 48 at [25]–[27]. In that case the court concluded the NSW Bar Council had standing to make an application for review.

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

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

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

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

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

### Commonwealth provisions

The relevant Commonwealth provisions include:

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

## [1-358] Closed courts

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

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

When a complainant's evidence is being given or heard before the court (whether this is in person or via an audio visual or audio recording) proceedings are to be held in camera unless otherwise ordered: s 291(1). Where a record of the original evidence of the complainant is tendered in proceedings by the prosecutor under Ch 3, Pt 5, Div 3 *Criminal Procedure Act*, the record does not need to be tendered in camera: s 291(6).

Media access to such proceedings is governed by s 291C of the Act. The court may make arrangements for media representatives to view or hear evidence or a record of it, in circumstances where the media is not entitled to be present in the courtroom: s 291C(2). For details of such procedures: see District Court Criminal Practice Note 4, "Media access to sexual assault proceedings heard in camera", in **Miscellaneous** at **[10-500]**.

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

**Children in criminal proceedings**

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

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

**Terrorism**

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

**Witness protection**

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

**Commonwealth provisions**

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

Section 93.2 of the Code, in Pt 5.2 titled "Espionage and related offences", empowers a court to exclude members of the public from all or part of a hearing if satisfied it is in the interests of Australia's national security. Orders may also be made that no report of the whole or specified part of the hearing be published. The contravention of an order is an offence: s 93.2(3). See also the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth) which establishes a

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

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

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

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

See the following:

- *Bail Act* 2013, s 89(1) prohibits publication of association conditions in terms similar to *Crimes (Sentencing Procedure) Act* 1999, s 100H (see below).
- *Child Protection (Offenders Prohibition Orders) Act* 2004, s 18.
- *Children (Criminal Proceedings) Act* 1987, s 15A prohibits the publication or broadcast of the names of children involved as offenders, witnesses, or brothers and sisters of child victims in criminal proceedings (see below).
- *Crimes Act* 1900, s 578A prohibits the publication of matters identifying a complainant in proceedings in respect of a prescribed sexual offence. As to publication, once proceedings are finalised see: ss 578A(4)(a)–(f) and 578A(3).
- *Crimes (Appeal and Review) Act* 2001, s 111.
- *Crimes (Domestic and Personal Violence) Act* 2007, s 45(1) prohibits the publication of names or identifying information concerning children in AVO proceedings.
- *Crimes (Sentencing Procedure) Act* 1999, s 100H prohibits the publication or broadcast of persons named in non-association orders (other than the offender) made under s 17A(2)(a), or any information calculated to identify any such person.
- *Evidence Act* 1995, s 195 prohibits the publication of prohibited questions, the nature of which are set out in that section.
- *Law Enforcement (Controlled Operations) Act* 1997, s 28.
- *Law Enforcement and National Security (Assumed Identities) Act* 2010, s 34.
- *Status of Children Act* 1996, s 25.

### Publication of children's names in criminal proceedings

*Children (Criminal Proceedings) Act* 1987, s 15A prohibits the publication or broadcast of the names of children involved as offenders, witnesses, or brothers and sisters of child victims in criminal proceedings. Where there has been breach of an order under s 15A(1), proceedings should be commenced under s 15A(7) instead of seeking a non-publication order under s 7 of the *Suppression Act*: *R v AB (No 1)* (2018) 97 NSWLR 1015 at [38]-[39].

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

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

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

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

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

**Commonwealth provisions**

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

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

A person commits an offence if:

(a) the person publishes any matter; and

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

(c) the matter:

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

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

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

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

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

## Checklist for suppression orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) Ensure a copy of the order is:

  (a) entered on Justicelink

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

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# Trial instructions R–Z


*para*

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# Procedures for fitness to be tried (including special hearings)

## [4-300] Introduction

The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (the Act), prescribes criminal procedures for the Supreme Court and District Court for persons affected by mental health and cognitive impairments. The Act replaced the *Mental Health (Forensic Provisions) Act* 1990 (the 1990 Act) and commenced on 27 March 2021.

A "defendant", the term generally used throughout the Act, is defined in s 3(1) to include an accused.

Part 4, Div 2 of the Act deals with fitness to stand trial (see **[4-310]**) and Pt 4, Div 3 deals with special hearings, including the special verdict of act proven but not criminally responsible on the ground of a mental health impairment or cognitive impairment (see **[4-315]**).

When a fitness inquiry is held, the court is obliged to consider "whether the trial process can be modified, or assistance provided, to facilitate the [accused's] understanding and effective participation in the trial", so as to avoid a determination of unfitness: s 44(5)(a). An example may be introducing frequent breaks to enable an accused with an intellectual disability to receive regular explanations in language they can understand as to what is happening in the proceedings, or permitting a support person to be seated alongside the accused. It is important to clarify with the parties precisely what is being sought.

For the procedures where fitness is raised in relation to federal offences see **[4-305]**.

See generally, *Criminal Practice and Procedure NSW* at [17-s1].

## [4-302] Application of the Act

The Act applies to:

- proceedings which had commenced but were not completed before 27 March 2021 if the accused's unfitness to be tried was raised before then
- a fitness inquiry or special hearing which commenced under the 1990 Act but was not completed before 27 March 2021: Sch 2, Pt 2, cl 7.

Section 38 of the 1990 Act continues to apply to proceedings where the defence of not guilty by reason of mental illness was raised before 27 March 2021 until a determination is made as to whether a special verdict should be entered or the defence is no longer being raised. However, if a special verdict of not guilty by reason of mental illness would, but for the new Act, have been found the court must instead find the special verdict of act proven but not criminally responsible: Sch 2, Pt 2, cl 5. In *R v Tonga* [2021] NSWSC 1064, Wilson J considered what was meant by "the

commencement of proceedings" in the context of a mental illness (or impairment) defence under Pt 3 of the new Act, and concluded the proceedings commenced when the Crown presented the indictment: at [6]–[10]; see also *R v Siemek (No. 1)* [2021] NSWSC 1292 at [9].

Part 2 of the 1990 Act continues to apply to criminal proceedings where, before 27 March 2021, a limiting term had been nominated or an order made under s 27 of that Act: Sch 2, Pt 2, cl 7A.

## [4-304] Statutory definitions of mental health and cognitive impairments

The Act contains definitions of a "mental health impairment" and a "cognitive impairment". Previously the question of whether a person suffered a mental health impairment was determined in accordance with the common law. A person suffering from a cognitive impairment did not necessarily fall within the parameters of the 1990 Act.

Introducing these separate categories of impairment is one of the most significant changes made by the Act to the law as it was under the 1990 Act. Each are defined in the Act. The category into which an accused person falls will have significant consequences if there is a finding that they are not fit to be tried, with the need to refer the matter to the Mental Health Review Tribunal potentially obviated. For an accused with a cognitive impairment, it is ordinarily unlikely that their condition will change, or that they will become fit to be tried with time and treatment. See further, K Eagle and A Johnson, "Clinical issues with the *Mental Health and Cognitive Impairment Forensic Provisions* Act 2021" (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: ss 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: ss 56(5), (6). This permits the accused to raise the defence of mental health impairment or cognitive impairment in Pt 3 of the Act.

The verdicts available include:

(a) not guilty

(b) a special verdict of act proven but not criminally responsible

(c) that on the limited evidence available, the accused committed the offence charged, or

(d) that on the limited evidence available, the accused committed an available alternative offence: s 59(1).

If the court finds the accused committed the offence, and would have imposed a sentence of imprisonment, it must impose a limiting term: ss 63–65.

See step 5–5B at **[4-320]**.

If the verdict is act proven but not criminally responsible or simply not guilty, the accused is dealt with in the same manner as if that verdict was given in a normal trial: s 60.

## [4-320] Part 4 procedure

| **Step 1: Fitness is raised** | **Section** |
|---|---|
| Upon fitness first being raised the court may **dismiss** the charge (without conducting an inquiry) if of the opinion, having regard to any of the following, that it is inappropriate to inflict any punishment—<br>(a) the trivial nature of the charge or offence,<br>(b) the nature of the accused's mental health impairment or cognitive impairment,<br>(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:<br>• adjourn proceedings<br>• grant bail<br>• remand in custody (not exceeding 28 days)<br>• request the accused to undergo a psychiatric or other examination<br>• request that a psychiatric or other report relating to the accused be obtained<br>• discharge a jury<br>• any other order that the court considers appropriate.<br><br>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.<br><br>See **step 3** when bail is granted.<br><br>**Note 1:** The court, the accused or the prosecutor may raise the question of an accused's unfitness to be tried: s 39.<br><br>**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.<br><br>**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.<br><br>**Note 4**: In appropriate cases where the accused has a cognitive impairment discuss with the parties whether consideration should be given to adapting or modifying the trial process. | 43 |

| **Step 2: Court holds inquiry** | **Section** |
|---|---|
| See inquiry procedure at s 44 including matters to consider in determining fitness such as whether the trial process can be modified, the complexity of the trial, and whether the accused person is represented. | 44 |

| **Step 2: Court holds inquiry** | **Section** |
|---|---|
| After an inquiry: | |
| 1. If the accused is found **fit** to be tried, proceedings recommence or continue in accordance with the appropriate criminal procedures. Where the accused has been committed for trial, the court may remit matter to a magistrate for a case conference. | 46, 52 |
| 2. If the accused is found unfit to be tried, the court must also determine whether, on the balance of probabilities, during the next 12 months, the accused:<br>• **will not** become fit to be tried — **see step 2A**<br>• **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:<br>• adjourn proceedings<br>• grant bail (see **step 3**)<br>• remand in custody<br>• discharge a jury<br>• any other order the court thinks appropriate.<br>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:** 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 |

| **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.** | 49 |
| 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). | |
| 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* | 47(2)(d), (e) |

| **Step 2B: Court finds accused unfit but may become fit within 12 mths — referral to MHRT** | **Section** |
|---|---|
| *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]). | |

