Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 69

May 2022

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 69

Update 69, May 2022

Child witness/accused

Cross-referencing to parts of [1-349]ff **Closed court, suppression and non-publication orders** has been updated at [1-150] **Other procedural provisions applicable to children**.

Cross-examination — improper; of defendant has been re-named [1-340] **Cross-examination**.

Cross-examination concerning complainant's prior sexual history

This section has been moved from [1-342] in what was previously **Cross-examination — improper; of defendant** and is now a separate chapter at [1-347]. References to s 293 *Criminal Procedure Act* 1986 have been changed to s 294CB as the section was renumbered, with effect from 1 June 2022, by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021.

Closed court, suppression and non-publication orders

The following cases have been added where indicated:

> [1-352] **Court Suppression and Non-publication Orders Act 2010.** *Munshizada v R* [2021] NSWCCA 307 and *Sultani v R* [2021] NSWCCA 301 which address whether the power in s 7 *Court Suppression and Non-publication Orders Act* 2010 extends to a judicial officer in, for example, the District Court, making non-publication orders with the capacity to affect proceedings in another, for example, the Supreme Court.
>
> [1-359] **Self-executing prohibition of publication provisions.** *Z (a pseudonym) v R* [2022] NSWCCA 8 where it was held that the prohibition in s 578A(2) *Crimes Act* 1900 extends to appeals not involving a prescribed sexual offence if such an offence was part of the original proceedings.

Evidence given by alternative means

This chapter has been revised at [1-362] to update the reference to the DPP (NSW) Prosecution Guidelines which were reissued in March 2021.

Jury

Hoang v The Queen [2022] HCA 14 has been added to:

> [1-495] **Offences and irregularities involving jurors**. Section 68C(1) *Jury Act* 1977, which concerns impermissible inquiries by jurors during a trial, is not directed towards inadvertent searches. What is a "matter relevant to the trial" will vary from case to case.
>
> [1-505] **Discharging individual jurors**. Once a judge is satisfied of misconduct by a juror (see s 53A(2) *Jury Act*) the juror must be discharged. In that case, the juror's internet inquiry about a Working with Children Check was found to amount to misconduct. The fact it was conducted out of curiosity was irrelevant

Self represented accused

[1-840] **Cross-examination of complainants in prescribed sexual offence proceedings and vulnerable witnesses in criminal proceedings** has been updated. References to s 293 *Criminal Procedure Act* 1986 have been changed to s 294CB (see above). References to guidelines concerning the professional obligations of Crown Prosecutors, barristers and solicitors when a litigant is self-represented have been updated at [1-835] **Notes**.

Sexual assault communications privilege

In [1-895] **Introduction** and [1-898] **Disclosing and allowing access to protected confidences** references to s 293 *Criminal Procedure Act* 1986 have been changed to s 294CB (see above). *WS v R* [2022] NSWCCA 77 has been added to the list of cases considering the exclusions in s 294CB *Criminal Procedure Act* in [1-348] **The exclusions in s 294CB(4)**. In that case, evidence the complainant was raped by another person proximate to the relevant charges and had undergone a pregnancy test around that time was found to satisfy both limbs of s 294CB(4)(c).

Complaint evidence

This has been revised to incorporate amendments to s 294(2) *Criminal Procedure Act* by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* to replace the words "warn" or "warning" with "direct" or "direction". At [2-570] **Suggested direction — where complaint evidence admitted under s 66(2)**, reference is made to new ss 293A(2A) and 294(2A) *Criminal Procedure Act* which provide that directions under ss 293A or 294 may be given at any time during the trial and more than once.

Complicity

The suggested direction at [2-720] **Suggested direction — accessory after the fact** has been amended to clarify that presence alone may be sufficient to make a person liable as an aider and abettor.

Directions — misconceptions about consent in sexual assault trials

This new chapter has been added at [2-980] to provide commentary and suggested directions concerning misconceptions about consent in sexual assault trials following the addition of ss 292 to 292E to the *Criminal Procedure Act* by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act*.

Election of accused not to give evidence or offer explanation

[2-1000] **Introduction** has been amended to add *Ahmed v R* [2021] NSWCCA 280 where the importance of an *Azzopardi* direction in cases where the accused bears the onus of establishing a defence was emphasised. A warning cannot necessarily be implied from the right to silence direction.

Expert evidence

A new section [2-1110] **Specialised knowledge concerning child behaviour: ss 79(2), 108C** has been created. This summarises the effect of ss 79(2) and s 108C

Evidence Act 1995. A procedural note has been included to suggest an approach that may be taken if expert evidence related to child behaviour in child sexual assault cases is relied upon by the Crown. *Aziz (a pseudonym) v R* [2022] NSWCCA 76, where consideration was given to the basis on which such evidence is admissible has been added.

Sexual intercourse without consent

A note at the beginning of the chapter indicates that the directions in ss 292–292E *Criminal Procedure Act* (see [2-980] **Directions — misconceptions about consent in sexual assault trials**) apply to hearings which commence from 1 June 2022.

The suggested directions at [5-1550] **Suggested direction — sexual intercourse without consent (s 61I) for offences committed before 1 January 2008** and [5-1566] **Suggested direction — sexual intercourse without consent (s 61I) where alleged offence committed on and after 1 January 2008 and before 1 June 2022** have been extensively revised. The references to legislation in [5-1568] **Notes** have been updated and the following cases have been added:

> *Beattie v R* [2020] NSWCCA 334 — which considered the extent of the differences between the earlier provisions concerning consent (former ss 61HA and 61HE *Crimes Act*).
>
> *Saffin v R* [2020] NSWCCA 246 which discusses the three levels of knowledge (actual, reckless and belief on unreasonable grounds).
>
> *Carlyle-Watson v R* [2019] NSWCCA 226 where the court concluded that in cases of accessories to sexual intercourse without consent, the relevant state of mind as to the complainant's lack of consent is knowledge; recklessness is insufficient.
>
> *Decision Restricted* [2020] NSWCCA 138 where the court held that the proper medical purpose exception in s 61HA(a) *Crimes Act* does not apply if a proper medical purpose is accompanied by a sexual purpose.

Suggested directions for certain offences of aggravated sexual assault in s 61J *Crimes Act* 1900 have been added at [5-1570] **Suggested direction — s 61J circumstance(s) of aggravation**. *JH v R* [2021] NSWCCA 324, where the court held the term "serious physical disability" in s 61J(2)(f) did not require explanation for a jury, has been added to the notes at [5-1585].

Keen v R [2020] NSWCCA 59, *R v Hajje* [2006] NSWCCA 23 and *Sita v R* [2022] NSWCCA 90, which confirm that a *Markuleski* direction is not confined to "word against word" cases have been added to the notes at [5-1590] **Suggested R v Markuleski (2001) 52 NSWLR 82 direction — multiple counts**.

Sexual touching

A note at the beginning of the chapter indicates that the directions in ss 292–292E *Criminal Procedure Act* (see [2-980] **Directions — misconceptions about consent in sexual assault trials**) apply to hearings which commence from 1 June 2022.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 69

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Child witness/accused

[1-100] Definition of "child"

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

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

- giving of evidence by CCTV and the use of alternative arrangements, at [1-362]–[1-366]
- support persons, at [1-368]–[1-370]
- pre-recorded interviews, at [1-372]–[1-378]
- evidence given via audio visual link, at [1-380]–[1-382]
- operational guidelines for the use of remote witness video facilities, at [1-384].

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

[1-105] Competence generally

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

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

[1-110] Competence of children and other witnesses

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

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

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

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

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

[1-115] Sworn evidence

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

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

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

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

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

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

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

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

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

[1-118] Unsworn evidence — conditions of competence

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

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

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

[1-120] Jury directions — unsworn evidence

Where a witness is a young child there is no requirement to direct the jury to take into account the differences between sworn and unsworn evidence in assessing the reliability of unsworn evidence: *The Queen v GW* (2016) 258 CLR 108 at [56]. The fact that the child in that case did not take an oath or make an affirmation (and was not exposed to the consequences of failing to adhere to either) was held to be not material to the assessment of whether the evidence is truthful and reliable: *The Queen v GW* at [54]. Nor is there a requirement under the common law to warn the jury of the need for caution in accepting evidence and in assessing the weight to be given to it because it

is unsworn: *The Queen v GW* at [56]. The *Evidence Act* does not treat unsworn evidence as a kind of evidence that may be unreliable. If a direction is requested under s 165(2), there is no requirement to warn the jury that the evidence may be unreliable because it is unsworn: *The Queen v GW* at [56].

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

[1-122] Use of specialised knowledge

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

[1-125] Evidence in narrative form

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

[1-135] Warnings about children's evidence

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

> **165A Warnings in relation to children's evidence**
>
> (1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:
>
> (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses,
>
> (b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults,
>
> (c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child,
>
> (d) in the case of a criminal proceeding — give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.
>
> (2) Subsection (1) does not prevent the judge, at the request of a party, from:
>
> (a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable, and

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

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

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

Section 165(6) provides:

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

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

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

In *RELC v R* [2006] NSWCCA 383 at [77]–[83], the court applied the previous version of s 165A concerning warning about children's evidence. The court held that the trial judge had erred by warning the jury that the evidence of an eight-year-old witness called by the defence was potentially unreliable by reason of the child's age. There was nothing in the evidence given by either the defence witness or the complainant that, by reason of their age, justified a warning to the jury: *RELC v R* at [83]. The other matters (apart from age) relied upon by the judge to give the warning

(that the witness was giving evidence for her father; had given inconsistent accounts of the events; had told the police that she had lied to them; and, that she had given untrue answers in cross-examination) were not "matters … within the kind or type of evidence which may be unreliable as contemplated in s 165": *R v RELC* at [81]–[82]. The court in *ML v R* [2015] NSWCCA 27 rejected a submission that the judge erred by failing to warn the jury under s 165A(2) of the forensic disadvantage the appellant suffered by not being able to cross-examine the complainant (aged six years) due to her lack of memory.

As to warnings in relation to forensic disadvantage: see further **Complaint evidence** at [2-640]–[2-650].

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

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

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

[1-150] Other procedural provisions applicable to children

As to the:

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

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

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

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

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

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

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

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

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

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

The phrase "understands the proceedings" could include, inter alia, the nature of the allegations and the facts the prosecution must prove. An accepted "measure" where a child is represented, is for the trial judge to request the child's barrister or solicitor to assure the court that the child understands the proceedings. A court is to give the child the fullest opportunity practicable to be heard, and to participate, in the proceedings: s 12(4).

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Cross-examination

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

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

> (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "***disallowable question***"):
>
> (a) is misleading or confusing, or
>
> (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
>
> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
>
> (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).
>
> (2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
>
> (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
>
> (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and
>
> (c) the context in which the question is put, including:
>
> (i) the nature of the proceeding, and
>
> (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates, and
>
> (iii) the relationship (if any) between the witness and any other party to the proceeding
>
> …
>
> (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
>
> (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.
>
> …

[1-341] Notes

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

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

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

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

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

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

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

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

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

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

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

(c) has made a prior inconsistent statement.

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

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

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

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

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

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

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

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

(b) that evidence has been admitted.

[1-345] Notes

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

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

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

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

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

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

[The next page is 51]

Cross-examination concerning complainant's prior sexual history

[1-347] Introduction

Section 293 *Criminal Procedure Act* 1986 was renumbered as s 294CB on 1 June 2022: *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021: Sch 2[4].

Sections 294CB(2) and 294CB(3) provide that, for prescribed sexual offence proceedings, evidence relating to the prior sexual history of the complainant is inadmissible subject to exceptions outlined in s 294CB(4)(a)–(f). Evidence falling within the exceptions can only be admitted if its probative value outweighs any distress, humiliation or embarrassment the complainant might suffer as a result of its admission: s 294CB(4).

Sections 294CB(5) to 294CB(8) set out the procedure for determining whether evidence said to fall within the identified exceptions in s 294CB may be admitted. In summary:

- evidence related to the complainant's sexual reputation, sexual experience or sexual activity cannot be given unless the court has first decided the evidence is admissible: s 294CB(5)
- questions of the admissibility of the evidence or the right to cross-examine the complainant are determined in the absence of the jury: s 294CB(7)
- the accused may be permitted to cross-examine a complainant concerning evidence of the complainant's sexual experience, or lack of it, or participation or lack of participation in sexual activity, if the evidence was disclosed or implied in the prosecution case, and the accused would be unfairly prejudiced if not able to do so: s 294CB(6)
- if the court decides the evidence is admissible, written reasons must be given identifying with clarity the nature and scope of the evidence and the reasons for concluding it is admissible, before the evidence is led: s 294CB(8).

Note: in cases where evidence has been admitted under s 294CB, see also [2-988] and the note to the suggested direction **Circumstances in which non-consensual sexual activity occurs — s 292A**.

There has been some controversy associated with s 294CB (previously s 293) since it was first enacted, principally because of its capacity to prejudice an accused in the conduct of their trial. A five-judge Bench was convened in *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 to consider how s 293 (now s 294CB) applied in the context of allegations of previous unrelated false complaints and the correctness of *M v R* (unrep, 15/9/93, NSWCCA) (where it was held, in respect of an earlier version of s 293, that it extended to exclude such evidence). The controversy concerning the section and the relevant case law was summarised by Leeming JA in *Jackmain (a pseudonym) v R* at [88]–[178].

Section 293 (now s 294CB) was designed to exclude, to a significant degree, cross-examination of a complainant's sexual activity or experience with only limited exceptions: *Jackmain v R* at [15]. Its purpose is to protect sexual assault complainants

and prevent embarrassing and humiliating cross-examination of a complainant about their past sexual activities: *Jackmain v R* at [23]–[24]; [233]; [246]–[247]; *GP v R* [2016] NSWCCA 150 at [40].

Section 294CB renders otherwise relevant evidence inadmissible; if the evidence in question is irrelevant, or otherwise inadmissible, it does not fall within the parameters of s 294CB: *Decision Restricted* [2021] NSWCCA 51 at [42]; *R v Morgan* (1993) 30 NSWLR 543 at 544; see also *HG v The Queen* (1999) 197 CLR 414 at [24].

The procedure for determining admissibility

The procedure contemplated by s 294CB(7) (previously s 293(7)) for determining whether evidence is admissible is a voir dire: *Uddin v R* [2020] NSWCCA 115 at [56]. To facilitate the conduct of the voir dire, s 294CB must be read down to permit evidence that would otherwise be inadmissible to be given so the task under ss 294CB(6) and 294(7) can be performed. The effect is that the exclusionary rules in ss 294CB(2) and 294CB(3) do not apply to evidence given during the voir dire: *Uddin v R* at [53]–[58]; [94]; *Jackmain v R* at [16]; [91]–[95]; [248].