| **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:<br>(a) unfit to be tried; and<br>(b) suffers from a mental health impairment.<br><br>To arrange an assessment and report by FMHN and, where appropriate, care and/or treatment whilst on bail, it is suggested the court:<br>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.<br>2. Adjourn the proceedings with liberty to relist the matter upon provision of a report by FMHN.<br>3. Contact the office of the Statewide Clinical Director Forensic Mental Health (FMHN phone: 02 9700 3027) to arrange assessment.<br>4. Provide any psychiatric or psychological reports filed in the proceedings.<br><br>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:<br>(a) If the person is suitable for community care, makes a referral of the person to a *community mental health service*; or<br>(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.<br><br>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).<br><br>If the DPP advises no further proceedings will be taken the court must order the accused's release: s 53(3).<br><br>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:<br>1. the patient's detention, care or treatment in a mental health facility, correctional centre, detention centre or other place, or<br>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).<br><br>**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). | 56 |
| There are three possible verdicts: | |
| 1. Not guilty<br>(a) person ceases to be a forensic patient<br>(b) no disposition decision | 59(1)(a), 60 |
| 2. Special verdict of act proven but not criminally responsible (NCR)<br>**see step 5A** | 59(1)(b) |
| 3. A qualified finding of guilt based on limited evidence<br>**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.<br><br>**Note**: if a jury is determining the special hearing, a direction such as that at [4-331] will be required: see s 56(11). | 66 |

| Step 5A: Act proven but not criminally responsible | Section |
|---|---|
| Where a special verdict of act proven but not criminally responsible (NCR) is given, the court makes orders as prescribed by s 33 including: | 59(1)(b), 61 |
| 1. **Remand in custody until further order made under s 33** | 33 |
| 2. **Detention in place and manner as court thinks fit until released by due process of law**; or | |
| 3. **Unconditional or conditional release** (before making such an order, the court may request a report by a forensic psychologist not currently involved in treating the accused as to their condition and whether they are likely to seriously endanger their safety or that of any member of the public. The accused is not to be released unless the court is satisfied on the balance of probabilities that the accused's safety or that of the public will not be seriously endangered by their release). | |
| 4. **Such other order court considers appropriate** | |
| 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. | 66 |

| Step 5A: Act proven but not criminally responsible | Section |
|---|---|
| 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:<br>1. Adjourn the proceedings (the FMHN requires at least 8 weeks to conduct an assessment and prepare a report)<br>2. The court may direct that during the adjournment:<br>(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<br>(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:<br>(i) If the court is considering releasing the person:<br>Recommended conditions as to care and/or treatment in the community.<br>(ii) If the court is considering detaining the person:<br>Recommended placement in a prison or mental health facility.<br>(The court later considers the recommendations of the FMHN report).<br>See order for release under s 33 and order for detention.<br>**Note**: the defence will need to make arrangements to obtain a report for an accused suffering from a cognitive impairment. If the accused is in custody and suffering from a cognitive impairment only, then such a report may be obtained from the Specialist Disability Service of Corrective Services. | |

| Step 5B: Offence committed on limited evidence | Section |
|---|---|
| If the court finds that on the limited evidence before it, the accused committed the offence charged or an alternative offence (a qualified finding of guilt) then: | 59(1)(c), (d), 62 |
| 1. If the court would not have imposed imprisonment, the court may impose a penalty or make any other order it might have made on conviction of the accused in a normal criminal trial. The court must inform the MHRT.<br>**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:<br>(a) nominate a limiting term,<br>(b) refer the person to the MHRT; and<br>(c) make an interim order with respect to custody.<br>See order under s 65.<br>In determining a limiting term or other penalty the court must take into account factors in s 63(5).<br>**Note 1**: See **step 5A** as to reports that may be provided pursuant to s 66. | 63(2), 65 |

| Step 5B: Offence committed on limited evidence | Section |
|---|---|
| **Note 2**: the defence will need to make arrangements to obtain a report for an accused suffering from a cognitive impairment. If the accused is in custody and suffering from a cognitive impairment only, then such a report may be obtained from the Specialist Disability Service of Corrective Services. | |

| 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).

## [4-330] 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).

## [4-331] 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.

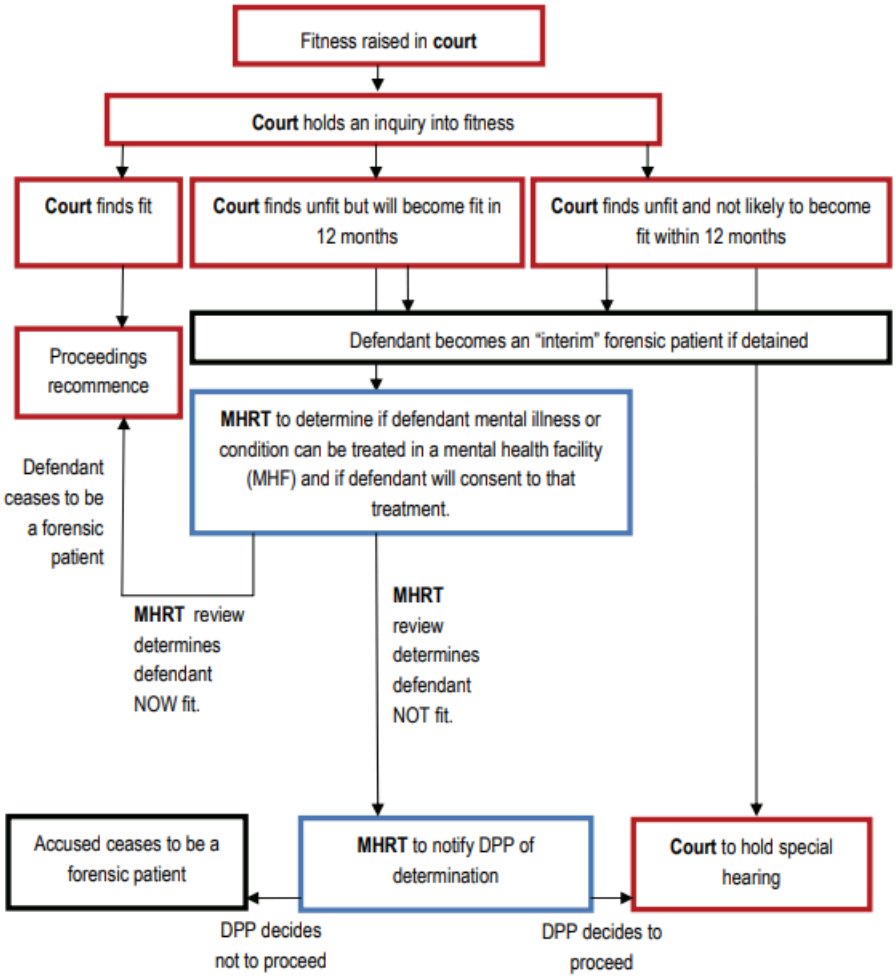
I should emphasise that although I am telling you about the legal and practical consequences of any verdict you may reach in order for you to understand the nature of the special proceeding in which we are engaged, your duty is confined to deciding whether, on the limited evidence available, the prosecution 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

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 following flow diagram summarises the regime for procedures following a finding of unfitness proposed by the NSWLRC, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Report No 138, 2013, p 137 (reproduced with permission).

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*para*

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# Maintain unlawful sexual relationship with a child

***Crimes Act* 1900 (NSW), s 66EA**

## [5-905] Introduction

Under s 66EA(1) of the *Crimes Act* 1900, it is an offence for an adult to maintain an unlawful sexual relationship with a child. Section 66EA, in its current form, commenced on 1 December 2018. It is in the form recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse and is largely modelled on the Queensland offence found in s 229B of the *Criminal Code* (Qld).

The new s 66EA extends to relationships existing wholly or partly before 1 December 2018, provided the accused's acts were unlawful sexual acts during the period of the relationship: s 66EA(7). "Unlawful sexual act" is defined as any act that constitutes, or would constitute, one of the numerous sexual offences listed in s 66EA(15).

## [5-910] Suggested procedure before empanelling jury and formally arraigning accused

Given the nature of this offence, it is expected the Crown would adopt the preferable, and more straightforward, course of including any alternative counts on the indictment as it is anticipated the question of alternative verdicts will arise in every case. It is also anticipated that the unlawful sexual acts making up the s 66EA offence would be particularised in the indictment.

However, if the indictment only contains a substantive s 66EA count, it is good practice to ask the parties, 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.

## [5-915] Suggested direction — maintain unlawful sexual relationship with child

The following direction is suggested on the basis of the text of s 66EA and without the benefit of any appellate consideration of its terms. Matters of potential controversy include the concepts of "maintain" and "relationship". 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*].

The critical issue is whether the Crown has proved beyond reasonable doubt that the accused maintained an unlawful sexual relationship with the complainant. The word "relationship" bears its ordinary meaning. Whether or not there was a relationship between the accused and the complainant is a question of fact for you to determine.

As you will appreciate, a relationship is a way of describing the nature of the connection between two or more people. In the circumstances of this offence it concerns two people — you are considering whether there is a relationship between the accused and the complainant. The Crown case on this aspect of the offence is that you would be satisfied that the following evidence proves beyond reasonable doubt the relationship in this case [*describe evidence Crown relies on to prove the relationship: eg familial; position of authority*].

Whilst the existence of the relationship must comprise something more than the alleged unlawful acts alone, in considering whether or not there is a relationship, all the circumstances of the association between the accused and the complainant, including evidence of any unlawful sexual conduct, must be taken into account.

In determining whether the relationship was an unlawful sexual relationship, you must also 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 say that children cannot consent to sexual activity.]

Although the Crown relies on the unlawful sexual acts I have just summarised, in determining whether the Crown has established beyond reasonable doubt that the accused maintained an unlawful sexual relationship with the complainant, you do not need to be satisfied that the Crown has proved that every unlawful sexual act alleged against the accused occurred. All you need to be satisfied of beyond reasonable doubt is

that the accused committed two or more of the unlawful sexual acts with or towards the complainant. Further, you do not all need to agree about which two unlawful sexual acts constitute the unlawful sexual relationship. This means [*give examples from the Crown case to illustrate that each juror may be satisfied of two or more different unlawful sexual acts.*]. 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 defence case on the unlawful sexual acts*].

In the context of considering whether you are satisfied the accused maintained an unlawful sexual relationship with the complainant, maintained has its ordinary everyday meaning. That is, carried on, kept up or continued. [*Summarise how Crown puts its case on this aspect of offence*].

[*Where there is a dispute as to whether the relationship was "maintained"*:

The Crown must prove beyond reasonable doubt that there was an ongoing relationship of a sexual nature between the accused and the complainant. An isolated incident is not enough. You must be satisfied beyond reasonable doubt that the evidence establishes some continuity or repetition of sexual conduct. [*Summarise the Crown and defence cases concerning this element of the offence*]. If you are not satisfied of this beyond reasonable doubt then you must find the accused not guilty.]

If you are satisfied beyond reasonable doubt that the Crown has established that at least two of the unlawful sexual acts occurred, then because of the way the law defines an "unlawful sexual relationship" the Crown will have proved the existence of an unlawful sexual relationship between the accused and the complainant. [*If the circumstances of the case warrant it*: A consequence of that finding, if you come to it, is that you will not then need to return verdicts for the alternative counts in the indictment.]

*Alternative verdicts – s 66EA(13)*

**See note 8 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.

## [5-920] Notes

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). 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 adult is defined as someone 18 years or older and a child is a person under 16 years old: s 66EA(15).
4. 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* 1900: 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.
5. In the Second Reading Speech for the *Criminal Legislation Amendment (Child Sexual Abuse) Bill* 2018, the Attorney General said of the new offence that it:

   > will provide that it is an offence to maintain an unlawful sexual relationship with a child under 16. A person will have maintained an unlawful sexual relationship if they have engaged in two or more unlawful sexual acts with a child…

   In *R v M, DV* (2019) 133 SASR 470, where the SA Court of Appeal considered the South Australian equivalent provision in s 50 of the *Criminal Law Consolidation Act* 1935 (SA), the court held, by majority, that over and above proving two or more unlawful sexual acts, the Crown must also prove there was a relationship between the accused and the complainant: at [10]; [183]–[184]; cf, Blue J at [84]; *R v Mann* [2020] SASCFC 69 at [21]. In *R v Mann*, the court described the actus reus of the offence as the maintenance of a relationship in the course of which an adult engages in two or more unlawful sexual acts with a child, observing that the words "in which" in s 50(2) of the Act (which is replicated in s 66EA(2)) differentiate the relationship from the unlawful sexual acts: [12]-[13]; *R v M, DV* at [1], [9]-[10].
6. The word "relationship" retains its ordinary meaning: *R v Mann* at [10]. The category of relationships is not closed because they vary widely and the concept can evolve over time: *R v Mann* at [26]. When determining whether a relationship exists, all the circumstances of the association between the accused and the complainant, including evidence of any unlawful sexual conduct, must be taken into account: *R v Mann* at [12], [15], [35]; *R v M, DV* at [10]; [184]. The duration, frequency, nature and continuity of the interactions between the persons are relevant considerations: *R v Mann* at [27]. While a relationship is generally characterised by repeated interactions, it can be interrupted by absence for a period of time: *R v Mann* at [28].
7. 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]

8. Nor is the jury required to agree about which two unlawful sexual acts constitute the unlawful sexual relationship: s 66EA(5)(c).

9. 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.

10. 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 **[5-910]**. It is necessary to consider alternative verdicts where:

    (a) the issue in the trial concerns "maintaining" the relationship, and/or

    (b) the jury is not satisfied the Crown has proved the occurrence of two or more unlawful sexual acts.

    If "maintaining" the relationship is in issue, because the central issue concerns *only* the continuity of the relationship, when it comes to considering the alternative counts the jury may return a verdict with respect to one or more of the alternative counts. The position is different if the issue concerns the existence of an unlawful sexual relationship. It is logical to conclude that, given the definition of an unlawful sexual relationship in s 66EA(2), once a jury is satisfied beyond reasonable doubt that two or more unlawful acts occurred then the Crown has proved that part of its case. If they are not so satisfied then the Crown has not proved an essential aspect of its case and the jury then needs to consider the alternatives. However, in such a case, if the jury is not satisfied that two or more unlawful sexual acts occurred, then they could only return a verdict in respect of *one* of the alternative counts.

    In cases where both scenarios arise, the directions will need to address both.

11. 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.

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# Sexual touching

***Crimes Act* 1900 (NSW), ss 61KC, 61KD, 66DA and 66DB**

## [5-1770] Introduction

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (the amending Act) implemented recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse and the Child Sexual Offences Review team to reform the law with respect to sexual offences. These included repealing the basic and aggravated offences of indecent assault (former ss 61L and 61M *Crimes Act* 1900) and replacing them with separate offences of sexual touching in ss 61KC and 61KD for adults, and in ss 66DA and 66DB for children.

The new provisions apply to offences committed on or after 1 December 2018: *Crimes Act* 1900, Sch 11, Pt 35.

For offences committed before 1 December 2018 see **[5-650] 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].

## [5-1775] Suggested direction — basic offence (s 61KC)

**Note: It is good practice to provide the four elements of the offence to the jury in written form.**

The suggested direction is based on the offence in s 61KC(a). For incitement offences see the commentary at **[5-1798] 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 **[5-1797] Suggested direction — sexually touching a child under 10 (s 66DA)**.

The accused is charged with sexual touching. The Crown case is that [*briefly outline the incident/s to which the charge relates*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following four elements which make up the offence.

1. the accused intentionally touched the complainant;
2. the touching was sexual;
3. the complainant did not consent to being touched in that way; and
4. the accused knew the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them you must find the accused not guilty.

1. **The accused intentionally touched the complainant**

   The slightest contact with the complainant is enough to amount to touching.

   The touching does not have to be a hostile or aggressive act or one that caused the complainant fear or pain, but it must be an intentional touching; not an accidental touching.

2. **The touching was sexual**

   Sexual touching means touching another person with any part of the body **[***add where relevant*: "or with anything else, or through anything, including through anything worn by the person doing the touching or by the person being touched"**]**, in circumstances where a reasonable person would consider the touching to be sexual.

   In determining whether a reasonable person would consider the touching was sexual, you should consider everything that you regard as relevant, but there are some particular matters you are required to take into account. They are:

   - the part of the body touched, **[***or if appropriate*: "or doing the touching"]. Was it the genital or anal area or **[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 touching did so for the purpose of obtaining sexual arousal or sexual gratification.
   - was there any other aspect of the touching (including the circumstances in which it was done) which made it sexual?

   The Crown is not required to prove any particular one of these matters. They are matters you are required to take into account, along with anything else you consider to be relevant when you are deciding whether the Crown has proved that the touching was "sexual".

**[***Where appropriate*: A touching done for genuine medical or hygienic purposes is not a sexual touching. As that is what the accused says was the reason for the touching in this case, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

3. **The sexual touching was done without the complainant's consent**

The third element concerns the complainant's state of mind. The Crown must prove that the sexual touching was done without [*her/his*] 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 [*she/he*] was not consenting at the time the touching occurred.

**[***Where appropriate***:** The complainant said in evidence that [*she/he*] 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:

- [*she/he*] consented while substantially intoxicated by alcohol or any drug, or
- [*she/he*] consented because of intimidatory or coercive conduct, or other threat, even though that conduct does not involve a threat of force, or
- [*she/he*] consented because of the abuse of a position of authority or trust.

If you are satisfied the complainant consented in that circumstance, it does not necessarily follow that you should be satisfied beyond reasonable doubt [*she/he*] did not consent. The essential matter the Crown must prove is that the complainant did not consent in the sense that [*she/he*] did not freely and voluntarily agree to the sexual touching.**]**

To repeat what I have said, the third element the Crown must prove concerns the complainant's state of mind. The Crown must prove the complainant did not consent to the sexual touching at the time it occurred.

4. **The accused knew the complainant did not consent**

The fourth element concerns the accused's state of mind. The Crown is required to prove the accused knew the complainant did not consent to the sexual touching.

This is a question about what the accused's state of mind actually was. It is not a question about what you or anyone else would have known, thought or believed in the circumstances. It is what [*he/she*] knew, thought or believed.

You must consider all of the circumstances, including any steps taken by the accused to make sure the complainant consented to the sexual touching.

**[***Add, if appropriate:* The law is that any intoxication of the accused that was self-induced must be ignored. If you consider that [*he/she*] was intoxicated by voluntarily drinking alcohol [or taking drugs], you must ignore that and decide this element by considering what [*his/her*] state of mind would have been if [*he/she*] had not been intoxicated.**]**

The law says the Crown will have proved the accused knew the complainant did not consent to sexual touching if: **[***refer only to those of the following matters that arise from the evidence* **— see further [5-1780] Notes below]**

(a) the accused knew the complainant did not consent; or

(b) the accused was reckless as to whether the complainant consented because [*he/she*] realised there was a possibility [*she/he*] did not consent; or

(c) the accused was reckless as to whether the complainant consented because [*he/she*] did not even think about whether [*she/he*] consented but went ahead not caring, or considering it was irrelevant whether [s*he/he*] consented; or

(d) the accused may have actually believed the complainant consented, but [*he/she*] had no reasonable grounds for that belief; or

(e) the accused knew the complainant consented under a mistaken belief about [refer to those parts of s 61HE(6) that may apply].

To repeat what I said at the beginning of these directions, you can only find the accused guilty if the Crown proves each of the four elements beyond reasonable doubt. If the Crown fails to prove any one of them you must find the accused not guilty.