Generally, counsel should provide a detailed written statement of the evidence proposed to be led so the trial judge can determine whether the evidence falls within the parameters of s 294CB(4) and its probative value: *Taylor v R* (2009) 78 NSWLR 198 at [44]–[45]. In *Jackmain v R*, at [248], Wilson J (Johnson J agreeing at [234]) observed that ordinarily the voir dire would be conducted on the documents as "it would be wholly inconsistent with the intention of the legislature … for a complainant to be required to give evidence *viva voce* and endure the sort of humiliating and distressing cross-examination that the Parliament sought to prevent." In an appropriate case, however, it may be necessary for oral evidence to be given: see for example *Uddin v R* at [94], where the oral evidence was to be given by persons other than the complainant.

Before the evidence is given, precise written reasons must be given for admitting the evidence and recording the nature and scope of the admitted evidence (s 294CB(8)): *Taylor v R* at [44]–[47]; *Dimian v R* (unrep, 23/11/95, NSWCCA). However, there is no need for the questions that are to be asked to be specifically identified: *Taylor v R* at [48].

Whether the evidence discloses the complainant has had sexual experience or taken part in sexual activity in s 294CB(3) is determined according to ordinary evidentiary principles: *Uddin v R* at [107].

[1-348] The exclusions in s 294CB(4)

Within the very narrow parameters of the provision, s 294CB(4) (formerly s 293(4)) should be construed broadly in the interests of the accused: *R v Taylor* at [36]; *Decision Restricted* [2021] NSWCCA 51 at [55]–[57]. However, it is important to bear in mind the intent of the legislature in introducing the section and its predecessors. In *GP v R* [2016] NSWCCA 150, Payne JA (McCallum and Wilson JJ agreeing) said at [40]–[41]:

> [Section 294CB] … clearly strikes a balance between competing interests being, on the one hand the interest of preventing distressing and humiliating cross-examination of sexual assault victims about their prior sexual history and on the other, the interest of

> permitting an accused person to cross-examine victims about defined aspects of their sexual history in the circumstances prescribed in the exceptions contained within [s 294CB].
>
> …
>
> [A]n approach to construction which seeks to discern a single purpose, and construing the legislation as though it pursued that purpose to the fullest extent possible may be contrary to the manifest intention of the legislation.

A number of cases have considered aspects of the exclusions in s 294CB(4). As to:

- the meaning of the expression "connected set of circumstances" and "at or about the time of" in s 294CB(4)(a) see: *Jackmain v R* at [189]–[195] and particularly at [191] where emphasis was given to the very short temporal period intended to apply; *R v Morgan* (1993) 30 NSWLR 543 (decided under s 409B, the then predecessor provision); *R v Edwards* [2015] NSWCCA 24 at [25]–[30]; *GEH v R* [2012] NSWCCA 150 at [11]–[13] (Basten JA) and [35] (Harrison J); *Decision Restricted* [2021] NSWCCA 51 at [59]–[60] (Leeming JA, Walton J agreeing) but cf Adamson J at [88]–[91].
- the fact false complaint evidence may have the capacity to fall within the exceptions in s 294CB(4) see: *Adams v R* [2018] NSWCCA 303 at [163]–[177]. Where there is false complaint evidence years remote from the alleged offending, the temporal requirement in s 294(4)(a) cannot be satisfied: *Jackmain v R* at [25]; [190]; [235]; [238]; [240].
- whether evidence of fear and anxiety constitutes "disease or injury … attributable to the sexual intercourse so alleged" referred to in s 294CB(4)(c) see: *GP v R* [2016] NSWCCA 150 at [34], [44]; a psychological condition of diagnosed depression and suicidal ideation falls within the term "disease or injury": *JAD v R* [2012] NSWCCA 73 at [83].
- the phrase "sexual intercourse so alleged" in s 294CB(4)(c)(i) includes only the physical act and excludes issues of consent: *Taleb v R* [2015] NSWCCA 105 at [93].
- the admissibility of evidence of "the presence of semen [which] … is attributable to the sexual intercourse alleged to have been had by the accused" (s 294CB(4)(c)(ii)) see *WS v R* [2022] NSWCCA 77. In that case, a miscarriage of justice occurred because evidence the complainant was raped by another person at a similar time to the relevant offences was excluded, but evidence she had undergone a pregnancy test around that time was admitted. In the circumstances of that case, the court concluded both limbs of s 294CB(4)(c) were satisfied: at [78]–[80] (Macfarlan JA; Walton J agreeing); cf Rothman J at [108]–[111].

In *Decision Restricted* [2021] NSWCCA 51, Leeming JA (Walton J agreeing; Adamson J dissenting) observed, at [64], that when weighing the probative value of the evidence, "the distress, humiliation or embarrassment" to the complainant that is relevant is that which is over and above that which will inevitably occur by giving evidence even without reference to the matters caught by s 294CB. *WS v R* is an example of a case where the probative value of the evidence was found to outweigh the distress, humiliation and embarrassment the complainant might suffer: at [62]–[66], [84].

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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). The power in s 7 is broad and may, depending on the particular circumstances, extend to a judicial officer in one court (for example, the District Court) making non-publication orders with the capacity to affect proceedings in another (for example, the Supreme Court): *Munshizada v R* [2021] NSWCCA 307 at [31]–[33]; cf *Sultani v R* [2021] NSWCCA 301 at [15]–[16].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Limited non-publication orders may be appropriate in some cases. For example, in *State of 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).

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

- *Law Enforcement and National Security (Assumed Identities) Act* 2010, s 34.
- *Status of Children Act* 1996, s 25.

Publication of children's names in criminal proceedings

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

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

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

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

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

Note also that s 15E(5) enables the court to make an order for publication or broadcast of a deceased child's name if no senior next of kin is available to give consent and the court is satisfied the public interest requires it. In determining whether an order for publication should be made, the court must consider the circumstances of the particular case and the public interest. In assessing the "public interest", a broad concept, the court looks at the circumstances of the case: *R v 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.

[The next page is 71]

Evidence given by alternative means

[1-360] Introduction

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

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

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

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

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

Complainants in sexual offence proceedings

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

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

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

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

Sexual offence witnesses

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

Vulnerable persons in personal assault offence proceedings

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

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

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

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

(a) an intellectual disability

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

(c) a neurological disorder

(d) dementia

(e) a severe mental illness

(f) a brain injury.

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

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

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

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

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

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

Commonwealth sexual offence proceedings

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

Government agency witnesses

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

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

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

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

[1-363] Implied power to make screening orders

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

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

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

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

New South Wales offence proceedings

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

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

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

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

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

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

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

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

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

Commonwealth sexual offence proceedings

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

[1-368] Right to a support person

New South Wales offence proceedings

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

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

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

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

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

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

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

Commonwealth sexual offence proceedings

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

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

Vulnerable persons

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

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

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

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

opportunity to access the recording and it would be in the interests of justice for it to be admitted. The trial judge retains a discretion to rule that the whole or any part of the contents of a recording is inadmissible: s 306V(4).

Competence and recorded interviews

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

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

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

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

Domestic violence complainants

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

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

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

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

The judge must warn the jury not to draw any inference adverse to the accused or give the complainant's statement any greater or lesser weight because it is recorded

rather than oral: s 289J. See **Suggested direction — evidence in the form of a recording** at [1-376], which includes a form of words for the warning and where the transcript of the recorded statement is provided to the jury.

Commonwealth sexual offence proceedings

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

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

Vulnerable persons

Section 306X *Criminal Procedure Act* 1986 provides:

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

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

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

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

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

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

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

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

The law provides that [*children/intellectual disabled/cognitively impaired people/domestic violence complainants*] may give evidence in a certain way. [*This witness's*] evidence, or the main part of it, has been recorded, and we will shortly have the recording played to you.

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

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

If a transcript of the recording is provided, add:

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

Warnings in Commonwealth sexual offence proceedings

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

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

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

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

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

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

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

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

(e) If the tape is to be replayed or the transcript of the tape provided to the jury, the judge should caution the jury about their approach to that evidence when the tape is being replayed to them or the transcript of the tape returned to them in terms to the effect that "because they are hearing the evidence in chief of the complainant repeated a second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case";

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

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

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

[1-380] Evidence given via audio visual link

The *Evidence (Audio and Audio Visual Links) Act* 1998 permits evidence to be taken via audio link or audio visual link from elsewhere in NSW, non-participating States and foreign countries (other than New Zealand) (Pt 1A), or from participating States (Pt 2). Links to New Zealand are dealt with in Pt 4 *Evidence and Procedure (New Zealand) Act* 1994 (Cth).

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

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

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

Evidence may be taken via video link or telephone from New Zealand provided the necessary facilities are available and the evidence can be more conveniently given from New Zealand: s 25(2) *Evidence and Procedure (New Zealand) Act* 1994 (Cth); *Derbas v R* [2007] NSWCCA 118 at [35].

As long ago as 1993, Hunt CJ at CL observed that the use of video links "has proved to be very successful from a technical point of view in demonstrating the demeanour of the witness": *DPP v Alexander* (1993) 33 NSWLR 482 at 498. The broad acceptance of the use of video-link facilities for taking evidence was more recently recognised in *R v Lodhi* (2006) 163 A Crim R 488 at [37]. In *R v Wilkie* [2005] NSWSC 794, Howie J said at [69]:

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

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

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

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

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

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

> Making a direction that the evidence of an accusing witness be received by audiovisual link external to the courtroom must, by its very nature, involve unfairness to the accused because it deprives him or her of a face-to-face confrontation with the witness. The provision cannot mean *any* unfairness, however small. The Court must consider the degree and effect of the unfairness. In a criminal trial, the best measure is whether the

> making of a direction will cause the trial to be an unfair one to the accused. An accused person has the fundamental right to a fair trial. A direction should not be made if it would mean that an accused could *not* have a fair trial.

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

Commonwealth offences

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

There are also specific provisions in Div 272 *Criminal Code Act* 1995 (Cth) regarding proceedings for child sex tourism offences. The court may, on application by a party to the proceeding, direct that evidence from a witness (other than the defendant) be taken by video link from outside Australia if satisfied that facilities are available and it is in the interests of justice that evidence be taken in this way. The court must also be satisfied that attendance of the witness at court would cause unreasonable expense or inconvenience, cause the witness psychological harm or unreasonable distress, or cause the witness to become so intimidated or distressed that the witness's reliability would be significantly reduced: s 272.21. Sections 272.22–272.26 provide for the technical requirements for video link, the application of laws about witnesses, and the administration of oaths and affirmations.

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

New South Wales legislation

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

> It seems to me at this point in the proceedings against the accused that appropriate directions and warnings to the jury would cure much of the asserted prejudice that would flow from the use of audiovisual means of adducing the evidence of the two witnesses. For example, the jury would be told, if it were necessary to do so, that as the credit of the witnesses was a crucial issue in the resolution of the charges against the accused, any difficulty they might encounter in assessing the credibility of the witness by reason of the fact that the evidence was adduced before them by the use of a video link should be

> resolved in favour of the accused. So if they thought that demeanour might be important and they were having difficulty in properly assessing the demeanour of the witness by the restrictions or limitations placed upon that task because of the use of the video link, that might be a matter that would give rise to a doubt about whether they could rely upon the witness and, therefore, may give rise to a doubt that the prosecution had proved its case.
>
> These directions and any other that the accused thought necessary to address deficiencies in the evidence or the difficulties in cross-examination caused by the video link procedure would simply be to remind the jury of the practical limitations of the onus of proof in the circumstances of these two witnesses giving evidence by video link. Much of the criticism of the procedure overlooks the fact that deficiencies or difficulties encountered with the evidence of the witnesses caused by the use of the video link should rebound on the Crown and the jury simply need to be reminded of this fact in fair but forceful terms.

Proceedings for Commonwealth offences

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

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

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

[1-384] Operational guidelines for the use of remote witness video facilities

The NSW Department of Police and Justice has produced "Operational guidelines" for the use of remote witness video facilities: see [10-670]ff.

[1-385] Complainant not called on retrial

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

[The next page is 103]

Jury

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

[1-440] Number of jurors

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

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

[1-445] Anonymity of jurors

Potential jurors are not required to disclose their identities except to the sheriff: s 37. They are to be referred throughout the proceedings by numbers provided to them by the sheriff: s 29(4). The defence is not entitled to any information concerning any of the jurors: *R v Ronen* (2004) 211 FLR 320.

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

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

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

[1-455] Excusing jurors

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

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

Note: s 38(10) and cl 5 *Jury Regulation* 2015 as to non-disclosure of certain identities. See *Criminal Practice and Procedure NSW* at [29-50,605.5]. See *Dodds v R* [2009] NSWCCA 78 at [61] as to the procedure in such a case.

[1-460] Right to challenge

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

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

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

[1-465] Pleas

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

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

[1-470] Opening to the jury

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

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

[1-475] Jury booklet and DVD

The jury members will already have been provided with some information about the trial process and their duties and responsibilities. The sheriffs screen a DVD entitled "Welcome to jury service" to the jury panel prior to empanelment. The sheriff's officers

have standing orders to do this at all court houses. It is suggested that judges should acquaint themselves with the content of this DVD. Judges wishing to obtain a copy should contact the Assistant Sheriff, Manager Jury and Court Administration.

A booklet "Welcome to Jury Service" is also available at all court houses and may be distributed to jury members by the sheriff's officers after empanelment. Officers have standing instructions to only distribute this booklet with the concurrence of the presiding judge. The booklet also provides information about the trial process, the jurors' duties and responsibilities, and a variety of practical matters (such as court hours and meals).

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

Nature of a criminal trial

A criminal trial occurs when the Crown alleges that a member of the community has committed a crime and the accused denies the allegation. The trial is conducted on the basis that the parties determine the evidence to be placed before the jury and identify the issues that the jury needs to consider. The jury resolves the dispute by giving a verdict of guilty or not guilty of the crime or crimes charged. A criminal trial is not an investigation into the incidents surrounding the allegation made by the Crown and is not a search for the truth. Therefore neither the judge nor the jury has any right to make investigations or inquiries of any kind outside the courtroom and independent of the parties. The verdict must be based only upon an assessment of the evidence produced by the parties. That evidence is to be considered dispassionately, fairly and without showing favour or prejudice to either party. The verdict based upon the evidence must be in accordance with the law as explained by the judge.

Role of judge and jury

The jury as a whole is to decide facts and issues arising from the evidence and ultimately to determine whether the accused is guilty of the crime or crimes charged in the indictment. These decisions are based upon the evidence presented at the trial and the directions of law given by the judge. Before the jury is asked to deliberate on their verdict counsel will make their own submissions and arguments based upon the evidence. The jury must follow directions of law stated by the judge and take into account any warning given as to particular aspects of the evidence. Each juror is to act in accordance with the oath or affirmation made at the start of the trial to give "a true verdict in accordance with the evidence". A true verdict is not one based upon sympathy or prejudice or material obtained from outside the courtroom.