## [5-1780] Notes

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) that do not apply. See *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4] and [42].
2. The Crown must prove the alleged complainant did not consent. What amounts to knowledge of consent and how consent may be negated is addressed in detail in s 61HE.
3. Consent is not an element of a sexual touching offence if the alleged victim is a child: s 61HE(1) lists the offences to which the definition of consent applies.
4. The exception for genuine medical or hygienic purposes in s 61HB(3) may be excluded when the relevant acts giving rise to the offence occurred during a medical examination: *Decision Restricted* [2020] NSWCCA 138 at [51]–[65]. There is no requirement that the sole purpose of touching in such a context be for sexual gratification. The exception is only engaged when the relevant act is carried out for proper medical purposes: at [51]; see also [99].
5. Evidence that, at the relevant time, the accused was intoxicated cannot be taken into account if it was self-induced: s 61HE(4)(b).
6. Where a trial involves an offence of sexual touching and an offence of indecent assault (*Crimes Act*, s 61M, now repealed) separate consent directions are required: *Holt v R* [2019] NSWCCA 50 at [64].

## [5-1785] Suggested direction — aggravated offence (s 61KD)

If the Crown has charged the accused with an aggravated offence, adapt so much of the suggested direction for the basic offence as is appropriate and continue with whichever of the following aggravated circumstances have been relied upon.

Because it is possible for the jury to reach different verdicts, it may avoid confusion if they are provided with a written list of possible verdicts (a "verdict sheet"), particularly if the trial involves multiple counts.

The final element the Crown must prove beyond reasonable doubt is that the offence was aggravated because [*specify circumstance of aggravation*]. You only need to consider this element if you are satisfied the Crown has proved the first four elements of the offence beyond reasonable doubt.

**In company — s 61KD(2)(a)**

[*This direction is based upon the sexual touching being carried out by the accused in the presence of an alleged co-offender in his/her company. Modification will be required if the roles are different.*]

It is an aggravating circumstance if the offence was committed in the company of another person or persons. The Crown alleges the accused committed the offence when [*he/she*] was in the company of [*alleged co-offender*]. The Crown case is that when the accused sexually touched the complainant, [*alleged co-offender*] was [*specify nature of presence*].

The Crown will prove the offence was committed "in company" if it proves beyond reasonable doubt:

(a) the accused and [*alleged co-offender*] shared a common purpose that the complainant would be sexually touched;

and

(b) [*alleged co-offender*] was physically present when the sexual touching occurred.

For [*alleged co-offender*] to be "physically present", the Crown must prove [*he/she*] was sufficiently close **[***refer only to those of the following the Crown relies on***]**:

(a) to intimidate or coerce the complainant in relation to the sexual touching;

or

(b) to encourage or support the accused in sexually touching the complainant.

It is not enough for the Crown to prove either the accused shared a common purpose with [*alleged co-offender*] that the complainant would be sexually touched, or that [*alleged co-offender*] was physically present. The Crown must prove both of these beyond reasonable doubt before you can conclude the offence was committed in company.

**[***If appropriate, add*: It is not enough [*alleged co-offender*] shared a common purpose with the accused that the complainant would be sexually touched, but was not physically present in the way in which I have defined that concept. For example, it would not be enough if [*alleged co-offender*] was somewhere else acting as a look-out, or had provided encouragement to the accused at some time before the sexual touching occurred.**]**

[*Summarise the evidence relied on by the Crown and the defence case.*]

**Under authority — s 61KD(2)(b)**

The Crown alleges the aggravating circumstance that the offence was committed when the complainant was under the authority of the accused. To establish this, the Crown must prove the complainant was under [*his/her*] care, supervision or authority [*whether generally or at the time of the offence*]. It is a matter for you to determine whether the evidence establishes the complainant was under the care, supervision or authority of the accused.

[*Summarise the evidence relied on by the Crown and the defence case*].**]**

**Complainant has serious physical disability or cognitive impairment — 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 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 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".

## [5-1790] Notes — aggravated sexual touching — under s 61KD

1. As indicated in the suggested direction, the "circumstances of aggravation" for a charge against s 61KD are listed in s 61KD(2).
2. An alternative verdict for the basic offence in s 61KC is available for a charge under s 61KD: s 80AB(1).
3. To establish that the offence was committed in company, the Crown must show another person was physically present and shared a common purpose with the accused: *R v Button* (2002) 54 NSWLR 455 at [120]. Whether or not another person is physically present depends on what was described in *Button* at [125] as:

> … the coercive effect of the group. There must be such proximity as would enable the inference that the coercive effect of the group operated, either to embolden or reassure the offender in committing the crime, or to intimidate the victim into submission.

See also *R v ITA* [2003] NSWCCA 174 at [137]–[140].

Mere presence of another person is not sufficient: *R v Crozier* (unrep, 8/3/96, NSWCCA); *Kelly v The Queen* (1989) 23 FCR 463 at 466. The complainant's perspective (of being confronted with more than one person) is relevant but not determinative. "If two or more persons are present, and share the same purpose, they will be 'in company', even if the victim was unaware of the other person": *Button* at [120]. It is sufficient if the complainant is confronted by the "combined force of two or more persons", even if the other person(s) did not intend to physically participate if required: *R v Leoni* [1999] NSWCCA 14 at [20] (referring to the judgment of King CJ in *R v Broughman* (1986) 43 SASR 187 at 191); applied in *R v Villar* [2004] NSWCCA 302 at [68]. Proof of this aggravating circumstance does not depend upon the other person being convicted of the same offence: *Villar* at [69].

4. As to whether the alleged victim is under the authority of the accused (s 61KD(2)(b)), s 61H(2) provides that "a person is under the authority of another person if [they are] in the care, or under the supervision or authority, of the other person". In *KSC v R* [2012] NSWCCA 179 at [125], McClellan CJ at CL (Davies and Fullerton JJ agreeing) concluded that the components in the definition of care and supervision made plain the nature of the relationship to which section was directed and that each of the words "care", "supervision" and "authority" were ordinary English words a jury would have no difficulty understanding. See also *R v Howes* [2000] VSCA 159 at [4]; *R v MacFie* [2000] VSCA 173 at [18], [21]. It is not confined to relationships based on a legal right or power: *Howes* at [50]; *MacFie* at [20]–[21].

5. "Serious physical disability" (s 61KD(3)(d)) is not defined. The following definitions from s 3(1) *Community Welfare Act* 1987 may be considered a guide as to the concepts the jury could be invited to consider in deciding the "ordinary English meaning":

> "***physically disabled person***" includes a person who, as a result of having a physical impairment to [their] 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 [their] opportunities to enjoy a full and active life.
>
> "***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.

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.

## [5-1795] Suggested direction — sexually touching a child under 10 (s 66DA)

**Note: It is good practice to provide the elements of the offence to the jury in written form.**

This direction can be adapted for an offence involving a child against s 66DB. For incitement offences see the commentary at **[5-1798] Incitement offences**.

It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.

The accused is charged with sexually touching the complainant. The Crown case is that [*briefly outline the incident/s to which the charge relates*].

Before you can find the accused is guilty, the Crown must prove beyond reasonable doubt each of the following elements of the offence.

1. the complainant was a child under 10 years old;
2. the accused intentionally touched the complainant; and
3. the touching was sexual.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them then you must find the accused not guilty.

1. **The complainant was a child under 10**

   The law says a child is a person who is under the age of 10 years. In this case there is no dispute the complainant was a child of [*age*] at the time specified on the indictment. [*This will require adaptation if the complainant's age is disputed*].

2. **The accused intentionally touched the complainant**

   The slightest contact with the complainant is enough to amount to touching. The touching does not have to be a hostile or aggressive act or one that caused the complainant fear or pain, but it must be an intentional touching; not an accidental touching.

3. **The touching was sexual**

   Sexual touching means touching another person with any part of the body **[add where relevant:** "or with anything else, or through anything, including through anything worn by the person doing the touching or by the person being touched"**]**, in circumstances where a reasonable person would consider the touching to be sexual.

In determining whether a reasonable person would consider the touching was sexual, you should consider everything you regard as relevant, but there are some particular matters you are required to take into account. They are:

- the part of the body touched, **[***or if appropriate*: "or doing the touching"**]**. Was it the genital or anal area or [*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 touching did so for sexual arousal or sexual gratification.
- was there any other aspect of the touching (including the circumstances in which it was done) which made it sexual?

The Crown is not required to prove any particular one of these matters. They are matters you are required to take into account, along with anything else you consider to be relevant when you are deciding whether the Crown has proved the touching was "sexual".

**[***Where appropriate*: Touching done for genuine medical or hygienic purposes is not sexual touching. As that is what the accused says was the reason for the touching in this case, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

**[***If the circumstances of the particular case require it*: Some sexual offences require the Crown to prove the complainant did not consent. But where the alleged offence involves a child, consent is irrelevant. The law says that children cannot consent to sexual activity.**]**

If you find that the Crown has proved all three elements of the offence beyond reasonable doubt, then your verdict should be "guilty". However, if you are not satisfied the Crown has proved any one element of the offence, then your verdict should be "not guilty".

## [5-1797] Notes — sexual touching of a child

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. Whether or not s 80AF offended the principles concerning retrospectivity was considered in *Stephens v R* [2021] NSWCCA 152. Although s 80AF was enacted to address issues associated with proving the timing of historical sexual offences, it may require consideration in contemporary cases as between offences against ss 66DA and 66DB.

2. The suggested direction at **[5-1795]** 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).

## [5-1798] Notes — incitement offences

1. The offences of sexual touching include inciting an alleged victim to sexually touch the alleged offender or a third person, or inciting a third person to sexually touch the alleged victim (ss 61KC(b)–(d), 61KD(b)–(d), 66DA(b)–(d) and 66DB(b)–(d)).

2. It is not an offence to incite an offence where the offence is constituted by inciting another person to sexual touching: s 80G(5)(a).