The judge is responsible for the conduct of the trial by the parties. The judge may be required to make decisions on questions of law throughout the trial including whether evidence sought to be led by a party is relevant. The judge must ensure that the trial is fair and conducted in accordance with the law. The judge will give directions of law to the jury as to how they approach their task during their deliberations in a summing up before the jury commences its deliberations. The judge does not determine any facts, resolve any issues raised by the evidence or decide the verdict.

Jury foreperson

The jury foreperson is the representative or spokesperson for the jury. He or she can be chosen in any way the jury thinks appropriate. The main function of the foreperson is

to deliver the verdict on behalf of the jury. Sometimes the jury chooses to communicate with the judge through a note from the foreperson. The foreperson has no greater importance or responsibility than any other member of the jury in its deliberations. The foreperson can be changed at any time.

Onus and standard of proof

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

The Crown has to prove the essential facts or elements that go to make up the charge alleged against the accused. Each of the essential facts must be proved beyond reasonable doubt before the accused can be found guilty. Suspicion cannot be the basis of a guilty verdict nor can a finding that the accused probably committed the offence. The accused must be given the benefit of any reasonable doubt arising about his or her guilt.

No discussions outside jury room

A juror should not discuss the case or any aspect of it with any person other than a fellow juror. Any discussion by the jury about the evidence or the law should be confined to the jury room and only when all jurors are present. This is because each member of the jury is entitled to know the views and opinions of every other member of the jury about the evidence and the law as the trial proceeds.

Any discussion with a person other than a juror risks the opinions of a person, who has not heard the evidence, who has not heard arguments or submissions by counsel or who may not understand the applicable law, influencing the jury's deliberations and perhaps ultimately the verdict given. The opinions of a person who is not a juror are not only irrelevant but they are unreliable as they may depend upon prejudice or ignorance.

Duties of a juror to report irregularities

It is the duty of a juror to bring to the attention of the judge any irregularity that has occurred because of the conduct of fellow jurors during the course of the trial. This should occur immediately the juror learns of the misconduct. The matters to be raised include:

- the fact that a juror has been discussing the matter with a person who is not a juror or making inquiries outside the jury room
- that a juror is refusing to participate in the jury's functions
- that a juror is not apparently able to comprehend the English language
- that a juror appears to lack the ability to be impartial.

Criminal conduct by a juror during and after the trial

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

For this offence, "making any inquiry" includes:

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

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

Media reports

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

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

Note: the headings in this direction are for the benefit of the judge.

Serving on a jury may be a completely new experience for some, if not all, of you. It is therefore appropriate for me to explain a number of matters to you. During the course of the trial I will remind you of some of these matters if they assume particular importance and I will give you further information if necessary.

Other sources of information for jurors

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

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

The charge(s)

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

accused" as a matter of convenience and only because [*he/she*] has been accused of committing an offence. [*He/she*] has pleaded "not guilty", that is the accused has denied the allegation made by the Crown and it becomes your responsibility, as the jury, to decide whether the Crown is able to prove [*that charge/those charges*] beyond reasonable doubt.

[Where there are multiple charges, add

It is alleged by the Crown that [*the accused*] committed a number of offences. Those charges are being tried together as a matter of convenience. However, you will, in due course, be required to return a verdict in relation to each of them. You will need to consider each charge separately. There is no legal requirement that the verdicts must all be the same but this will become more apparent when you and I are aware of the issues you have to determine.]

[Where appropriate, add

You must not be prejudiced against the accused because [*he/she*] is facing a number of charges. The accused is to be treated as being not guilty of any offence, unless and until [*he/she*] is proved guilty by your evaluation of the evidence and applying the law that I will explain to you. The charges are being tried together merely because it is convenient to do so because there is a connection between them. But that does not relieve you of considering the charges separately or the Crown of proving each of them beyond reasonable doubt.**]**

[If there are any alternative charges, add

The charges in counts [*indicate counts in indictment*] are said to be in the alternative. What that means is that, if you find the accused not guilty of the first of those charges, you will then be asked to consider whether [*he/she*] is guilty or not guilty of the alternative charge. If you find the accused guilty of the first of those charges then you will not be required to make a decision and return a verdict on the alternative charge. I will say something more about this after the evidence has concluded.**]**

Roles and functions

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

Each of you is to perform the function of a judge. You are the judges of the facts and that means the verdict(s) will ultimately be your decision. I have no say in what evidence you accept or reject or what arguments and submissions of counsel you find persuasive. Nor do I decide what verdict or verdicts you give in respect of the [charge/ charges] before you. That is your responsibility and you make that decision by determining what facts you find proved and by applying the law that I will explain.

Of course I also have a role as a judge but, as you would probably have assumed, I am the judge of the law. During the trial I am required to ensure that all the rules of procedure and evidence are followed. During the trial and at the end of the evidence, I will give you directions about the legal principles that are relevant to the case and explain how they should be applied by you to the issues you have to decide. I may be required by law to warn you as to how you must approach certain types of evidence. In performing your function you must accept and apply the law that comes from me.

Legal argument

During the trial a question of law or evidence may arise for me to decide. I may need to hear submissions from the lawyers representing the parties before I make a decision. If that occurs, it is usually necessary for the matter to be debated in your absence and you will be asked to retire to the jury room. You should not think this is so that information can be hidden from you. I assure you that any material the parties believe is necessary for you to reach your verdict(s) will be placed before you. The reason you are asked to leave the courtroom is simply to ensure counsel can be free to make submissions to me on issues of law that do not concern you. It is also to ensure you are not distracted by legal issues so you can concentrate on the evidence once I have made my ruling. It only complicates your task if, for example, you were to hear about some item of evidence I ultimately decide is not relevant to the case. So, if a matter of law does arise during the course of the evidence, I ask for your patience and understanding. I assure you that your absence from the courtroom will be kept to the minimum time necessary.

Introduction of lawyers

Let me introduce the lawyers to you. The barrister sitting [.....] is the Crown Prosecutor. In a criminal case, the Prosecutor presents the charge(s) in the name of the State, and on behalf of the community. That does not mean the Prosecutor should be treated any differently than defence counsel, simply because of their function. The Crown's arguments and submissions made to you at the end of the trial should not be treated as more persuasive simply because they are made on behalf of the State or the community. They are no more than arguments presented to you by one of the parties in these proceedings and you can accept them or reject them based upon your evaluation of their merit and how they accord with your findings of fact based upon the evidence. By tradition, the Crown Prosecutor is not referred to by [*his/her*] personal name but as, in this case, [*Mr/Ms*] Crown. This is to signify that the prosecutor is not acting in a personal capacity.

The barrister sitting [.....] is [*name of defence counsel*] and [*he/she*] appears for the accused, and will represent [*him/her*] throughout the trial. Defence counsel will also ultimately put arguments and submissions to you. Just as with the Prosecutor you should decide them on their merits and as they accord with your view of the evidence.

Selection of foreperson/representative

[*You have been told by my associate that*] you are required to choose a [*foreperson/representative*]. That person's role will simply be to speak for all of you whenever you need to communicate with me. If your [*foreperson/representative*] raises a question with me on the jury's behalf, it helps to maintain the anonymity of individual jurors. But any one of you is entitled to communicate with me in writing if necessary. The [*foreperson/representative*] also announces your verdict(s) on behalf of the jury as a whole. We do not require each juror to each give his or her verdict(s). But bear

in mind that the [*foreperson/representative*] does not have any more functions or responsibilities than these. You are all equals in the jury room. You all have the same entitlement and responsibility in discussing the evidence and ultimately deciding upon your verdict(s).

How you choose your [*foreperson/representative*] is entirely up to you. There is no urgency to reach a final decision on that matter, and you can feel free to change your [*foreperson/representative*] if you wish to do so at any time. When you have chosen your [*foreperson/representative*], he or she should sit in the front row of the jury box in the seat nearest to me and that way I will know who you have chosen.

Queries about evidence or procedure

If you have any questions about the evidence or the procedure during the trial, or you have any concerns whatsoever about the course of the trial or what is taking place, you should direct those questions or concerns to me, and only to me. The Court officers attending on you are there to provide for your general needs, but are not there to answer questions about the trial itself. Should you have anything you wish to raise with me, or to ask me, please write a note and give it to the officer. The note will be given to me and, after I have discussed it with counsel, I shall deal with the matter.

Note taking

You are perfectly entitled to make notes as the case progresses. Writing materials will be made available to you. If you decide to take notes, may I suggest you be careful not to allow note taking to distract you from your primary task of absorbing the evidence and assessing the witnesses. Do not try to take down everything a witness says. It may be more significant to note your reaction to a particular witness as that may be significant in your later assessment of the evidence. It may be important, for example, to note the reaction of a witness in cross-examination. A note of how you found the witness, for example whether you thought the witness was trying to tell you the truth, or was on the other hand being evasive, might be more important to recall during your deliberations than actually what the witness said.

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

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

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

If you have read or heard or have otherwise become aware of any publicity about the events with which this trial is concerned, or about the accused, it is of fundamental importance that you put any such publicity right out of your minds. Remember that you have each sworn an oath, or made an affirmation, to decide this case solely upon the evidence presented here in this courtroom and upon the basis of the legal directions I give to you. Before you were empanelled I asked that any person who could not be objective in their assessment of the evidence ask to be excused. None of you indicated

you had a problem in that regard. You would be disobeying your oath or affirmation if you were to take into account, or allowed yourself to be influenced by, information that has come to you from something you have read, seen or heard outside the courtroom.**]**

Media publicity during the trial

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

The nature of a criminal trial

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

The overall issue is whether the Crown can prove the charge(s) alleged against the accused. The evidence placed before you on that issue is under the control of the counsel of both parties. In our system of justice the parties place evidence before the jury provided that it is relevant to the questions of fact that you have to determine. The parties decide what issues or what facts are in dispute. I play no part in which witnesses are called. My task is only to ensure the evidence is relevant: that is, to ensure the evidence is of some significance to the issues raised and the ultimate question whether the Crown has proved the accused's guilt. Usually there will be no issue as to whether evidence is relevant but if a dispute arises about it, that is a matter I must determine as a question of law. Otherwise I have no part to play in how the trial is conducted, what evidence is placed before you or what issues you are asked to resolve on the way to reaching a verdict.

Onus and standard of proof

The obligation is on the Crown to put evidence before a jury in order to prove beyond reasonable doubt that the accused is guilty of the [*charge/charges*] alleged against him/her. It is important you bear in mind throughout the trial and during your deliberations this fundamental aspect of a criminal trial. The Crown must prove the accused's guilt based upon the evidence it places before the jury. The accused has no obligation to produce any evidence or to prove anything at all at any stage in the trial. In particular the accused does not have to prove [*he/she*] did not commit the offence. The accused is presumed to be innocent of any wrongdoing until a jury is satisfied beyond reasonable doubt that [*his/her*] guilt has been established according to law. This does not mean the Crown has to satisfy you of its version of the facts wherever some dispute arises. What is required is that the Crown proves those facts that are essential to make out the charge(s) and proves those facts beyond reasonable doubt. These are sometimes referred to as the essential facts or ingredients of the offence. You will be told shortly what the essential facts are in this particular case.

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

The expression "proved beyond reasonable doubt" is ancient and has been deeply ingrained in the criminal law of this State for a very long time. You have probably heard this expression before and the words mean exactly what they say – proof beyond reasonable doubt. This is the highest standard of proof known to the law. It is not an expression that is usually explained by trial judges but it can be compared with the lower standard of proof required in civil cases where matters need only be proved on what is called the balance of probabilities. The test in a criminal case is not whether the accused is probably guilty. In a criminal trial the Crown must prove the accused's guilt beyond reasonable doubt. Obviously a suspicion, even a strong suspicion, that the accused may be guilty is not enough. A decision that the accused has probably committed the offence(s) also falls short of what is required. Before you can find the accused guilty you must consider all the evidence placed before you, and ask yourself whether you are satisfied beyond a reasonable doubt that the Crown has made out its case. The accused is entitled by law to the benefit of any reasonable doubt that is left in your mind at the end of your deliberations.

Deciding the case only on the evidence

It should be obvious from what I have just said that you are not here to determine where the truth lies. You are not simply deciding which version you prefer: that offered by the Crown or that from the defence. You are not investigating the incident giving rise to the charge(s). You are being asked to make a judgment or decision based upon the evidence placed before you. Jurors might in a particular case feel frustrated by what they see as a lack of evidence or information about some particular aspect of the case before them. In some rare cases this has led jurors to make inquiries themselves to try and fill in the gaps that they perceive in the evidence. But that is not your function, nor is it mine. If you or I did our own investigations that would result in a miscarriage of justice. Any verdict given, even if it was not actually affected by those investigations, would be set aside by an appeal court. That would result in a waste of your time and that of your fellow jurors, and lead to considerable expense to the community and the parties.

You are judges deciding facts and ultimately whether the accused's guilt has been proved beyond reasonable doubt based upon the material placed before you during the trial. You must understand that it is absolutely forbidden that you make any inquiries on any subject matter arising in the trial outside the courtroom. To do so would be a breach of your oath or affirmation, it would be unfair to both the Crown and the defence and you would have committed a criminal offence. If you felt there was some evidence or information missing, then you simply take that fact into account in deciding whether on the evidence that is before you the Crown has proved the guilt of the accused beyond reasonable doubt.

Prohibition against making enquiries outside the courtroom

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

It is a serious criminal offence for a member of the jury to make any inquiry for the purpose of obtaining information about the accused, or any other matter relevant to the

trial. It is so serious that it can be punished by imprisonment. This prohibition continues from the time the juror is empanelled until the juror is discharged. It includes asking a question of any person other than a fellow juror or me. It includes conducting any research using the internet.

[*If the judge considers it appropriate add*

You should keep away from the internet and the other communication sources which may pass comment upon the issues in this trial. You may not communicate with anyone about the case on your mobile phone, smart phone, through email, text messaging, or on Twitter, through any blog or website, any internet chatroom, or by way of any other social networking websites including Facebook, MySpace, LinkedIn and YouTube. You should avoid any communication which may expose you to other people's opinions or views.]

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

Always keep steadily in your mind your function as a judge of the facts as I have explained it to you. If you undertake any activity in connection with your role as a juror outside the court house, then you are performing a different role. You have stopped being an impartial judge and have become an investigator. That is not a role you are permitted to undertake. It would be unfair to both the Crown and the accused to use any material obtained outside the courtroom because the parties would not be aware of it and, therefore, would be unable to test it or make submissions to you about it.