3. "Incite" is not defined in the Act. Its meaning was discussed in *R v Eade* [2002] NSWCCA 257, where Smart AJ observed at [59]–[60]:

> In *Young v Cassells* (1914) 33 NZLR 852 Stout CJ…said: "The word 'incite' means to rouse; to stimulate; to urge or spur on; to stir up; to animate." In *R v Massie* [1999] VR 542 at 564, Brooking JA, with whom Winneke P and Batt JA agreed, said of 'incite', "common forms of behaviour covered by the word are 'command', 'request', 'propose', 'advise', 'encourage', or 'authorise'".
>
> It was pointed out in *Regina v Asst Recorder of Kingston* [1969] 2 QB 58 at 62 that with the offence of incitement it is merely the incitement which constitutes the offence and that it matters not that no steps have been taken towards the commission of the substantive offence nor whether the incitement had any effect at all: *Young v Cassells*…"

4. The incitement must be to commit the specific offence at hand: *Walsh v Sainsbury* (1925) 36 CLR 464 at 476; *Clyne v Bowman* (1987) 11 NSWLR 341 at 347–348. It is not necessary to prove the person incited acted upon the incitement or whether the incitement had any effect. However, it is necessary to prove that the course of conduct urged would, if it had been acted upon as the inciter intended it to be, amount to the commission of the offence: *R v Dimozantis* (unrep, 7/10/1991, Vic CCA); *R v Assistant Recorder of Kingston-Upon-Hull; Ex parte Morgan* [1969] 2 QB 58 at 62.

**[The next page is 1013]**

# Supply of prohibited drugs

## [5-1800] Introduction

### Supply

As to the supply of a prohibited drug: see s 25 *Drug Misuse and Trafficking Act* 1985 (DMTA). "Supply" is defined in s 3 DMTA.

See generally, *Criminal Practice and Procedure NSW* at [10-s 3] and [10-s 25] and accompanying annotations; *Criminal Law NSW* at [DMTA.25A.40]ff.

### Knowingly take part in supply

Section 6 DMTA defines the concept "knowingly take part in" conduct which amounts to an offence under the Act including the supply of a prohibited drug: see *Criminal Practice and Procedure NSW* at [10-s 6] and especially [10-s 6.15]; *Criminal Law NSW* at [DMTA.6.20].

### Deeming provision

Section 29 DMTA contains a provision that deems possession of a drug to be for the purpose of supply where the amount of the drug is not less than the "traffickable quantity" specified for the particular drug the subject of the charge. Under the section, once possession of not less than a traffickable amount of a drug is proved beyond reasonable doubt, the accused has the onus of proving on the balance of probabilities that he or she had the drug otherwise than for supply.

See generally, *Criminal Practice and Procedure NSW* at [10-s 29] and annotations; *Criminal Law NSW* at [DMTA.29.20].

### "Carey defence"

"Supply" does not include temporary possession of a prohibited drug with the intention of returning it to the owner of the drug: see *R v Carey* (1990) 20 NSWLR 292. *Alliston v R* [2011] NSWCCA 281 discusses when the issue should be left to the jury. *Alliston* holds that *Carey* can apply to part of the drug in the possession of the accused, so that the "defence" may result in the accused being found not guilty of supplying a large commercial quantity or a commercial quantity but guilty of a lesser offence such as supply simpliciter. *Alliston* does not suggest that the deeming provision does not apply to all of the drug in a case of supply under s 25(1).

### Amount of the drug

*Alliston* is also an example of a factual situation where it is necessary to emphasise to the jury that the Crown must prove beyond reasonable doubt, not only that the accused was in possession of a prohibited drug, but also the amount of that drug. That case concerned the quantity of the drug stated in the charge but it applies also to charges of supply based upon s 29. Unless the Crown proves beyond reasonable doubt that the accused was in possession of at least a traffickable quantity, the deeming provision under s 29 DMTA does not apply. This issue may arise where the drug is in more than one place or package as was the case in *Alliston*.

There are only three amounts that are relevant to a trial on indictment. The "large commercial quantity" and "commercial quantity" are relevant to the nature of the supply and are to be proved by the Crown as part of the charge. The "traffickable quantity" is an evidentiary provision that operates to place an onus on the accused.

The "small quantity" and "indictable quantity" are relevant only to jurisdiction of the Local Court.

The Crown can base its case of supply within the terms of any of the various forms of supply listed in s 3 including actual supply or possession for supply under s 29 or both.

**Supply to minors**

Section 25 DMTA contains a number of subsections involving offences of supplying by an adult (a person over the age of 18 years) to a minor (a person under the age of 16 years). In such cases, particular note should be taken of the alternative charge provisions which are differently worded: cf ss 25(2B) and (2E).

**Ongoing supply**

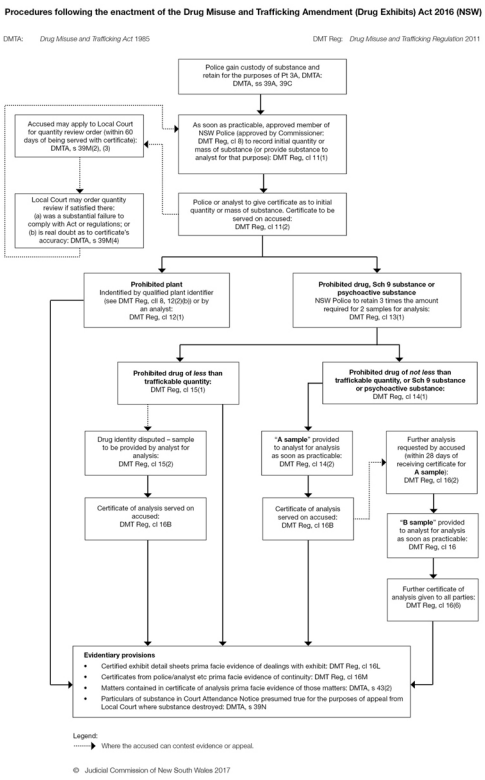
Section 25A DMTA creates an offence of supplying drugs on an ongoing basis. The offence does not apply to cannabis. The jury must be satisfied of the same three occasions of supply relied upon as the basis for the offence and given directions to this effect: see s 25A(3) and *R v Seymour* [2001] NSWCCA 272 at [11]–[12]. The word "supplies" in s 25A must be read in accordance with the extended definition of supply in s 3(1) of the Act: *Nguyen v R* [2018] NSWCCA 176 at [33]–[34], [37]; *Younan v R* [2018] NSWCCA 180 at [21], [23]–[24].

See generally, *Criminal Practice and Procedure NSW* at [10-s 25A.1]; *Criminal Law NSW* at [DMTA.25A.120].

**Drug exhibits**

Police procedures for drug exhibits are in Pt 3A of the *Drug Misuse and Trafficking Act* 1985 and Pt 3 the *Drug Misuse and Trafficking Regulation* 2011.

The flow diagram explains the procedures, including any time limits. In short, these provisions provide that the quantity or mass of a substance must be recorded by an approved member of the NSW Police Force (or provided to an analyst for that purpose), as soon as practicable after coming into the custody of the NSW Police Force, and before any samples are taken for analysis. A certificate is then issued to the accused. Provision is also made for the retention and transportation of substances, evidentiary presumptions for chain of custody of drug exhibits and a Local Court review of the initial quantity or mass of a substance recorded on a certificate.




## [5-1810] Suggested direction — actual supply

**Note:** Because of the wide variety of possible bases of liability under the definition of supply in s 3 DMTA, the suggested direction is restricted to the ordinary meaning of the term, that is, "to give or provide".

[*The accused*] is charged with supplying a prohibited drug namely [*specify drug*].

There are three elements of the offence the Crown must prove beyond reasonable doubt. They are:

1. that [*the accused*] supplied a substance
2. the substance was a prohibited drug, and
3. [*the accused*] knew that what was supplied was a prohibited drug.

I will deal with each of these elements in turn.

1. **Supply**

   The first element the Crown must prove is that [*the accused*] supplied a substance to another person. For the purposes of this case, it will have done so if it establishes beyond reasonable doubt that [*he/she*] intentionally gave or provided the substance to somebody, whether by way of sale or otherwise. [*Specify the allegation made by the Crown in the particular case.*]

2. **Prohibited drug**

   The second element the Crown must prove is that the substance supplied was a prohibited drug. Here the Crown alleges that the substance supplied was [*specify*

*drug*]. I direct you, as a matter of law, that if you accept the evidence relied on by the Crown that the substance is or includes [*specify drug*], then that substance is in law a prohibited drug. There is an Act of Parliament that contains a list of substances that are declared to be prohibited drugs for the purpose of this offence. [*Specify drug*] is one of the drugs listed in that Act.

It is not necessary that the Crown prove that the whole of the substance supplied consisted of that prohibited drug. The law is that anything that contains a prohibited drug in any proportion is to be treated as a prohibited drug. In other words, the purity of the prohibited drug is irrelevant.

[*If in issue, canvass the evidence relating to these matters.*]

[*Where the substance is not a prohibited drug: see s 40 DMTA and substitute the suggested direction at [5-1820] below.*]

3. **Knowledge**

The third element the Crown must prove is that [*the accused*] knew or believed at the time [*he/she*] supplied the substance to the other person that it was a prohibited drug. The Crown does not have to prove [*he/she*] knew the drug was the particular one specified in the charge, but it does have to prove [*he/she*] knew or believed that the substance was a prohibited drug. The Crown may do so by showing [*the accused*] actually knew or believed that what was being supplied was a prohibited drug, or was aware that there was a significant or real chance that it was.