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

Discussing the case with others

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

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

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

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

Bringing irregularities to the judge's attention

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

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

Reporting other misconduct and irregularities — s 75C Jury Act

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

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

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

Breaks/personal issues/daily attendance

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

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

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

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

Outline of the trial

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

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

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

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

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

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

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

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

[1-492] Jury questions for witnesses

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

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

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

[1-494] Expert evidence

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

[1-495] Offences and irregularities involving jurors

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

- disclosure of information by jurors about their deliberations: s 68B
- inquiries by jurors to obtain information about the accused or matters relevant to the trial: s 68C. Section 68(1), with s 68C(5)(b), is directed to a juror making an inquiry for the purpose of obtaining information about a matter relevant to the trial, not to inadvertent searching. What is a "matter relevant to the trial" will vary from case to case: see *Hoang v The Queen* [2022] HCA 14 at [32]–[36].
- soliciting information from, or harassing, jurors: s 68A.

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

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

[1-500] Communications between jurors and the judge

Notes between the jury and the judge should be disclosed to the parties unless they concern the jury's deliberation process, or where the communication concerns a matter

unconnected with the issues to be determined, or where the subject was inappropriate for the jury to raise with the judge: *Burrell v R* [2007] NSWCCA 65 at [217], [263]–[268].

[1-505] Discharging individual jurors

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

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

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

In *R v Rogerson (No 27)* [2016] NSWSC 152 at [10] a juror observed sleeping during the evidence was found to have engaged in misconduct. However, bringing a newspaper or clippings from the paper into the jury room (*Carr v R* [2015] NSWCCA 186 at [20]) or playing a word game in the jury room during breaks in the proceedings (*Li v R* (2010) 265 at [151]) were both held not to be misconduct giving rise to a miscarriage of justice. Once a judge is affirmatively satisfied of misconduct by a juror, that juror must immediately be discharged: *Hoang v The Queen* [2022] HCA 14 at [41]. In *Hoang v The Queen*, the juror's internet inquiry about the Working with Children Check, which was evidence given at the trial and the subject of defence submissions and the judge's summing up, amounted to misconduct under s 53A(2). The fact the search was conducted out of curiosity was irrelevant: at [38].

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

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

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

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

There is no rigid rule governing whether or not to discharge a whole jury for an inadvertent and potentially prejudicial event occurring during the trial. It depends on: the seriousness of the event in the context of the contested issues; the stage the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction to overcome its apprehended impact: *Zheng v R* [2021] NSWCCA 78 at [92]–[96].

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

As to continuing with the balance of the jury see: *Crofts v The Queen* (1996) 186 CLR 427 at 432, 440; *Wu v The Queen* (1999) 199 CLR 99; *Criminal Practice and Procedure NSW* at [29-50,960.5].

[1-515] Suggested direction following discharge of juror

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

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

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

[1-520] Discharge of the whole jury

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

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

[1-525] Provision of transcripts

Section 55C of the Act provides that upon request the jury may be given a copy of the whole or part of the trial transcript. This can include addresses and the summing up: *R v Sukkar* [2005] NSWCCA 54 at [84]. See generally *R v Fowler* [2000] NSWCCA 142 at [91]; *R v Bartle* [2003] NSWCCA 329 at [687].

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

Members of the jury you are to be given the [*transcript/part of the transcript*] of the evidence. Usually the transcript is accurate and the parties have been given the opportunity to indicate whether they believe that any part of it is not accurate. If you have a note of the evidence that is inconsistent with the transcript, then you should raise that matter for clarification. The transcript is given to you to help you recall the precise evidence of a witness or the evidence about a particular topic. If you are concerned with a part of the witness' evidence then you should consider what [*he/she*] said about that topic in evidence in chief and in cross-examination. You should also put that part of the evidence in context of the evidence given by the witness.

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

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

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

[*If appropriate*

You have asked for the transcript of the evidence of witness A. You will recall that witness B also gave evidence about the issue/s raised in witness A's evidence. In order for you to properly consider [*that/those issue/s*] I have also made available to you the transcript of witness B's evidence. I would encourage you to read the evidence of B in relation to that issue as well as the evidence of witness A. This will remind you of the whole of the evidence on [*that/those issue/s*].]

[1-535] Written directions

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

However, s 55B does not abrogate the trial judge's obligation to give oral directions concerning the elements of the offences: *Trevascus v R* at [65]; see also the discussion of the relevant cases at [52]–[63]. The judge must emphasise to the jury that the written directions are not a substitute for the oral directions given: *Trevascus v R* at [67].

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

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

[The next page is 123]

Self-represented accused

[1-800] Conduct of trials

An accused person may appear personally, and may conduct his or her own case: ss 36(1), 37(2) *Criminal Procedure Act* 1986. These provisions apply "to all offences, however arising (whether under an Act or at common law), whenever committed and in whatever court dealt with": s 28(1) *Criminal Procedure Act*. While the election by an accused to appear self-represented is a fundamental right which should not be interfered with (*R v Zorad* (1990) 19 NSWLR 91 at 95) the operation of the adversarial system "may be severely impaired" by the absence of legal representation: *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at [49]. The High Court in *Dietrich v The Queen* (1992) 177 CLR 292 at 302 describes the disadvantages facing a self-represented accused. See also Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, "Self-represented parties" at [10.1]ff.

[1-810] Duty of the trial judge

The duty of the trial judge is to give information and advice as is necessary to ensure that the self-represented accused receives a fair trial so that "the accused is put in a position where he [or she] is able to make an effective choice as to the exercise of his [or her] rights during the course of the trial, but it is not [the judge's] duty to tell the accused how to exercise those rights": *R v Zorad* (1990) 19 NSWLR 91 at 99; *R v Anastasiou (aka Peters)* (1991) 21 NSWLR 394 at 399. The trial judge must maintain the appearance of impartiality and should ascertain the level of assistance required by a self-represented accused: *Kenny v Ritter* [2009] SASC 139 at [23]. A judge is entitled to peruse committal papers to inform himself or herself about the likely scope of the trial and potential evidentiary or other issues that might arise: *R v SY* [2004] NSWCCA 297 at [13]. The judge may also, of course, ask the Crown to give an outline of the Crown case and the nature of the evidence to be led.

[1-820] Suggested advice and information to accused in the absence of the jury

The suggested advice and information below assumes that the Crown has taken all reasonable steps to ensure that the self-represented accused is "equipped to respond" to the Crown case in accordance with the Office of Director of Public Prosecutions (NSW), Prosecution Guidelines, Guideline 4.6, *Unrepresented accused*. The suggested advice and information also assumes that the issues of whether proceedings should be stayed, or whether the trial will proceed as a judge-alone trial, have already been resolved. Where the trial is by judge-alone trial, the suggested information and advice will require appropriate amendment.

It is a matter of discretion for the trial judge as to whether aspects of the following suggested advice and information are provided to the accused, prior to, or after, the Crown Prosecutor opens its case. Given the length of the suggested guidance, the judge may prefer to deal with the issues in more than one stage. Consideration might also be given to the provision of the suggested advice and information to the accused in

written form. If the issue of an alibi is raised by a self-represented accused at the beginning of the trial and notice has not been given to the Crown, then, depending on the circumstances, it might be necessary to consider a short adjournment: see **Alibi** at [6-010].

Before empanelling the jury

You have been charged with … [*state offence(s)*]. There are a number of elements to that charge(s) which the Crown must prove beyond reasonable doubt … [*detail elements of offence(s)*]. As this is a criminal trial, the burden or obligation to prove you are guilty is placed squarely on the Crown. That burden rests upon the Crown in respect of every element or essential fact that makes up the offence. There is no obligation whatsoever on you to prove any fact or issue that is in dispute. You do not have any obligation to call any evidence or prove anything.

Role of judge and jury

I should explain my role and the role of the jury in the trial. The jury is the sole judge of the facts. All disputes about matters of fact in this case will be decided by the jury and not me. Generally that means that it is entirely up to the jury to decide what evidence they accept and what evidence they do not accept. I am not involved in making decisions about the facts. I am the judge of the law. During the trial this means that I am required to ensure that all the rules of procedure and evidence are followed. At the end of the trial, I will give the jury directions about the legal principles that apply to the case. I will explain to them how the legal principles should be applied to the issues which they have to decide.

Legal argument

Sometimes during the trial a question of law will arise for me to decide. This might include arguments about whether particular evidence should be admitted. I may need to hear arguments from the Crown Prosecutor and from you before I make a decision. If that occurs, it is usually necessary for the matter to be debated in the absence of the jury.

Opening addresses

After the jury has been empanelled, I will ask the Crown Prosecutor to give an outline of the case the Crown anticipates establishing by the evidence. The purpose of the opening is to assist the jury in understanding the evidence as it is given during the trial. What the Crown tells the jury in the outline is not evidence. It is nothing more than an outline of what the Crown expects the evidence will establish. After the Crown Prosecutor has completed [*his/her*] address you have the right to address the jury yourself. Your address can refer to any issues which you dispute or which you do not dispute. However, at this stage, your address must be limited to the matters dealt with in the prosecutor's opening address and, if you wish, to the matters you propose to raise in your defence … [*see* s 159(1), (2) *Criminal Procedure Act* 1986]. Like the Crown Prosecutor's opening address, what you say to the jury at this stage is not evidence. You do not have to address the jury. That is up to you.

[*Note:* *It may be appropriate to empanel the jury after these opening remarks: see [1-015] below; and once that has been completed, continue with the following comments in the jury's absence.*]

Explanation of the Crown case and objections

You have heard the Crown Prosecutor explain to the jury the nature of the charge(s) and the Crown's case against you. When the jury is brought back into court, the Crown Prosecutor will call witnesses and produce documents or other material, to seek to prove the charge(s).

[*If it is considered more appropriate to give this information and advice before the jury has been empanelled, this part of the advice could read:*

Once the Crown Prosecutor explains to the jury the nature of the charge(s) and the Crown's case against you, [*he/she*] will call witnesses and produce documents or other material, to seek to prove the charge(s).**]**

Documents and other material tendered in evidence during the trial are marked as exhibits. The exhibits are used by the jury in its deliberations.

You can object to any question asked by the Crown Prosecutor if you have a legal basis for doing so. An example of a legal basis for an objection is that a question is not relevant or it is unfair. If you want to object to any question, after it is asked but before it has been answered, you must stand up and say "I object". I will then hear whatever you want to say about the question, and depending on why you are objecting, I may do so in the absence of the jury. You cannot object simply because you disagree with the evidence. If you are unsure about your right to object to a question on legal grounds, you should ask me for assistance.

If the Crown seeks to tender material such as a document, photograph, video or other item, you have the right to object to its tender if there is a legal basis for the objection. If you want me to rule on the tender of any such material you should stand up and say, "I object", and I will then hear whatever you want to say. Again, I may do so in the absence of the jury.

Cross-examination of Crown witnesses

[*Note:* *The following does* ***not* *apply to cross-examination of complainants in prescribed sexual offence proceedings and vulnerable witnesses in personal violence proceedings: see [1-020] below which addresses that scenario.***]**

You have the right to cross-examine a Crown witness: that is, to ask him or her any questions which you think may help you, or weaken the Crown case. However, they must be questions, not statements or comments by you. If a Crown witness is able to say something or has material which you think will assist your case [*give example, possibly an earlier inconsistent statement of an alleged victim who is a witness*], then you can ask the witness questions and tender in evidence that material through the witness. If there is evidence you want the jury to consider which affects the reliability of the witness or the witness's evidence [*give examples — related to witness's memory, or potentially unreliable evidence or witnesses referred to in s 165 Evidence Act such as identification evidence, prison informers, etc*], then you may test that by asking the witness questions.

If you are going to contradict the evidence of a Crown witness or suggest that the witness is telling lies, you should make your allegations to that witness in the form of questions, so that he or she has the opportunity to respond to your suggestions. It is also important for you to remember that any suggestion in a question you have asked during cross-examination is not evidence, unless the witness agreed with that

suggestion. So, for example, if you ask a witness [*give example, "you saw me wearing a grey jumper on [date], didn't you?"*], and the witness says "no" or "I don't know" or "I don't remember", there is no evidence to support the particular question you have asked.

[*Note:* *The rule in Browne v Dunn does not generally apply in criminal trials: MWJ v The Queen (2005) 80 ALJR 329 at [41].*]

Defence case

No case to answer

After the Crown Prosecutor has called all the Crown evidence, you will be given the opportunity to submit to me that the Crown case should be taken away from the jury because there is not enough evidence to prove the charge(s) against you. This application is made in the absence of the jury. You do not have to do this.

Opportunity to present any evidence

If you do not make such an application, or you make an application and it is rejected, you will then be given an opportunity to present any evidence you wish to answer the Crown case. You do not have to give evidence yourself and you do not have to call any witnesses to give evidence on your behalf. The Crown has to prove the case against you. You do not have to prove anything.

However, if you are calling any evidence, either by giving evidence yourself or by calling other witnesses, you may, if you wish, first address the jury … [*see* s 159(3) *Criminal Procedure Act*]. The purpose of addressing the jury before you call your evidence is to give them a general outline of the case you are going to present. During that address you cannot attack the Crown case. You have the opportunity to do that later, in your final address, after all the evidence has been given.

You may give evidence yourself, or choose not to give evidence. If you choose not to give evidence, I will direct the jury that you are entitled to say nothing and make the Crown prove your guilt and that your silence in court cannot be used against you … [*see* **Suggested Direction** at [2-1010]].

Even if you do not give evidence, you can still call other witnesses to give evidence which is relevant to the charge(s). You may also tender any relevant documents or other things as exhibits in your case. If you intend to give evidence yourself and to call other witnesses, it is normal to give your own evidence before calling those witnesses because, if you give evidence after any of your witnesses, the comment may be made that you have tailored your own evidence to fit in with the evidence given by them … [*see R v RPS (unrep, 13/8/97, NSWCCA) at 23*]. But if you decide not to call evidence, I will direct the jury that decision cannot be used against you either.

I remind you again that you do not have to give evidence or call witnesses to give evidence on your behalf. It is entirely a matter for the Crown to prove its case against you. You do not have to prove anything.

Questioning witnesses

When you do call your own witnesses, you may ask them questions. However, you cannot ask your own witnesses a leading question. A leading question is one which suggests the answer to the witness. [*Give example, "You're a good bloke aren't you?"*] If you do ask a leading question, then the Crown is likely to object.

In some circumstances you may, with the leave of the court, question a witness you have called as though you were cross-examining the witness.

[*Optional explanation to accused of s 38 Evidence Act 1995*

You may wish to do this because the witness has given evidence that is unfavourable to you, or the witness has not made a genuine attempt to give evidence about a matter which he or she may reasonably be expected to have knowledge of, or the witness has given a prior statement which is inconsistent with the evidence he or she has given in court.]

If that occurs, I will make a legal ruling about whether you can cross-examine your own witness. If leave is granted, you may ask him or her any questions which you think may help you, or weaken the Crown case.

The Crown has the right to cross-examine the witnesses you call. At the conclusion of the Crown's cross-examination, you may ask each witness further questions to explain or contradict matters put to them in cross-examination which they might have been unable to explain or contradict during the cross-examination itself.

It is also very important that all the evidence you want the jury to hear is given during your case.