**[*Where appropriate, add***

It is [*the accused's*] actual knowledge or belief which must be proved by the Crown, and not simply what some person in [*the accused's*] position may have known or believed. However, you may infer or conclude what a person knew or believed from considering all the surrounding circumstances, provided any such inference or conclusion is a rational one and is not based on mere speculation or suspicion. Because of the requirement that the Crown proves this element of the offence beyond reasonable doubt, any inference or conclusion you draw about [*the accused's*] knowledge or belief must be the only rational inference or conclusion open on the evidence. In this context, you may consider as one of the circumstances to be taken into account what a reasonable person in the position of [*the accused*] would have known or believed as to the nature of the substance being supplied. However, I must stress that what you are concerned with is whether you are satisfied beyond reasonable doubt that [*the accused*] [*himself/herself*] had this knowledge or belief at the time of the supply.**]**

[*Canvass evidence on the issue of knowledge etc and opposing submissions*.]

[*Substitute references to "growing plant" and "prohibited plant" for "substance" and "prohibited drug" if necessary.*]

## [5-1820] Suggested direction — where substance supplied is not a prohibited drug

Section 40 DMTA provides that, where the substance being supplied is not a prohibited drug but for the purposes of supply is represented as being a prohibited drug, the substance is deemed to be a prohibited drug for the purposes of the DMTA.

In such a case, the suggested directions set out in [5-1810] can be used except that in relation to the element of "prohibited drug" the following be substituted:

2. **Prohibited drug**

The second element the Crown must prove beyond reasonable doubt is that the substance supplied was a prohibited drug. In this case, the evidence is that the substance was not in fact a prohibited drug. There is an Act of Parliament that contains a list of substances that are declared to be prohibited drugs for the purpose of this offence. The substance alleged to have been supplied by [*the accused*] is not contained in that list. However, the Crown relies upon a provision in the law that states that where a substance, which is not a prohibited drug, is, for the purpose of its being supplied, represented (whether verbally, in writing or by conduct) as being a prohibited drug, then it is to be regarded as being, a prohibited drug.

[*Briefly refer to evidence and submissions on this aspect.*]

## [5-1830] Suggested direction — actual supply of commercial quantity

Section 25(2) DMTA provides for an offence of supplying not less than a commercial quantity of a prohibited drug. However, there is an increased penalty where the amount supplied is not less than a large commercial quantity. Although it is not a separate offence, if the Crown wishes to rely upon the penalty for a large commercial quantity this should be averred in the indictment. As to the quantities specified for particular drugs: see Sch 1 DMTA.

Where the charge alleges the supply was of a large commercial or commercial quantity, the suggested directions set out in [5-1810] are applicable but there should be directions added as to the element in respect of the quantity, whether it be the large commercial or the commercial quantity, as follows:

4. **[Large] commercial quantity**

In this case, the Crown alleges that what was supplied was the [*large*] commercial quantity of the prohibited drug, so a fourth element the Crown must prove beyond reasonable doubt is that the amount of the drug supplied was not less than the quantity prescribed by the law for this particular drug as being the [*large*] commercial quantity. I direct you that for the drug [*specified drug*], the [*large*] commercial quantity prescribed by the law is [*set out the prescribed quantity*]. The Crown case is that what was supplied was [*set out quantity alleged by Crown*].

5. **Knowledge of [large] commercial quantity**

The fifth and final element the Crown must prove is that [*the accused*] knew or believed at the time [*he/she*] supplied the drug that it was an amount which was not less than the [*large*] commercial quantity. The Crown does not have to prove [*the accused*] knew that the amount of the drug was [*quantity alleged by Crown*] but it does have to prove that [*the accused*] actually knew, or believed, that the drug being supplied was in an amount which was not less than [*prescribed [large] commercial quantity*], or that [*the accused*] was aware that there was a significant or real chance that it was.

**[*Where appropriate, add***

As I said a moment ago about the Crown proving [*the accused's*] knowledge that the substance supplied was a prohibited drug, it is [*the accused's*] actual knowledge or belief which must be proved, not what some person in [*the accused's*] position may have known or believed. However, knowledge or belief may be inferred or concluded from consideration of the surrounding circumstances, provided any such inference or conclusion is a rational one and is not based on speculation or suspicion.

Because of the requirement that the Crown proves this beyond reasonable doubt, any inference or conclusion that you draw about [*the accused's*] knowledge or belief must be the only rational inference or conclusion open on the evidence. In this context, you may consider as one of the circumstances to be taken into account what a reasonable person in the position of [*the accused*] would have known or believed as to quantity of the substance being supplied.

However, as I have already said, what you are concerned with is whether you are satisfied beyond reasonable doubt that [*the accused*] [*himself/herself*] had this knowledge or belief, at the time [*he/she*] supplied the drug, that it was in an amount which was not less than the [*large*] commercial quantity.

[*Canvass evidence on the issue of knowledge, etc and opposing submissions*].**]**

If the Crown fails to prove these last two elements that are concerned with the quantity of the drug but proves beyond reasonable doubt the first three elements of the charge, then you are entitled to find that [*the accused*] is not guilty of the charge of supplying a [*large*] commercial quantity but find [*him/her*] guilty of the offence of simply supplying the prohibited drug. In that case, when the charge is read out to the foreperson for the purposes of taking your verdict, your foreperson will answer "not guilty of the charge of supplying a [*large*] commercial quantity but guilty of supply".

[***If appropriate*** *on a charge of supplying a large commercial quantity the jury can bring in a verdict of one of two alternatives: "not guilty of supplying a large commercial quantity but guilty of supplying a commercial quantity" or "not guilty of supplying a large commercial quantity but guilty of supply"*.]

## [5-1840] Suggested direction — supply based upon s 29 DMTA — "deemed supply"

This suggested direction assumes that the Crown allegation is based upon possession for the purpose of supply and the application of s 29 DMTA.

In directing on "possession" there is no need for the suggested direction to refer to joint possession unless that is the allegation raised: *R v Wan* [2003] [2003] NSWCCA 225 at [14].

Where the only issue is whether the accused knew that he or she had a (large) commercial or commercial quantity of drug in his or her possession, there is no need

for the judge to instruct the jury in detail on the deeming provision except to explain the nature of the "supply" being alleged and such a direction should be separate from that relating to knowledge of the quantity charged: *R v Micalizzi* [2004] NSWCCA 406.

[*The accused*] is charged with supplying a prohibited drug namely [*specify drug*]. Although the charge is one of supplying a prohibited drug, the Crown does not have to prove that [*the accused*] actually supplied that drug. I will explain how the law operates to bring about that result shortly.

There are three elements of the charge the Crown must prove and they must each be proved beyond reasonable doubt. They are:

1. there was a substance which was a prohibited drug
2. [*the accused*] possessed that substance
3. [*the accused*] possessed that substance for the purposes of supply.

1. **Prohibited drug**

   The Crown must prove beyond reasonable doubt that the substance which it alleges that [*the accused*] supplied was a prohibited drug. Here the Crown alleges that the prohibited drug was [*specify drug*]. I direct you, as a matter of law, that if you accept the evidence relied on by the Crown that the substance which [*the accused*] is alleged to have supplied is or includes [*specify drug*], then that substance is in law a prohibited drug. There is an Act of Parliament that contains a list of substances that are declared to be prohibited drugs for the purpose of this offence. [*Specify drug*] is one of the drugs listed in that Act.

   It is not necessary that the Crown prove that the whole of the substance consisted of that prohibited drug. The law is that anything that contains a prohibited drug in any proportion is sufficient. In other words, purity of the prohibited drug is irrelevant.

   [*If in issue, canvass the evidence relating to these matters.*]

2. **Possession**

   Dealing next with the question of possession, the Crown must prove that [*the accused*] intentionally had the substance in [*his/her*] physical custody or control to the exclusion of any other person.

   **[*Where the allegation is of joint possession, add***

   *— except some other person acting jointly with [the accused] in possessing the substance.*]

   **[*Where the allegation is that the accused did not have physical possession of the substance***

   The Crown must prove that [*the accused*] intentionally had the substance in some place to which [*he/she*] had access and might go to obtain physical custody or control of it to the exclusion of any other person.]

   **[*Where the allegation is of joint possession, add***

   — either alone or together with some other person acting jointly with [*him/her*] in possessing the substance.]

The Crown must also prove that in intentionally having such custody or control of the substance, [*the accused*] knew or believed at the time that the substance was a prohibited drug. The Crown does not have to prove that [*the accused*] knew that the drug was the particular one specified in the charge, but it does have to prove beyond reasonable doubt that [*the accused*] knew or believed that it was a prohibited drug. The Crown may do so by proving [*the accused*] actually knew or believed that what [*he/she*] had custody or control of was a prohibited drug, or was aware that there was a significant or real chance that it was.

**[*Where appropriate, add***

It is [*the accused's*] actual knowledge or belief which must be proved, not what some person in [*the accused's*] position may have known or believed. However, knowledge or belief may be inferred or concluded from consideration of the surrounding circumstances, provided any such inference or conclusion is a rational one and is not based on speculation or suspicion. Because of the requirement that the Crown proves this beyond reasonable doubt, any inference or conclusion that you draw about [*the accused's*] knowledge or belief must be the only rational inference or conclusion open on the evidence. In this context, you may consider as one of the circumstances to be taken into account what a reasonable person in the position of [*the accused*] would have known or believed as to the nature of the substance that the person had in [his/her] custody or control. However, I must stress that what you are concerned with is whether you are satisfied that [*the accused*] [*himself/herself*] had this knowledge or belief that the substance was a prohibited drug.

[*Canvass evidence on the issue of knowledge, etc and opposing submissions.*]**]**

If the Crown has not proved beyond reasonable doubt that [*the accused*] was in possession of the substance alleged to be a prohibited drug, then the Crown case has failed and [*the accused*] must be found not guilty of the charge.

3. **For the purpose of supply**

The Crown must prove that [*the accused*] had the substance in [*his/her*] possession for the purpose of supply.

The charge is that [*the accused*] "supplied a prohibited drug" but that does not require proof that [*the accused*] actually supplied somebody with the drug. The ordinary meaning of the word "supply" is "to give or provide something to somebody". But in this case, there is no evidence of [*the accused*] having given or provided anything to anybody. The Crown does not make that allegation against [*the accused*] and does not have to do so in order to prove the charge.