Closing addresses

When all of the evidence has been presented, both you and the Crown Prosecutor have the opportunity to address the jury again. The Crown Prosecutor will address the jury first. After that, you will have the opportunity, if you wish, to address the jury. At that time, you may present arguments as to why the jury should not accept the Crown case against you, or as to why you should be found "not guilty". At that stage, you can discuss the evidence already given, but you cannot introduce new evidence. You will be entitled to refer in your address to all of the evidence that the jury has heard or seen. This includes any exhibit which has been put into evidence, and includes your own evidence if you have given evidence. As I have already said, any suggestion in a question you have asked one of the Crown's witnesses during cross-examination or one of your own witnesses is not evidence unless the witness agreed with the suggestion put to them.

You must understand that if, during your address, you assert facts about the charge(s) which are not supported by the evidence, I may give the Crown permission to make a supplementary address or another address to the jury replying to any such assertion [*see* s 160(2) *Criminal Procedure Act*].

If you would like me to further explain anything I have told you, please let me know now, or when the particular matter arises.

[Other general comments

Other general comments may be necessary depending on the nature of the case. These comments should be made before the jury has been empanelled.**]**

[***Where appropriate*** *— admission to an investigating official*

In this case, the Crown alleges that you have made an admission to an investigating official. It is for the judge in the trial to decide whether an admission you may have made should be admitted in evidence. I decide those issues by hearing evidence from

the witnesses to whom you are said to have made the alleged admission. If you wish to contest the evidence of the admission, then you should tell me now, and I will deal with the issue before the jury is empanelled.**]**

[***Where appropriate*** *— good character*

If you want to suggest to the jury that you are a person of good character either generally or in a particular respect, then you are entitled to raise that good character for their consideration. You may do this by either asking appropriate questions of Crown witnesses, or by stating this during your evidence, and/or by calling witnesses to give evidence to that effect. [*For example, if you do not have a criminal history, then you may wish to ask one of the Crown witnesses a question about that*.]

However, it is important for you to understand that if you, either directly or by implication, suggest to a witness that you are a person of good character either generally or in a particular respect then, depending on his or her answer, the Crown may lead evidence to rebut your suggestion that you are a person of good character. This may include evidence of any criminal record you might have.**]**

[***Where appropriate*** *— alibi*

If you wish to rely upon an alibi: that is, to suggest either by cross-examination of Crown witnesses, during your own evidence, or by calling witnesses in your case, that you were not at a relevant place at the relevant time, but were somewhere else, then, unless you have already given notice of that alibi to the Crown, you may not do so unless you first obtain the leave of the court.**]**

[1-830] Empanelling the jury — right of accused to challenge

[*Name of the accused*], the law requires that you be tried by a jury of 12 people chosen from those members of the public forming the jury panel who are presently in court. Each potential juror has been given a number. They are referred to by that number and not by their names. Twelve cards will now be drawn, at random, from a box, one by one. Each of the 12 people selected will then take a seat in the jury box over there. Each person will then be called again, one by one.

[If Bibles are being used to swear the jurors:

The sheriff's officer might hand them a Bible. This depends on whether they have told the sheriff's officer that they will take an oath or make an affirmation.**]**

You have a legal right to challenge a maximum of three people without giving any reason. If you do wish to challenge a particular person, then you should say, "challenge" as that person's number is read a second time.

In addition, if you want to challenge a particular person for a specific reason, then you should, without stating your reason, say, "challenge for cause". I will deal with that situation, if it arises [*see* s 46 *Jury Act* 1977]. Do you understand?

The Crown has the same right of challenge, and that right will be exercised by the Crown Prosecutor.

[1-835] Notes

1. *Stay of proceeding*: even if a self-represented accused is aware of their right to make an application for an adjournment or stay of the proceedings to enable legal representation to be obtained, the trial judge should consider whether the trial is likely to be unfair if the accused is forced to proceed unrepresented: *Dietrich v The Queen* (1992) 177 CLR 292.

   Where a self-represented accused, "who through no fault on his or her part, is unable to obtain legal representation" and is facing trial for serious offences, a trial judge has power to make an order staying the proceedings if, in the circumstances of the case, it appears that the accused would otherwise not receive a fair trial: *Dietrich v The Queen* at 315. See also *R v Gilfillan* [2003] NSWCCA 102 where the Court of Criminal Appeal noted at [75] that circumstances may exist where it is reasonable for an accused to withdraw his or her instructions even at an advanced stage of a trial, and that although there is a strong public interest in ensuring that a criminal trial which is well advanced proceeds to a verdict, the court is required to consider why instructions were withdrawn.

   In *Craig v South Australia* (1995) 184 CLR 163 at 184, the High Court considered the phrase, "through no fault of his own", and concluded that the test focused on the reasonableness of the accused's conduct in all of the circumstances, and excluded the situation where it was fair to say the accused "by his gratuitous and unreasonable conduct, had been the author of his own misfortune".

2. *Address by the Crown Prosecutor:* the Crown is not prohibited from making a closing address where the accused is self-represented, although there is a practice that the Crown not do so in such circumstances: *R v Zorad* (1990) 19 NSWLR 91; *R v EJ Smith* [1982] 2 NSWLR 608 at 615–616. The decision as to whether the Crown Prosecutor should exercise the right to make a closing address is a discretionary question for the trial judge: *R v Zorad* at 95.

3. The following documents may also be of assistance when considering the professional obligations of the Crown Prosecutor:

   - Office of the Director of Public Prosecutions (NSW), Guideline 4.6: *Unrepresented Accused*, Prosecution Guidelines, March 2021: see https://www.odpp.nsw.gov.au/sites/default/files/2021-08/Prosecution-Guidelines.pdf
   - The New South Wales Bar Association, *Guidelines for barristers on dealing with self-represented litigants*, October 2001: see https://nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Self%20Represented%20Litigants.pdf
   - The New South Wales Law Society, *Guidelines for solicitors dealing with self-represented parties*, April 2006: see https://www.lawsociety.com.au/sites/default/files/2018-03/Self%20represented%20parties.pdf .

[1-840] Cross-examination of complainants in prescribed sexual offence proceedings and vulnerable witnesses in criminal proceedings

Special procedures apply with respect to the cross-examination of certain witnesses by a self-represented accused. The relevant categories of witness are complainants in

sexual offence proceedings: s 294A *Criminal Procedure Act*; and vulnerable persons (whether or not the complainant) in criminal proceedings: s 306ZL. If the accused is self-represented, any cross-examination must be conducted through a court-appointed intermediary.

With respect to vulnerable persons, the court may choose not to appoint such a person if the court considers that it is not in the interests of justice to do so: s 306ZL(5). There is no discretion with respect to sexual offence complainants: s 294A(5).

The person appointed must ask the complainant or vulnerable person only those questions which the accused requests that person to put to the complainant or vulnerable person: ss 294A(3), 306ZL(3); and must not give legal or other advice to the accused: ss 294A(4), 306ZL(4).

The procedure applies whether or not closed-circuit television facilities are used to give evidence, or alternative arrangements have been made: ss 294A(6), 306ZL(6).

The purpose of the provisions is to spare the witness "the need to answer questions directly asked of him or her by the person said to have committed the offence": *Clark v R* [2008] NSWCCA 122. The legitimacy of such provisions with respect to sexual assault complainants was confirmed in *R v MSK & MAK* (2004) 61 NSWLR 204, where it was recognised at [69]:

> The use by [the self-represented accused] of the opportunity to confront and to challenge his alleged victim personally and directly risks diverting the integrity of the judicial process, insofar as it is likely to intimidate the complainant to the point where he or she is unable to give a coherent and rational account of what truthfully occurred. The threat of its occurrence may also discourage a victim of sexual assault from giving evidence or even from making an initial complaint.

Special leave to appeal to the High Court was refused on 17 February 2005: *R v MSK and MAK* [2005] HCA Trans 22.

Section 294A does not prescribe a procedure for the application of its provisions. In *Clark v R* it was held that it was appropriate for the judge to have appointed the registrar as the intermediary, and that there was nothing in the legislation to require the appointment of a legal practitioner: at [40], [43]–[44]. The appointed person should be present in court to hear the complainant's examination in chief to ensure the appointed person can carry out the cross-examination effectively and intelligently: at [45], [55].

The judge erred in requiring the appellant to provide the judge with a list of questions proposed for cross-examination before the complainant's examination in chief: *Clark v R* at [46]. Such a requirement is "likely to give rise to the risk of a miscarriage of justice": at [47], [55]. Furthermore, it may be impossible to meet as the questions asked in cross-examination may depend to a significant degree upon the witness's responses to previous questions: at [48]. Such an approach may be justified where proposed questions deal with the matters proscribed by s 293 (now s 294CB) *Criminal Procedure Act*: at [49]; but even in those circumstances disclosure before the complainant's evidence in chief is finished is not justified: at [50]–[53].

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

The following procedure is suggested (steps (a) to (e) should take place in the absence of the jury):

(a) At the earliest possible opportunity in proceedings, the court should inform the self-represented accused that if they remain self-represented, they are prevented by law from personally questioning the complainant, and that the court must appoint a person to ask the questions on their behalf.

(b) Once it is apparent the trial will proceed with a self-represented accused, at the earliest opportunity the court should appoint the person who will ask the accused's questions of the complainant: s 294A(2). In any event, the person should be appointed in sufficient time to ensure they can be present in court to hear the complainant's examination in chief: *Clark v R* [2008] NSWCCA 122 at [45], [55].

(c) The judge will explain to the intermediary their role, that is, that the intermediary is only to ask the questions sought to be put by the accused: s 294A(3).

(d) The court should advise the accused to begin to prepare a list of questions sought to be asked of the complainant in cross-examination. Consistent with the judge's obligations with respect to a self-represented accused, the judge should explain the proposed procedure for cross-examination of the complainant to the accused and advise them of the nature and form of questions that are not permissible. For example, the trial judge should explain to the accused the type of questions that may be proscribed by s 294CB (formerly s 293): *Clark v R* at [49].

There is no requirement that the draft questions be made available to the Crown, although the Crown may be entitled to notice of particular questions, for example, for the purposes of ascertaining admissibility under s 294CB: *Clark v R* at [54].

Similarly, there is no requirement for all of the draft questions to be submitted to the court for approval in advance as:

> "… any question to be asked of a witness in cross-examination may ride upon the answer just given. The requirement to frame all questions in advance may impart a rigidity which robs a cross-examination of its effectiveness": *Clark v R* at [48].

However, the trial judge may require the accused to formulate proposed questions which might infringe the requirements of s 294CB, and inform the court in advance of any such questions: *Clark v R* at [49].

(e) If the accused is not literate, the court-appointed intermediary — or, if necessary, an interpreter — could write out the questions sought to be put by the accused.

(f) The jury will be brought back into court and an explanation should be given to the jury by the judge about the procedure to be adopted for the accused to cross-examine the complainant and the required warning given: s 294A(7).

(g) Once the complainant has given evidence in chief, the accused will be given the opportunity to add to and/or re-formulate the list of questions they have prepared.

(h) The intermediary will then ask the complainant only the questions the accused has requested be asked: s 294A(3). The intermediary may rephrase a question if necessary to aid the complainant's understanding: *Clark v R* at [45].

(i) If necessary during the cross-examination, the judge will give the accused the opportunity to re-formulate the questions in accordance with the court's rulings on objections and admissibility.

(j) After the complainant has answered the questions, the judge will ask the accused if there are any further questions arising from the complainant's answers, or any questions previously overlooked.

(k) If the accused has further questions, the procedures set out in paragraphs (d)–(e) and (h)–(j) would be repeated.

Section 294CB(4) sets out the limited circumstances in which a complainant can be cross-examined about their sexual experience. Section 294CB(8) provides the court must, *before* the evidence is given, provide reasons as to why the evidence falls within one of the exceptions in s 294CB(4) and the nature and scope of the evidence. Where an accused is self-represented "the trial judge needs to take special care to see that the requirements of the section are respected": *Clark v R* at [49]. The judge should explain to an accused person the nature of the questions proscribed by s 294CB and require the accused to formulate any proposed questions in advance: *Clark v R* at [49]. See further discussion of s 294CB at [1-347].

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

As you are representing yourself in these proceedings, you cannot ask the complainant questions once the Crown Prosecutor has finished asking [*his/her*] questions. I will appoint a person, who I will refer to as an intermediary, to ask the complainant questions in cross-examination for you. The intermediary will be present when the complainant gives [*his/her*] evidence in chief.

You need to prepare a list of the questions you want the intermediary to ask the complainant and I suggest you start preparing those questions now, if you have not already done so. The intermediary is only here to help you by asking the complainant the questions you have prepared. [*He/she*] cannot give you legal advice. However, the intermediary can put into other words the questions you have prepared. Before the intermediary cross-examines the complainant I will give you the opportunity to review the questions you propose to have asked.

The Crown Prosecutor will not see the questions before they are asked, but if [*he/she*] objects to any of the questions when the intermediary asks the complainant, then I will deal with that objection in the usual way.

During the complainant's cross-examination, if you need more time to prepare additional questions, or reconsider the wording of some of your questions because of rulings I have made as a result of objections or the admissibility of a particular question, then I will give you some time to do so.

[*Note:* *to address the possibility or difficulty of the accused communicating with the intermediary during the course of cross-examination see Clark v R at [47].*]

When the cross-examination is finished, and before I give the Crown Prosecutor the opportunity to re-examine the complainant, I will ask you if you have any other questions arising from the cross-examination of the complainant and, if you need more time to prepare additional questions, I will give you some time to do so.

[1-860] Suggested information and advice where s 294CB(4) does not apply

There are some questions that by law you cannot ask the complainant. You cannot ask [*him/her*] questions about what the law refers to as [*his/her*] "sexual reputation". This means you cannot ask any question which suggests the complainant:

- has or may have had sexual experience, or
- lacks sexual experience, or
- has taken part in sexual activity, or
- has not taken part in sexual activity.

[1-870] Suggested information and advice to accused's intermediary

You have been appointed by me to assist the accused in this case. That assistance is limited to asking the complainant the questions appearing on the list the accused has prepared. You cannot give the accused legal advice. However, if some of the questions the accused proposes that you ask do not make sense then you can put those particular questions into other words. The only time you may ask additional questions is when it is necessary to assist the complainant's understanding of a particular question which has been asked.

[1-875] Direction re use of intermediary

Where an intermediary is appointed to ask questions of a complainant in prescribed sexual offence proceedings: s 294A(7); or a vulnerable witness in criminal proceedings: s 306ZI(4); and the proceedings are before a jury, the judge must:

(a) inform the jury that this is standard procedure in such cases, and

(b) warn the jury not to draw any inference adverse to the accused, or to give the evidence any greater or lesser weight because of the use of that arrangement.

[1-880] Suggested direction to jury re use of intermediary

An intermediary has been appointed by me to cross-examine the complainant for the accused. [*He/she*] is not a lawyer representing the accused; perhaps this person is not a lawyer at all. During cross-examination, [*he/she*] will ask the complainant questions — which have been formulated by the accused — on the accused's behalf.

Where, as here, the accused is self-represented, it is standard procedure in cases of sexual assault for the court to appoint a person to ask the complainant questions on the accused's behalf. You should not draw any inference against the accused or give the evidence any greater or lesser weight simply because it is given in this manner. You should assess the evidence in the same way as you assess the evidence of any other witness in the case.

[1-890] Cross-examination in proceedings for Commonwealth offences

Part 1AD *Crimes Act 1914* (Cth) also places constraints on the cross-examination of certain witnesses by a self-represented accused. That Part applies to various offences, including child sex tourism, slavery, sexual servitude and human trafficking: s 15Y(1). Under s 15YF, a self-represented accused is prohibited from cross-examining a vulnerable person, and a person appointed by the court is to ask him or her any questions sought to be put by the accused. A self-represented accused must not cross-examine a vulnerable person unless the court grants leave: s 15YG(1). Section 15YG(1A) defines a vulnerable person to include a child witness (other than a child complainant) for a child proceeding (as defined in s 15YA). The court must not grant leave "unless satisfied that the vulnerable person's ability to testify under cross-examination will not be adversely affected": s 15YG(2). In applying this test, the court is to consider "any trauma that could be caused if the defendant conducts the cross-examination": s 15YG(3). The Commonwealth legislation does not specifically require a warning in the terms of ss 294A(7) or 306ZI(4) *Criminal Procedure Act*, although it may be prudent to give a warning in such terms for these matters.

Sexual assault communications privilege

[1-895] Introduction

In sexual assault trials, there are special provisions associated with the production, and admissibility, of counselling communications involving victims, or alleged victims, of sexual assault. These are found in Ch 6, Pt 5, Div 2 of the *Criminal Procedure Act* 1986 "Sexual assault communications privilege". It is important to consider how the specific terms of the legislation apply in the circumstances of an individual case; counsel also have a responsibility to assist in this regard: *R v Bonanno; ex parte Protected Confider* [2020] NSWCCA 156 at [13].

Generally, a person in possession of such material cannot be compelled to produce it in trials, sentence proceedings, committal proceedings or proceedings relating to bail: ss 297, 298.

The purpose of the privilege is to limit the disclosure of a broad range of counselling communications in criminal proceedings at the earliest point possible to encourage victims of sexual assault to seek professional assistance: *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [34]; *R v Bonanno; ex parte Protected Confider* at [14].

It is important to note the following:

- A subpoena for a protected confidence cannot be issued without the leave of the court and appropriate notice must be given: ss 297, 298, 299C. Nor can a subpoena be issued without the court having first considered the matters in ss 299C and 299D: *R v Bonanno; ex parte Protected Confider* at [12].
- In certain circumstances the court may waive the requirement for notice: s 299C(5).
- Victims or alleged victims of sexual assault offences cannot be compelled to disclose their counsellor's identity: s 298A.
- When determining issues under Div 2, the court may consider the document or evidence: s 299B. Generally the material should not be disclosed to a party: s 299B(3).
- The matters the court must consider when determining whether to grant leave are set out in s 299D.
- When determining whether access should be granted, s 294CB (formerly s 293), which provides that evidence of a complainant's sexual experience is inadmissible (subject to limited exceptions), may also require consideration.

See also "Sexual assault communications privilege" at [9-000]–[9-600] — in the *Sexual Assault Trials Handbook* for further discussion about the history of the provisions, case law and requirements; and I Nash, "Use of the sexual assault communications privilege in sexual assault trials" (2015) 27(3) *JOB* 21.

[1-896] What communications are protected?

A "protected confidence" is defined in s 296(1) as "a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence." The

definition of a "counselling communication" is broad. Such communications may be protected even if they were made before the relevant sexual assault offence occurred, or if the relevant communication was not made in connection with a sexual assault offence or any condition arising from a sexual assault offence: s 296(2). In *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [18], Basten JA observed that one explanation for expanding the concept of a protected confidence in the way done by s 296(2) was that Parliament wanted to avoid sexual assault victims being discouraged from reporting offences if that course might result in revealing other unrelated disclosures during counselling sessions.

Under s 296(4), the "counselling communication" must be made in confidence:

(a) by a person (the counselled person) to another person (the counsellor) who is counselling the person in relation to any harm they may have suffered, or

(b) to or about the counselled person by the counsellor during that counselling, or

(c) about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process, or

(d) by or to the counsellor, by or to another counsellor, or by or to a person who is counselling or has at any time counselled the person.

"Harm" in s 296(4)(a) is defined in s 295(1) to include "actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear)".

The counselling does not necessarily have to relate to harm suffered as a result of the sexual assault offence charged or any sexual assault offence: *KS v Veitch (No 2)* at [18]–[19]. Noting the potential for conflict between the "expansive provisions of s 296(2)" and the definition of "counselling communication" in s 296(4), Basten JA (Harrison J agreeing) observed that the broad construction of s 296(2) "might have greater force if it covered counselling for any condition, including disabilities, rather than "harm", which implies damage to which one has been subjected by another": at [19].

A person who "counsels" for the purposes of s 296 has "undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and listens to and gives verbal or other support or encouragement to the other person, or advises, gives therapy to or treats the other person, whether or not for fee or reward": s 296(5).

However, the fact a person has qualifications as a counsellor does not result in the inevitable conclusion that their relationship with the victim, and communications made as a result of that relationship, attracts the operation of the privilege. It is important in an individual case to consider whether the person was acting as a counsellor by, for example, providing support, advice, therapy or treatment. For example, in *ER v Khan* [2015] NSWCCA 230, Joint Investigation Response Team and FACS officers holding counselling qualifications were performing investigative functions and were not acting as "counsellors" to the complainant when the relevant communications were made. In that circumstance, the communications were found not to be protected under s 296: *ER v Khan* at [86], [95].

[1-897] Applications for leave

Protected confidence documents cannot be subpoenaed or produced in, or in connection with, any criminal proceedings or adduced as evidence in criminal proceedings except with leave: s 298(2). If leave to issue a subpoena is not sought, a court may nevertheless disregard the irregularity and consider the documents in determining whether access should be granted: *KS v Veitch (No 2)* at [29].

As a preliminary issue, if it appears a protected confider (usually the victim) may have grounds to make an application under Div 2, the court must satisfy itself that the victim is aware of the protections in Div 2 and is given a reasonable opportunity to seek legal advice: s 299.

The onus of proving a particular communication is privileged rests on the person asserting the privilege: *ER v Khan* [2015] NSWCCA 230 at [84]. A claim must be supported by focused and specific evidence (as is the case when a claim of client legal privilege is made): *ER v Khan* at [102]. When there is no evidence directly relevant to characterising the documents the subject of a claim, it may be necessary for the court to examine each document and base a determination on whether the document is a protected confidence and counselling communication from the nature and/or contents of each: s 299B(1); *KS v Veitch (No 2)* at [28] per Basten JA; *ER v Khan* at [97], [104]; *Rohan v R* [2018] NSWCCA 89 at [58]. To that end, a judge may compel the production of documents to enable determination of the question of leave to issue a subpoena: *Rohan v R* [2018] NSWCCA 89 at [58]. Whether it was intended that the requirements of s 299B could be readily applied when an application for leave to issue a subpoena was being determined, when there would normally be no documents available for examination, was the subject of comment by Beech-Jones J in *KS v Veitch (No 2)* at [85], and a matter about which RA Hulme J (Hoeben CJ at CL agreeing) expressed reservations in *Rohan v R* at [59]–[60] and [67].

An application for leave under Div 2 cannot be granted unless the court is satisfied, pursuant to s 299D(1):

(a) the document or evidence will, either by itself or having regard to other documents produced or adduced, have substantial probative value, and

(b) other documents or evidence concerning the matters to which the protected confidence relates are not available, and

(c) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or the contents of a document of substantial probative value: s 299D(1).

As to the operation and ambit of s 299D(1) see *KS v Veitch (No 2)* at [30]–[38]. The issues in s 299D cannot be considered without examining the documents or having sufficient information to make the correct statutory inquiries. A decision concerning whether or not to issue a subpoena cannot be made until the court has considered the matters in s 299D: *R v Bonanno; ex parte Protected Confider* at [12].

The concept of "substantial probative value" in s 299D(1)(a) is concerned with material that is admissible: *KS v Veitch (No 2)* at [37]. When determining whether

subpoenaed material has substantial probative value, the court should examine each document in question and not approach the task by looking at the material in its totality or globally: *PPC v Williams* [2013] NSWCCA 286 at [67], [69].

In determining whether the public interest in preserving confidentiality is substantially outweighed by the public interest in admitting evidence of substantial probative value under s 299D(1)(c), the non-exhaustive list of matters in s 299D(2) must be taken into account. This involves a balancing exercise of the matters listed. In *KS v Veitch (No 2)* the court held, with reference to s 299D(1)(c), that the public purpose of encouraging victims of sexual assault to seek professional help will be undermined if confidentiality is too readily overridden by other public interests, where the court may be satisfied that the particular confider will not suffer significant harm. On the other hand, an assessment that the information has substantial probative value, usually by casting doubt on the complainant's veracity or reliability, militates in favour of disclosure where it could give rise to a doubt as to the accused's guilt: *KS v Veitch (No 2)* at [34].

Consistent with usual principles, if the documents do not come within Div 2 of the Act, the party seeking to have the documents produced must, nevertheless, have a legitimate forensic purpose justifying their production: see *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 at 575; *R v Saleam* (1989) 16 NSWLR 14 at 17–18; *Attorney General for NSW v Stuart* (1994) 34 NSWLR 667 at 681. A "fishing" expedition cannot be allowed: *Alister v The Queen* (1984) 154 CLR 404 at 414.

[1-898] Disclosing and allowing access to protected confidences

Where leave is granted to issue a subpoena there is no subsequent leave requirement on production in answer to that subpoena: *KS v Veitch (No 2)* (2012) 84 NSWLR 172 at [23]; *NAR v PPC1* [2013] NSWCCA 25 at [74]; *PPC v Stylianou* [2018] NSWCCA 300 at [12], [15]–[16]. Nor is there a separate leave requirement for a party seeking access to the material produced. In *PPC v Stylianou*, at [18]–[19], the court, after considering the statutory scheme in Div 2, concluded that the District Court had a separate power to grant or withhold access to documents produced on subpoena and that such a power was sourced in the court's implied powers to do what is necessary to enable it to act effectively within its jurisdiction. The court's control over access, long recognised as a necessary part of litigation procedure, and common law principles relating to the inspection of documents subpoenaed in connection with criminal proceedings were expressly preserved by s 306(2): *PPC v Stylianou* at [20].

Access cannot be granted to a party (other than a protected confider) or the parties legal representative until the court is satisfied the preconditions in s 299D(1) have been satisfied: *PPC v Williams* [2013] NSWCCA 286 at [93].

Granting leave for the subpoena does not mean that access to the material produced automatically follows: *PPC v Stylianou* at [19]–[22]. The court's power to grant access to documents containing protected confidences is circumscribed by s 299B(3) which requires satisfaction of one of the two identified conditions: *PPC v Stylianou* at [21]. That is, the documents must not be disclosed unless the court determines the document or evidence does not record a protected confidence or that leave has been granted under Div 2 in respect of the document and disclosing the document would be consistent

with that leave. Satisfying a condition in s 299B(3) is a necessary but not sufficient requirement for access to subpoenaed material under s 298(2): *PPC v Stylianou* at [21]–[22].

To determine the question of access, the court may have to examine some or all of the subpoenaed documents and address the matters in s 299D(1), or any other matters the court would ordinarily take into account, to enable determination of that issue: *PPC v Stylianou* at [22]. That therefore requires consideration of whether the documents or evidence have substantial probative value. See [1-897] above.

The restrictions on admissibility in s 294CB (formerly s 293), which provides that evidence of a complainant's sexual experience is inadmissible, engages s 299D(1) and is therefore relevant to determining whether access should be granted: *KS v Veitch (No 2)* at [37]; *NAR v PPC1* at [29]; *PPC v Williams* at [86]–[87], [90]. It is directly relevant to the question of whether the material has substantial probative value: *PPC v Williams* at [94].

A victim (a principal protected confider) may consent to the production of a protected confidence: s 300(1). For the consent to be effective it must be in writing and expressly relate to the production of a document or adducing of evidence that is privileged: s 300(2). Such a consent amounts to an agreement for both parties to view the material: *NAR v PPC1* [2013] NSWCCA 25 at [53]. However, making a police statement indicating a preparedness to give the evidence contained in that statement, or which permits police to access medical records, does not amount to express consent for the purposes of s 300: *NAR v PPC1* at [52]; *JWM v R* [2014] NSWCCA 248 at [110].

[1-899] Power to make ancillary orders associated with disclosure

Under s 302 the court has powers to make ancillary orders with respect to the disclosure of protected confidences. However, the preconditions in s 299D(1) must be satisfied before making orders under s 302: *PPC v Williams* at [90]–[95].

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Trial instructions A–G

Circumstantial evidence

Complaint evidence

Complicity

Consciousness of guilt, lies and flight

Directions — misconceptions about consent in sexual assault trials

Demonstrations — see "Views and demonstrations" at [4-335]ff

Election of accused not to give evidence or offer explanation

Expert evidence

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Complaint evidence

[2-550] Introduction

Evidence of complaint by an alleged victim is admissible under s 66(2) *Evidence Act* 1995, where the complainant gives evidence. It is some evidence of the fact the accused conducted himself/herself as alleged in the complaint. The evidence can also be used to show consistency of conduct by the complainant. This type of evidence is not restricted to sexual assault cases. Evidence can be admitted under this section as relevant to any offence provided it is first-person hearsay under s 62 of the Act.

Evidence of complaint can also be admissible under s 65(2) *Evidence Act*, where the person making the complaint is not available to give evidence, for example where the complainant is dead or for some other reason is not available: see cl 4 of the Dictionary to the Act.

Further, such evidence can be admitted with leave under s 108(3)(b) in order to re-establish the credibility of a witness. In that case, the complaint can become evidence of the truth of the allegation made in the complaint by the operation of s 60 of the Act unless limited under s 136.

[2-560] Evidence of complaint where witness available to give evidence — s 66(2)

As to the admissibility of complaint under s 66(2): see generally *Papakosmas v The Queen* (1999) 196 CLR 297; *Criminal Practice and Procedure NSW* at [3-s 66.1]; *Uniform Evidence Law* (16th edn, 2021) at [EA.66.60]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 66-2ff.