The law gives an extended meaning to the word "supply" beyond the normal, everyday meaning of the word. I direct you as a matter of law that, for the purposes of determining the offence before you, the word "supply" includes having a substance which is a prohibited drug for the purpose of giving it or providing it to another person. In other words, "supply" means having a prohibited drug in a person's possession for the purpose of supply.

Here a particular rule of law comes into operation and must be applied by you. The law says that if an accused person has in [*his/her*] possession a specified quantity or more of a prohibited drug, then [*he/she*] is regarded as having possession of

that drug for the purpose of supply it; that is, to give it or provide it to some other person. In relation to the particular drug here alleged to be [*specify drug*], the law specifies such a quantity as [*state traffickable quantity*].

So, if you are satisfied the Crown has proved beyond reasonable doubt that the substance was a prohibited drug; that [*the accused*] was in possession of it (and I remind you that proof of possession includes proof that [*the accused*] knew or believed at the time that it was a prohibited drug) and that the amount of the drug was at least [*state traffickable quantity*], then the Crown has proved all of the elements of the offence of supply and [***if appropriate**, subject to an exception I am just about to mention*] you should return a verdict of guilty.

*[Where accused relies on possession other than for supply, add*

The exception is this. If you are satisfied that the Crown has proved beyond reasonable doubt each of these three elements, then it is a defence to this charge if [*the accused*] proves that [*he/she*] had the drug in [*his/her*] possession otherwise than for the purpose of supply.

[***or if appropriate**, obtained possession of the prohibited drug on and in accordance with the prescription of a medical practitioner or etc.*]

Supply here has its ordinary meaning, that is, to give or to provide the drug to somebody else, whether by way of sale or otherwise. So, what [*the accused*] needs to prove is that [*he/she*] had the drug in [*his/her*] possession for some purpose other than to give it, or provide it, to somebody else. [*The accused's*] case is that [*he/she*] had the drug [*specify defence case, for example, all the drug for [his/her] own use, or the Carey defence.*]

While the onus of proving this rests on [*the accused*], [*he/she*] does not have to prove it to the high standard of proof beyond reasonable doubt: that is the standard of proof placed only on the Crown. It is sufficient if [*the accused*] proves this matter on the balance of probabilities. The "balance of probabilities" means more likely than not, or more probable than not. I remind you that the elements of the charge the Crown must prove must be proved beyond reasonable doubt: that is in effect that [*the accused*] was in possession of at least [*the traffickable quantity*] of the prohibited drug. However, if you are satisfied that the Crown has proved those facts to that standard, you then come to consider whether [*the accused*] has proved that [he/she] had the drug in [*his/her*] possession otherwise than for the purpose of supplying it, and the standard to which [*the accused*] is required to prove this fact is on the balance of probabilities.

If, having considered the relevant evidence and submissions in relation to the matter, you are of the view that it is more probable than not, or more likely than not, that [*the accused*] had the drug in [*his/her*] possession for a purpose other than for supplying it, then you must return a verdict of "not guilty". If, on the other hand, you are not so satisfied, then you should find [*the accused*] guilty of the offence charged, provided always, of course, (as I have indicated) that you are satisfied, beyond reasonable doubt, as to the matters which the Crown must prove.

[*Review evidence and submissions.*]

To recap, the Crown is required to prove beyond reasonable doubt:

1. that the substance with which the case is concerned was a prohibited drug, and
2. that [*the accused*] was in possession of it, and
3. that [*the accused*] supplied it in the sense that [ *he/she*] was in possession of it for the purpose of supplying it. If you are satisfied of the first 2 of those 3 matters, and that the amount of the drug was [ *indicate traffickable quantity* ] or more, then the law is that [*the accused's*] possession of the drug was for the purpose of supplying it.

I remind you that proof of [*the accused*] being in possession of the drug includes proof [*he/she*] knew or believed at the time of the possession that it was a prohibited drug.

If you are satisfied the Crown has proved these facts beyond reasonable doubt, then you should find [*the accused*] guilty unless [*the accused*] has proved on the balance of probabilities that [*his/her*] possession of the drug was for some purpose other than to supply it.

## [5-1850] Suggested direction — supply of [large] commercial quantity based upon s 29 DMTA "deemed supply"

The suggested direction in [5-1840] is appropriate, but there should be a reference to two further elements the Crown must prove beyond reasonable doubt as follows:

4. **[Large] commercial quantity**

   In this case, in addition to the three elements to which I have already referred, the Crown must prove two additional matters beyond reasonable doubt. They are:

   In this case, the Crown alleges that what was supplied was the [large] commercial quantity of the prohibited drug, so a fourth element the Crown must prove beyond reasonable doubt is that the amount of the drug supplied was not less than the quantity prescribed by the law for this particular drug as being the [large] commercial quantity. I direct you that for the drug [*specify drug*] the [large] commercial quantity prescribed by the law is [*set out the prescribed quantity*]. The Crown case is that what was supplied was [*set out quantity alleged by Crown*].

5. **Knowledge of [large] commercial quantity**

   The fifth and final element the Crown must prove is that [*the accused*] knew or believed at the time [*he/she*] supplied the drug that it was in an amount which was not less than the [large] commercial quantity. The Crown does not have to prove that [*the accused*] knew that the amount of the drug was [*quantity alleged by Crown*] but it does have to prove [*the accused*] actually knew, or believed, that the drug being supplied was in an amount which was not less than [*prescribed* [*large*] *commercial quantity*], or that [*the accused*] was aware that there was a significant or real chance that it was.

*[Where appropriate, add*

As I said a moment ago about the Crown proving [ *the accused's*] knowledge that the substance supplied was a prohibited drug, it is [ *the accused's*] actual knowledge or belief which must be proved, not what some person in [ *the accused's*] position may have known or believed. However, knowledge or belief may be inferred or concluded

from consideration of the surrounding circumstances, provided any such inference or conclusion is a rational one and is not based on speculation or suspicion. Because of the requirement that the Crown proves this beyond reasonable doubt, any inference or conclusion that you draw about [*the accused's*] knowledge or belief must be the only rational inference or conclusion open on the evidence. In this context, you may consider as one of the circumstances to be taken into account what a reasonable person in the position of [*the accused*] would have known or believed as to the quantity of the substance being supplied. However, as I have already said, what you are concerned with is whether you are satisfied beyond reasonable doubt that [ *the accused*] [*himself/herself*] had this knowledge or belief, at the time [ *he/she*] supplied the drug, that it was in an amount which was not less than the [large] commercial quantity.

[*Canvass evidence on the issue of knowledge etc, and opposing submissions*.]**]**

If the Crown fails to prove these last two elements concerned with the quantity of the drug over and above the traffickable quantity but proves beyond reasonable doubt the first three elements of the charge, then you are entitled to find [*the accused*] not guilty of the charge of supplying a [large] commercial quantity but guilty of the offence of simply supplying the prohibited drug. In that case, when the charge is read out to the foreperson for the purposes of taking your verdict your foreperson can answer "not guilty of the charge of supplying a (large) commercial quantity but guilty of supply".

[***If appropriate*** *on a charge of supplying a large commercial quantity, the jury can bring in a verdict of one of two alternatives: "not guilty of supplying a large commercial quantity but guilty of supplying a commercial quantity" or "not guilty of supplying a large commercial quantity but guilty of supply".***]**

## [5-1860] Suggested direction — ongoing supply

**Note:** The following suggested direction is based on a case where there is evidence in the Crown case to prove the accused directly received a "financial or material reward" as a consequence of the supplies constituting the offence. However, "supplies" in s 25A must be read in accordance with the extended definition of supply in s 3(1): *Nguyen v R* [2018] NSWCCA 176 at [33]–[34]. See further the notes below.

[*The accused*] is charged with an offence of supplying a prohibited drug on three or more separate occasions during a period of 30 consecutive days for financial or material reward. The Crown must prove beyond reasonable doubt each of the following three elements:

1. [*the accused*] supplied a prohibited drug on three or more separate occasions
2. the occasions all occurred within a period of 30 consecutive days, and
3. in respect of each of the occasions you are satisfied occurred [*the accused*] received a financial or material reward.

1. **The accused supplied a prohibited drug on three or more separate occasions**

   Let me start by telling you what the Crown is required to prove in order to establish an offence of supplying a prohibited drug.

   [*The suggested direction for "actual supply" at [5-1810] should be used and adapted where necessary.*]

So, that is what the Crown is required to prove in order to establish an individual offence of supplying a prohibited drug. The Crown must prove beyond reasonable doubt that [*the accused*] supplied a prohibited drug on three or more separate occasions.

The Crown relies on the following occasions [*briefly identify the separate occasions*].

**[*Where the Crown alleges that the accused supplied different drugs***

It is not necessary to prove [*the accused*] supplied the same prohibited drug on each occasion. Provided you are satisfied [*he/she*] supplied a prohibited drug, it does not matter what type of prohibited drug it was.**]**

**[*Where the Crown relies on more than three occasions***

The Crown is therefore relying upon more than three occasions. It is necessary for the Crown to prove beyond reasonable doubt that [*the accused*] supplied a prohibited drug on at least three occasions. Before you can return a verdict of guilty you must be satisfied that at least three of them have been proved and you must be unanimous about this. In other words, you must all be satisfied as to the same three occasions.**]**

2. **The occasions all occurred within a period of 30 consecutive days**

   The second matter is that you must be satisfied beyond reasonable doubt that each of the occasions occurred during a period of 30 consecutive days. The first occasion relied upon by the Crown is alleged to have occurred on [*date*] and the last occasion relied on by the Crown is alleged to have occurred on [*date*]. If you are satisfied of this, then you should have no difficulty in being satisfied that each of the occasions occurred during a period of 30 consecutive days.

   [*Alternatively, if there is an issue about the 30 days, refer to the evidence and submissions.*]

3. **The accused received a financial or material reward**

   The third matter the Crown must prove is that [*the accused*] supplied a prohibited drug on each occasion for financial or material reward. This means that in respect of each of the occasions you are satisfied occurred, you must be satisfied that [*the accused*] [*himself/herself*] received a financial or material reward. Here the Crown alleges that [*refer to evidence*].

   To summarise, before you can return a verdict of guilty on this charge you must be satisfied the Crown has proved beyond reasonable doubt that:

   1. [*the accused*] supplied [a/any] prohibited drug on three or more occasions

      [***where appropriate**, and you must each agree upon the same occasions in respect of at least three of them.*]

   2. the occasions all occurred within a period of 30 consecutive days, and
   3. in respect of each of the occasions you are satisfied occurred that [*the accused*] received a financial or material reward.

If you are not satisfied that the Crown has proved each of these matters beyond reasonable doubt then you must return a verdict of not guilty. However, if you decide

that this is the appropriate verdict in respect of this charge, but you are satisfied beyond reasonable doubt that [*the accused*] committed one or more individual acts of supplying a prohibited drug — whether or not within a period of 30 consecutive days and whether or not for financial or material reward — then while returning a verdict of not guilty of the charge you should also return a verdict, or verdicts, of guilty in respect of those individual supply prohibited drug offence(s). You should not take this as an invitation to compromise. Before you can return a verdict of either guilty or not guilty in respect of any offence you must all be satisfied beyond reasonable doubt that it is the correct verdict.

[*Explain further how the verdict is to be announced by the foreperson just prior to conclusion of summing up*.]

## [5-1870] Notes

1. The Crown does not have to prove the accused actually received a financial or material reward as a result of the particular supplies: *Younan v R* [2018] NSWCCA 180 at [10]. It is sufficient if an inference is available from the evidence that the *purpose* of the relevant supplies was for financial or material reward: *Nguyen v R* [2018] NSWCCA 176 at [37]–[38]; *Younan v R* at [27]. In *Nguyen* the argument on appeal was that an offence against s 25A should be confined to acts of actual supply because the extended definition of supply in s 3(1) was constrained by the words "for financial or material reward" in s 25A(1). The court rejected that argument (see at [40]). The relevant reasoning is at [33]–[39]. The court concluded that provided a *purpose* of an accused in supplying the drugs (in the extended sense) is to obtain a financial or material reward, then an offence against s 25A was committed (so long as the other elements were proved). This construction was endorsed in the subsequent decision of *Younan* (see at [10] and [21]–[24]). RA Hulme J in *Younan* also said the interpretation of s 25A in *Nguyen* was supported by the Second Reading Speech: at [25]–[26].

**[The next page is 1031]**

# Prospect of disagreement

## [8-050] Introduction

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. Those directions are set out below, with additional text in square brackets, which was approved by the Court of Criminal Appeal in *R v Tangye* (unrep, 10/4/1997, NSWCCA).

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 set out in *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]. Similarly 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 — unanimity required

I have been told 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 [*sworn/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/ affirmation*] as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

*[If appropriate*

I remind you of the direction which I gave you at an early stage of my summing-up. Your verdict — whether it be "guilty" or "not guilty" — must be a unanimous one.

All twelve 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.**]**

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 already said, I ask you to retire again and see whether you can reach a verdict in this trial.

If there is still no likelihood of agreement, then, and only then, following *R v Tangye* (unrep, 10/4/1997, NSWCCA), the foreperson must be examined on oath to establish that fact, in accordance with s 56 *Jury Act* 1977, before the jury can be discharged.

The 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, in that the foreperson's view, 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.

The order as to the accused is:

> You are remanded for further trial upon [*this/these*] charge[s] at such time and place as may be appointed.

The question of bail is then considered.

## [8-070] Suggested direction before preconditions of s 55F(2) met — State offences — majority verdict(s) available

**Suggested perseverance direction before the preconditions of s 55F(2) Jury Act 1977 are satisfied**

I have been told 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.

*[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.**]**

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/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/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.**]**

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 already said, I ask you to retire again and see whether you can reach a verdict in this trial.

## [8-080] Notes

1. A trial judge should be careful not to undermine the effect of a *Black v The Queen* (1993) 179 CLR 44 direction by making reference to a specific time when a majority verdict can be taken: *RJS v R* [2007] NSWCCA 241 at [22]; *Ingham v R* [2011] NSWCCA 88 at [84] (d)–(e). The above direction is in similar terms to that

endorsed in *R v Muto* [1996] 1 VR 336 at 341–344, (affirmed in *R v Di Mauro* (2001) 3 VR 62 at [13]–[14]) and *Ingham v R* at [85] (b). No enquiry of the jury as to whether it is likely a majority verdict will be reached (for the purpose of discharge under s 56(2)) should be made by the judge until such time as a majority verdict is capable of being taken: *Hunt v R* [2011] NSWCCA 152 at [25], (see further Notes at [8-100]). The court said in *Hunt v R* at [33]:

> [W]hen a *Black* direction is given in response to an indication by the jury that it is deadlocked or otherwise unable to reach a unanimous verdict, it would be prudent that, generally speaking, no subsequent direction should be given which does other than continue to exhort the jury to strive for a unanimous verdict prior to the expiry of a minimum 8 hours of deliberation (and if necessary, a greater period having regard to the nature and complexity of the issues in the case) and that this is so notwithstanding that the jury may continue prior to the expiry of that period to advise the court that it is unable to reach a unanimous decision.

The jury should be encouraged to continue deliberations without being advised that the time for accepting a majority verdict is imminent: *R v VST* [2003] VSCA 35 at [38]; *RJS v R* at [23].

## [8-090] Suggested direction after preconditions of s 55F(2) met — State offences — majority verdict(s) available

**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**

I have been told 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.

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, and I must accept, a verdict of 11 [or ten where there are 11 jurors] of you as the verdict of the jury in this case. However, you should consider that it is preferable that your verdict be unanimous and you should continue to strive to reach a unanimous verdict.

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/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/affirmation*] as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

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.

As I have said, you should continue your deliberations with a view to reaching a unanimous verdict. If, however, that becomes plainly impossible but you are able to reach a verdict by agreement of 11 of you [or ten 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 ten 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 already said, I ask you to retire again and see whether you can reach a verdict in this trial.

## [8-100] Notes

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" (set out below) under s 55F(2) *Jury Act* 1977: at [7], [45].
2. In *RJS v R* [2007] NSWCCA 241 at [19], *AGW v R* [2008] NSWCCA 81 and *Hanna v R*, above, at [72], the court has emphasised that a majority verdict direction (as set out in [8-090] above) *cannot* be given until the court has "strictly observed" the two "essential preconditions" under s 55F(2) *Jury Act* 1977 for the acceptance of a majority verdict, being:
   (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.

   It is important that the trial judge make a finding that both preconditions under s 55F(2) *Jury Act* 1977 are satisfied before giving a majority verdict direction. It is not enough that the eight-hour period has elapsed.
3. It is necessary to demonstrate each of the two pre-conditions in s 55F(2)(a) has been considered and properly determined: *KE v R* [2021] NSWCCA 119 at [101]. 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].

4. The statutory pre-condition set out in s 55F(2)(a) *Jury Act* 1977 is not fulfilled simply by acting upon the lapse of the minimum period of eight hours: *AGW v R*, above, at [23]; *Hanna v R*, above, at [71]; *Hunt v R* [2011] NSWCCA 152 at [24]–[26]. 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*, above, at [23]; *Hunt v R* at [24]; *BR v R* (2014) 86 NSWLR 456 at [24], [47]. A judge must also be satisfied in accordance with s 55F(2)(b) *Jury Act* 1977 that it is unlikely that a unanimous verdict will be reached if further deliberation were undertaken, by examining on oath one or more of the jurors: *AGW v R*, above, at [26]. If a judge fails to address these two essential pre-conditions the trial is not conducted according to law: *AGW v R*, above, at [27]; *Hanna v R*, above, at [72]; *Hunt v R* at [25].

5. 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] NSWCCA 46 at [19]–[20]. Discrete and substantial breaks from the performance of the jury's task such as retirement overnight should not be included in the eight-hour calculation: *BR v R* at [21]. Time listening to a direction from the judge or travel time between the jury room and the courtroom should not be included in the calculation: *BR v R* at [22]–[23], [44]; *R v Rodriguez* [1998] 2 VR 167; *R v VST* (2003) 6 VR 569 at [13] not followed. Adjournment for lunch where it is not taken in the jury room should be excluded: *BR v R* at [21]. A court should be slow to make an assumption that time spent dining in the jury room is *necessarily* a time spent in deliberation: *BR v R* at [24] (Hulme AJ contra at [45]); *AGW v R*, above, at [24]. It is not current practice to record times jurors are permitted to leave the jury room for breaks but arguably these temporarily cease deliberations: Hulme AJ in *BR v R* at [46]–[47], Hall J agreeing at [36]. More attention and recording than has been the practice during the past needs to be made as to when the full complement of the jury is deliberating: Hulme AJ in *BR v R* at [47], Hall J agreeing at [36].

6. In *RJS v R*, above, Spigelman CJ questioned the Victorian practice (endorsed in *R v VST*, above) of recalling the jury once the minimum statutory period had elapsed to see if the jury had reached a unanimous verdict: at [24]. His Honour 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.

7. 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].

8. 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.

    The court cannot discharge a jury of 11 or 12 persons for disagreement unless it makes a finding referred to in s 56(2). No enquiry of the jury for the purpose of s 56(2) (that is, examination on oath of one or more of the jurors, that it is likely that the jurors will reach a majority verdict under s 55F) should be made until the point had been reached at which a majority verdict is capable of being taken: *Hunt v R* [2011] NSWCCA 152 at [26]. See the observations of Simpson AJA (Walton J agreeing; cf Adamson J) 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.

9. 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]. The decision of *HM v The Queen* [2013] 44 VR 717 and other intermediate decisions like it are incorrect and should not be followed: *Smith v The Queen* at [56]–[57]. 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.

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