The use to be made of the evidence can be limited under s 136 of the Act so that it cannot be used as proof of the fact of what was asserted in the complaint, but relevant only to the credibility of the alleged victim. This limit, however, would not generally be applied to complaint evidence admitted under s 66(2): see generally: *R v BD* (unrep, 28/7/97, NSWCCA); *Papakosmas v The Queen* at [40]; *Criminal Practice and Procedure NSW* at [3-s 136.1]; *Uniform Evidence Law* (16th edn, 2021) at [EA.136.60]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 136.1ff.

Section 66(2A) sets out matters the court may take into account in determining whether the occurrence was fresh in the memory of the person who made the representation. The phrase "fresh in the memory" is interpreted more broadly than by the High Court in *Graham v The Queen* (1998) 195 CLR 606: *R v XY* [2010] NSWCCA 181 at [78]–[79], [99]; and at [83]–[98]; see also *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56 at [89]. The time that has passed between the alleged offences and the complaint remains relevant but is not determinative: *R v XY* [2010] NSWCCA 181 at [79]. It is necessary to consider the facts in each case. In sexual assault cases it is recognised the nature of the offending may be such that the events involved may remain fresh in a complainant's memory for many years: *The Queen v Bauer (a pseudonym)* at [92]; *R v XY* at [85]; *R v Gregory-Roberts* [2016] NSWCCA 92 at [47]–[48]; *Kassab (a pseudonym) v R* [2021] NSWCCA 46 at [339]–[340].

As the evidence is admitted as hearsay, a warning may be required under s 165(1)(a) of the Act: see generally *R v TJF* [2001] NSWCCA 127 where there was delay

and the complaint was prompted; *Criminal Practice and Procedure NSW* at [3-s 165.1]ff; *Uniform Evidence Law* (16th edn, 2021) at [EA.165.90]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 165-9ff.

[2-570] Suggested direction — where complaint evidence admitted under s 66(2)

The following direction suits a case in which the fact of an assault is disputed. It may be modified for a case where the act is not disputed but there is an issue as to consent. If use of the evidence has been limited under s 136 *Evidence Act*, the direction should omit reference to the evidence having twofold use and omit the reference to s 60 *Evidence Act* use.

Where the evidence is used to re-establish credibility under s 108(3), the following direction may be used with appropriate adaptation including, of course, omission of references to s 60 *Evidence Act* use.

The directions include any required in accordance with s 294 if delay in complaint is raised.

If it is contended there is a difference between the complainant's evidence and a prior complaint, a direction under s 293A of the *Criminal Procedure Act* as suggested at [2-618] may be incorporated where indicated. A judge may give a direction under ss 293A or 294 at any time during the trial and may give the same direction more than once: ss 293A(2A); 294(2A). See further at [2-630] below.

The Crown relies on the evidence of the complainant having told [*witness*] about the alleged assault by the accused. This is referred to by lawyers as "complaint evidence" or "evidence of complaint". I will use those terms as a shorthand description of this evidence. [*Set out the evidence of complaint.*]

The first issue for you to decide is whether you accept the evidence of complaint. It was/was not disputed by the accused. [*Set out defence contentions if disputed*.]

If you accept the complaint evidence, the following directions apply to how it may be used.

Section 60 use

The first way in which the evidence may be relevant is that it can be regarded as additional evidence the complainant was assaulted in the way [*she/he*] described. So, not only would you have the complainant having given evidence before you about having been assaulted by the accused. You would also have the description of the assault that was given to [*witness*].

You should have regard to all of the circumstances relevant to making the complaint. In considering using the evidence for this purpose you should consider how consistent the complaint to [*witness*] is with the evidence the complainant gave in court. If there are discrepancies, you should consider why that may be so and whether that has a bearing upon whether you should treat the complaint evidence as additional evidence of the complainant having been assaulted.

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

[*Where, for a prescribed sexual offence, a s 293A direction is appropriate*, insert the direction suggested at [2-618].]

Credibility use

The second way the evidence of complaint may be used is that it can be relevant to the truthfulness of the complainant's evidence in court. The Crown says the fact [*she/he*] complained to [*witness*] when [*she/he*] did **[*add if relevant:* *and in the manner in which she/he did*]** makes it more likely [*she/he*] is telling you the truth about having been assaulted by the accused.

A matter you might consider in relation to using the evidence for this purpose is whether the complainant's conduct was consistent with the allegation. In other words, did [*she/he*] act in the way you would expect [*her/him*] to act if [*she/he*] had been assaulted as [*she/he*] claims? Things you might think about in relation to this are the timing of the complaint, in relation to when the assault is said to have occurred **[*if relevant:*** and the way the complainant appeared to [*witness*] when making the complaint**]**.

In considering whether there was consistency between the alleged assault and the complainant's conduct in complaining, you might bear in mind that different people have different personalities. In a given situation they might not all behave in the same way. In this case you are being asked to consider the complainant and the way [*she/he*] reacted to the experience [*she/he*] says [*she/he*] had.

Another matter you should consider is that just because a person says something on more than one occasion it does not mean that what is said is necessarily true or reliable. A false or inaccurate statement does not become more reliable just because it is repeated.

[*If there was a delay in complaint for a prescribed sexual offence, add (s 294(2)):* In relation to the timing of the complaint made to [*witness*], you should bear in mind that a delay in complaining does not necessarily indicate that the allegation is false. There may be good reasons why a victim of a sexual assault may hesitate in making, or refrain from making, a complaint about it. [*Summarise the competing cases as to this*.]**]**

[*In relation to delay in complaint for a prescribed sexual offence* (that is, where the "sufficient evidence" test under s 294(2)(c) is met) add: However, the accused has argued that the delay in making a complaint is inconsistent with the conduct of a truthful person who has been sexually assaulted and so you should regard this as indicating that the complainant's evidence is false. The accused asks you to rely upon the evidence that … [*set out the evidence relied upon by the accused said to justify that the jury should use the delay in assessing the complainant's credibility*].**]**

So, taking into account these matters, the question is whether the evidence of complaint supports **[if s 294(2)(c) applies**: or detracts from**]** the credibility of the complainant.

[*Where the evidence is limited to credibility under s 136 add:* You can only use the evidence of complaint in this way. You cannot use it as evidence that the assault occurred. The Crown did not lead the complaint evidence as itself being able to prove the charge. You can only find the charge proved on the evidence given in the courtroom and not what was said at some other place and time to [*witness*].**]**

Conclusion

So, that is how the evidence of complaint may be used in your deliberations. First you must decide whether you accept the complaint was in fact made to [*witness*] and what was actually said. Then you need to consider the various matters I have spoken about. [*A summary of the various matters that should be considered may be useful.*]

[*Summarise the competing cases to the extent that this has not already been done.*]

[2-590] Evidence of complaint where witness not available under s 65(2)

Evidence of a complaint about the accused's conduct can be admitted as evidence of the truth of the allegation under s 65 even though the complainant is not available as a witness, for example in a murder case. Such evidence will usually be admitted as evidence of a relationship between the complainant and the accused and is admitted for the purpose of being used by the jury as evidence of the truth of the allegation made.

Section 65(2) is premised upon an assumption that a party is seeking to prove a specific fact and so it requires the identification of the particular representation to be adduced to prove the fact: *Sio v The Queen* (2016) 259 CLR 47 at [57]. It is then that the court considers the circumstances of the representation to determine whether the conditions of admissibility have been met under s 65(2): *Sio v The Queen* at [57]. Section 65(2)(d)(ii) is directed at circumstances that of themselves tend to negative motive and opportunity of the declarant to lie: *Sio v The Queen* at [64].

Section 65(2)(d)(ii) requires a court to be positively satisfied that the representation which is tendered was made in circumstances that make it likely to be reliable notwithstanding its hearsay character: *Sio v The Queen* at [64].

The test in s 65(2)(b) is less stringent than that in either s 65(2)(c) or (d) but cases considering those parts of s 65(2) apply to the test in s 65(2)(b) provided the different language of each is borne in mind: *Priday v R* [2019] NSWCCA 272 at [29]–[37]. As to evidence admitted under s 65(2): see generally *Sio v The Queen* at [53]–[74]; *R v Serratore* (1999) 48 NSWLR 101; *R v Toki (No 3)* [2000] NSWSC 999; *Criminal Practice and Procedure NSW* at [3-s 65.1]ff; *Uniform Evidence Law* (16th edn, 2021) at [EA.65.150]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 65-2ff.

As to the unavailability of a witness: see cl 4 of the Dictionary and generally, *Criminal Practice and Procedure NSW* at [3-s 65.15]; *Uniform Evidence Law* (16th edn, 2021) at [EA.65.150]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 65-4.

Because of the variety of the situations in which such evidence can be given, no suggested form of direction is appropriate. However, a suitable direction can be adapted from the first part of the suggested direction in [2-570].

A warning would need to be given as to the fact that the evidence is hearsay under s 165 if it is requested.

[2-600] Evidence of complaint as a prior consistent statement under s 108(3)

Evidence of complaint that is not admitted under s 66(2), can be admitted in examination in chief or re-examination of the complainant by the Crown under s 108(3)(b). The evidence can only be introduced with the leave of the court: see s 192(2).

As to s 108(3)(b): see generally, *Graham v The Queen* (1998) 195 CLR 606; *R v DBG* [2002] NSWCCA 328; *Criminal Practice and Procedure NSW* at [3-s 108.1]; *Uniform Evidence Law* (16th edn, 2021) at [EA.108.150]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 108-3ff.

[2-615] Direction where difference in complainant's account — prescribed sexual offences only

In trials for a prescribed sexual offence, where there is evidence suggesting a difference in the complainant's account that may be relevant to their truthfulness or reliability, it may be necessary to give the jury a direction in accordance with s 293A of the *Criminal Procedure Act* 1986. A "prescribed sexual offence" is defined in s 3. "Difference" is defined to include a gap or an inconsistency in the account or a difference between the account and another account: s 293A(3). The direction is not given as a matter of course but after submissions have been heard from the parties: s 293A(1). If it is decided the circumstances warrant the direction the jury may be directed that:

(i) people may not recall all the details of a sexual offence or may not describe it the same way each time, and

(ii) trauma may affect people differently, including affecting how they recall events, and

(iii) it is common for there to be differences in accounts of a sexual offence, and

(iv) both truthful and untruthful accounts of a sexual offence may contain differences, and

that it is for the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability: s 293A(2).

This direction may be given at any time during the trial, and the same direction may be given on more than one occasion: s 293A(2A).

[2-618] Suggested direction

The defence case is that [*name of witness*] was not telling the truth, that there were gaps in the account [*she/he*] gave, and that there were differences and inconsistencies between [*her/his*] accounts given.

[*Summarise relevant evidence*]

Experience shows that people may not remember all the details of an event including a sexual offence in the same way each time, that trauma may affect people differently and may affect how they recall events, that sometimes there are differences in an account of a sexual offence, and both truthful and untruthful accounts of an event including a sexual offence may contain differences. It is your job, and entirely a matter for you members of the jury, as judges of the facts, to decide whether or not any differences in the complainant's account are important in assessing [*her/his*] truthfulness and reliability.

[2-620] Suggested direction — delay in, or absence of, complaint

This direction must be given when evidence is given, or a question is asked, tending to suggest an absence of, or delay in, making a complaint: s 294(1). The direction must not extend to directing that delay is relevant to the complainant's credibility "unless there is sufficient evidence to justify such a direction": s 294(2)(c).

You have heard evidence that the complainant did not complain about what [*she/he*] claims the accused did to [*her/him*] until [*she/he*] told [*set out details of when, to whom, and nature of complaint*].

[***Alternatively***: You have heard the complainant did not make any complaint about what [*she/he*] claims the accused did to [*her/him*].]

The delay in making a complaint about the alleged conduct of the accused [*or an absence of a complaint*] does not necessarily indicate the allegation the offence was committed is false. There may be good reasons why a victim of sexual assault may hesitate in making, or may refrain from making, a complaint about such an assault.

[***Where appropriate***: You have heard evidence that the complainant did not complain until [*she/he*] did so to [*specify*] because [*specify the explanation offered*].]

[***Where appropriate*** (that is, where the "sufficient evidence" test under s 294(2)(c) is met):

However, the delay in making a complaint [*or the absence of a complaint*] is a matter that you may take into account in assessing the credibility of the complainant's evidence as to what [*she/he*] said the accused did. The accused has argued that the delay in making a complaint [*or the absence of a complaint*] is inconsistent with the conduct of a truthful person who has been sexually assaulted and so you should regard this as indicating the complainant's evidence is false. [*She/he*] asks you to rely upon the evidence that … [*set out the evidence relied upon by the accused said to justify that the jury should use the delay in assessing the complainant's credibility*].

This is a matter which you should consider.]

[2-630] Notes

1. The statutory basis for the direction is found in s 294(1)–(3) *Criminal Procedure Act* 1986. The section is headed "Direction to be given by Judge in relation to lack of complaint in certain sexual offence proceedings" which provides:

   (1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest—

   (a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or

   (b) delay by that person in making any such complaint.

   (2) In circumstances to which this section applies, the Judge—

   (a) must direct the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and

(b) must direct the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and

(c) must not direct the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a direction.

(2A) A judge may, as the judge sees fit—

(a) give a direction in this section at any time during a trial, and

(b) give the same direction on more than 1 occasion during a trial.

(3) If the trial of the person also relates to a domestic violence offence alleged to have been committed by the person against the same victim, the Judge may—

(a) also give a warning under section 306ZR, or

(b) give a single warning to address both types of offences.

Sections 294(1), (2)(a) and (b) were previously found in s 405B *Crimes Act* 1900 and s 107 *Criminal Procedure Act*. Section 294(2) was enacted to override the presumption expressed in *Kilby v The Queen* (1973) 129 CLR 460 at 465 that a failure of a person to complain at the earliest reasonable opportunity may be used by the jury as evidence relevant to the falsity of the complaint: *Jarrett v R* (2014) 86 NSWLR 623 at [34]. Section 294(2)(c) (added in 2007) provided, until 1 June 2022, that a judge could not give a "warning" about delay "unless there is sufficient evidence to justify such a warning". Section 294(2) was amended by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 to replace the words "warn" or "warning" with "direct" or "direction": Sch 2[9]–[12]. These amendments apply to proceedings the hearing of which commence on and from 1 June 2022.

The Court of Criminal Appeal considered an earlier version of s 294(2) in *Jarrett v R* (2014) 86 NSWLR 623 and expressed its reasons using the then language of the provision. However, the Court's conclusions concerning the operation of the provision are unaffected by these amendments.

2. The addition of s 294(2)(c) significantly recasts s 294(2): *Jarrett v R* at [38]. It is complemented by s 294AA (inserted at the same time) which prohibits the judge from directing a jury that complainants as a class are unreliable witnesses and that there is danger of convicting on the uncorroborated evidence of a complainant: *Jarrett v R* at [38]. Section 294(2)(c) restricts the circumstances in which a judge can direct a jury that the delay in, or an absence of, complaint can be taken into account in assessing the complainant's credibility. The court in *Jarrett v R* at [43] held that the circumstances and the nature of the direction will vary from case to case; the test of "sufficient evidence" must be the basis of the direction and it must mould with the mandatory directions required by s 294(2)(a) and (b). In *Jarrett v R* at [43], Basten JA said:

> Without being prescriptive, there must be something in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would

> expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the "good reasons" why there was no timely complaint for the purposes of par (b), but, if not believed, may form the evidence justifying the warning under par (c).

An inconsistency between a complainant's complaints is "not the basis for a direction based on delay": *Jarrett v R* at [49].

[2-640] Delay in complaint and forensic disadvantage to the accused

Where s 165B *Evidence Act* applies, a direction regarding any forensic disadvantage to the accused is to be given if:

(a) the proceedings are criminal proceedings in which there is a jury: s 165B(1). (The section applies in judge alone trials by virtue of s 133(3) *Criminal Procedure Act* 1986 which requires the judge to take the warnings required to be given to a jury into account: *W v R* [2014] NSWCCA 110 at [126]–[127], [130].)

(b) the court is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay: s 165B(2)

  (i) significant forensic disadvantage includes, but is not limited to, death or inability to locate any potential witness and loss or otherwise unavailability of any potential evidence: s 165B(7)

  (ii) delay includes delay between the alleged offence and it being reported: s 165B(6)(a)

  (iii) significant forensic disadvantage is not established by mere passage of time by itself: s 165B(6)(b), and

(c) a party makes an application for the direction: s 165B(2).

The need to direct the jury on the forensic disadvantage occasioned to the accused as a result of delay in complaint emanated from the High Court decisions in *Longman v The Queen* (1989) 168 CLR 79 and later *Crampton v The Queen* (2000) 206 CLR 161 at [45]. Section 165B substantially changed the law as declared in those cases.

The onus is on the accused to satisfy the court the delay has caused a significant forensic disadvantage: *Cabot (a pseudonym) v R (No 2)* [2020] NSWCCA 354 at [39].

In *TO v R* [2017] NSWCCA 12 at [167], the court (Price J; Button and Fagan JJ agreeing) summarised the effect of s 165B with reference to the cases of *Groundstroem v R* [2013] NSWCCA 237 and *Jarrett v R* (2014) 86 NSWLR 623 at [60]–[63]:

1. The duty on the judge to give a direction in accordance with subsection (2) arises only on application by a party and what is said to be the particular significant forensic disadvantage must form part of the application: *Groundstroem v R* at [56].
2. Subsection (5) prohibits the judge from directing the jury "about any forensic disadvantage the defendant may have suffered because of delay" otherwise than in accordance with the section: *Jarrett v R* at [53].
3. There is a duty to inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence, only when the judge is satisfied that the defendant has "suffered a significant forensic disadvantage because of the consequences of delay": *Jarrett* at [53].

4. Subsection (3) provides a rider to the obligation to inform where the judge is satisfied there are "good reasons" for not taking that step: *Jarrett* at [53].

5. Subsection (4) prohibits the judge from suggesting that it would be dangerous or unsafe to convict the defendant "solely because of" the delay or the disadvantage. Otherwise, no particular form of words need be used: *Jarrett* at [53].

6. Whether there has been a significant forensic disadvantage depends on the nature of the complaint and the extent of the delay in the circumstances of the case. The extent of delay is not the test. It is the consequence of delay which is decisive: *Groundstroem* at [61]. The proper focus of s 165B is on the disadvantage to the accused: *Jarrett* at [60].

7. The concept of delay is relative and judgmental. Although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the exception in s 165B(3): *Jarrett* at [61]–[62].

8. If the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction: *Jarrett* at [63].

The focus of s 165B is on the disadvantage to the accused and, unlike *Longman v The Queen*, there is no generalised assumption concerning the reliability of the complainant's evidence as a consequence of the delay: *Jarrett v R* at [54], [60]. Section 165B(4) specifically prohibits the giving of a "dangerous to convict" *Longman* direction which was considered by the Parliament to be an encroachment on the fact-finding task of the jury: *W v R* at [125]. A failure by a party to apply for a forensic disadvantage direction does not prevent a judge giving such a direction in order to avoid a perceptible risk of a miscarriage of justice: *TO v R* at [181] and [183]. This is supported by the preservation of the common law under s 9(1) *Evidence Act* and by the text of s 165B(5) which include "… but this section does not affect any other power of the judge to give any warning to, or to inform, the jury": *TO v R* at [181]–[182].

The phrase "because of" in s 165B(2) requires that the consequences of delay cause, or is one matter causing, significant disadvantage to the accused: *Cabot (a pseudonym) v R (No 2)* at [71]. Where the accused's conduct significantly contributes to the delay in complaint because of, for example, threats the accused made to a complainant, any forensic disadvantage is a consequence of the accused's own actions, not the delay in complaint: *Jarrett v R* at [62]; *Cabot (a pseudonym) v R (No 2)* at [71]. Misconduct of an accused may also be relevant under s 165B(3) as to whether there are "good reasons" not to give the direction: *Cabot (a pseudonym) v R (No 2)* at [73].

Any warning given under s 165B must not infringe s 294AA(1) *Criminal Procedure Act* which provides, inter alia, that the judge "must not direct a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses". This prohibition includes "a direction to a jury of the danger of convicting on the uncorroborated evidence of any complainant": s 294AA(2). Section 165 *Evidence Act* is "subject to" s 294AA: s 294AA(3). See also [3-615] at notes 4 and 5.

[2-650] Suggested direction — delay in complaint and forensic disadvantage to the accused

Note: The suggested direction should be modified so as to deal only with the actual and possible disadvantages encountered in the case at hand and omitting assumptions that may not be applicable.

There is a direction I must give you relating to this issue of the delay in [*or absence of*] any complaint being made by the complainant.

It is most important that you appreciate fully the effects of delay [*or absence of complaint*] on the ability of [*the accused*] to defend [*himself/herself*] by testing prosecution evidence [*or bringing forward evidence*] in [*his/her*] own case, to establish a reasonable doubt about [*his/her*] guilt.

In this regard, I refer to the following specific difficulties encountered by [*the accused*] in testing the evidence of the prosecution [*or in adducing evidence*] in [*his/her*] own case … [*these specific difficulties should be highlighted in such a way as to make it clear that delay, for which the accused had not been responsible, had created those difficulties. All additional significant circumstances require comment. These may include:*

- *the delay in instituting the prosecution*
- *the possibility of distortion in human recollection*
- *the nature of the allegations*
- *the age of the complainant at the time of the allegations having regard to the current and previous forms of ss 165A and 165B Evidence Act*
- *the prosecution case is confined to the evidence of the complainant, and*
- *any unusual or special features.*]

These difficulties put the accused at a significant disadvantage in responding to the prosecution case, either in testing the prosecution evidence, or in bringing forward evidence [*him/herself*] to establish a reasonable doubt about [*his/her*] guilt, or both.

The delay means that evidence relied upon by the Crown cannot be as fully tested as it otherwise might have been.

Had the allegations been brought to light and the prosecution commenced much sooner, it would be expected that the complainant's memory for details would have been clearer. This may have enabled [*her/his*] evidence to be checked in relation to those details against independent sources so as to verify it, or to disprove it. The complainant's inability to recall precise details of the circumstances surrounding the incident(s) makes it difficult for the accused to throw doubt on [*her/his*] evidence by pointing to circumstances which may contradict [*her/him*]. Had the accused learned of the allegations at a much earlier time [*he/she*] may have been able to recall relevant details which could have been used by his counsel in cross-examination of the complainant.

Another aspect of the accused's disadvantage is that had [*he/she*] learned of the allegations at a much earlier time [*he/she*] may have been able to find witnesses or items of evidence that might have either contradicted the complainant or supported

[*his/her*] case, or both. [*He/she*] may have been able to recall with some precision what [*he/she*] was doing and where [*he/she*] was at particular times on particular dates and to have been able to bring forward evidence to support [*him/her*].

You should also take into account that because of the delay the accused has lost the opportunity to bring forward evidence from [*set out specific items of evidence lost or no longer available*].

Because the accused has been put into this situation of significant disadvantage [*he/she*] has been prejudiced in the conduct of his defence. As a result, I direct you that before you convict the accused you must give the prosecution case the most careful scrutiny. In carrying out that scrutiny you must bear in mind the matters I have just been speaking about — the fact the complainant's evidence has not been tested to the extent that it otherwise could have been and the inability of the accused to bring forward evidence to challenge it, or to support [*his/her*] defence.

[The next page is 287]

Complicity

[2-700] Introduction

A person may be criminally liable in various ways for a crime physically committed by another person. For the sake of simplicity, that other person is referred to in the suggested directions as "the principal offender", and the person charged with complicity in that crime is referred to as "the accused". See suggested directions on **Conspiracy** at [5-200]; **Manslaughter** at [5-950]ff and **Murder** at [5-1100]ff.

For the general law on complicity and the various ways that an accused may be held criminally responsible for the crime committed by the principal offender under State law: see Pt 9 *Crimes Act* 1900 (NSW); *Criminal Practice and Procedure (NSW)*, Pt 6 "Criminal responsibility"; *Criminal Law (NSW)*, annotations to Pt 9 *Crimes Act* at [CA.345.20]ff; New South Wales Law Reform Commission, *Complicity*, Report 129, 2010.

For the law on complicity in Commonwealth offences: see Pt 2.4 *Criminal Code Act* 1995 (Cth), especially ss 11.2 and 11.2A. (Note: s 11.2A commenced on 20 February 2010.) As to the position before: see *Handlen v The Queen* (2011) 245 CLR 282; Butterworths, *Federal Criminal Law*, annotations to Pt 2.4 *Criminal Code*; Thomson Reuters, Federal Offences, annotations to Pt 2.4 *Criminal Code*.

As to proof of the commission of an offence by the principal offender if that person is tried separately: see s 91(1) *Evidence Act* 1995.

Accessorial liability

[2-710] Suggested direction — accessory before the fact

This form of liability applies only where the principal offence is a "serious indictable offence": see ss 346 and 4 *Crimes Act*; see s 351 in relation to "minor indictable offences". The applicable directions will depend upon the nature of the issues before the court, for example, whether the accused accepts that the relevant acts relied upon by the Crown were committed but argues that there was no requisite mental state. There is no need to refer to terms such as "counsel" or "procure" unless those terms have been used in the charge, or raised by the parties; "to counsel" means "to order, advise encourage or persuade"; "to procure" means that the accused intentionally took steps to ensure that the offence was committed by the principal.

The Crown accepts that the accused was not present when the crime of [*specify offence*] was committed by [*the principal offender*]. But it alleges that the accused is still guilty of that crime because of what [*he/she*] did before the crime was committed by [*the principal offender*]. This allegation is known in law as being an accessory before the fact to the offence that was later committed by a person I will describe as a principal offender. The Crown must prove beyond reasonable doubt both that [*the principal offender*] committed an offence of a particular type and that the accused was an accessory to that crime before it was committed.

A person is guilty of being an accessory before the fact where at some time before the crime is actually carried out, he or she intentionally encourages or assists the principal

offender to commit that crime. Therefore, there must be some act committed by the accessory that was intended to bring about the crime later committed by the principal offender. The act of an accessory can consist of conduct of encouraging, including advising, urging or persuading the principal offender to commit the crime, or it can be assisting in the preparations for the commission of the crime. It can be both encouraging and assisting the principal offender.

In this case, the Crown alleges, and must prove beyond reasonable doubt, that the accused [*specify the act or acts of encouraging and/or assisting in the preparations relied upon by the Crown*] intending that [*the principal offender*] would commit the crime of [*specified offence*] later. The Crown must prove that by these acts the accused intentionally [*encouraged and/or assisted*] [*the principal offender*] to commit the crime of [*specified offence*].

The fact that a person knew that another person intended to commit a particular crime does not by itself mean that he or she is guilty of being an accessory before the fact. Nor is it enough that a person merely approves of the commission of the crime but did not make the approval known to the principal offender. To make out the offence, the Crown must prove beyond reasonable doubt that the accused intentionally encouraged [*the principal offender*] to commit the crime, and/or the accused assisted [*the principal offender*] in the preparations for the commission of the crime. There must be some conduct on the accused's part carried out with the intention to [*encourage and/or assist*] [*the principal offender*] to commit the crime that was later committed. Here, the Crown relies on [*specify the encouragement and/or assistance relied upon by the Crown*].

Before a person can be convicted of being an accessory before the fact, the Crown must prove beyond reasonable doubt that, at the time of the encouragement and/or assistance, the accused knew all the essential facts or circumstances which would make what was later done a crime. This includes the state of mind of the principal offender when those acts are carried out. The accused need not actually know that what he or she encourages and/or assists the principal offender to do is in law a crime. The accused does not need to have the legal knowledge that the conduct to be committed by the principal offender actually amounts to a criminal offence. But he or she must believe that what he or she is encouraging and/or assisting the principal offender to do are acts that make up the crime committed.

Here, according to the Crown's allegation, the crime foreseen by the accused was the offence of [*specify offence*]. The Crown must, therefore, prove that, at the time of the alleged [*encouragement and/or assistance*] given to [*the principal offender*], the accused foresaw that [*the principal offender*] would [*set out the elements of the serious indictable offence charged*]. Further, the Crown must prove beyond reasonable doubt that the [*encouragement and/or assistance*] given by the accused was aimed at the commission by [*the principal offender*] of that criminal act.

In summary, before you can convict the accused of being an accessory, the Crown must prove beyond reasonable doubt each of the following:

1. that [*the principal offender*] committed the offence of [*specify offence*], and
2. [*set out the alternative(s) which apply*] that:
   (a) the accused intentionally encouraged [*the principal offender*] to commit that offence, and/or

(b) the accused intentionally set out to assist [*the principal offender*] in the preparations to commit that offence, and

3. that the crime which [*the principal offender*] committed was one that the accused intended would be committed.

   [*If applicable* or was within the scope (see below) of what [*he/she*] foresaw that [*the principal offender*] would do], and

4. that the accused knew at the time of [*the encouragement and/or assistance*] all the essential facts, both of a physical and mental nature, which made what was to be done by [*the principal offender*] a crime,

   [*and* ***if applicable*** *(see below)*:

5. that the accused, before the crime was committed by [*the principal offender*] neither had a genuine change of mind nor expressly instructed [*the principal offender*] not to commit the offence.**]**

For you to be satisfied that [*the principal offender*] committed the crime, the Crown must prove each of the following facts beyond reasonable doubt.

[*Set out the elements of the specified offence committed by the principal offender.*]

[Where applicable, add involvement of third party

The act intended to encourage the commission of the crime or assist in its preparation may be carried out personally by the accused or through the intervention of a third person acting on the accused's behalf, or a combination of both.**]**

[Where the offence committed differs from that contemplated

On the facts you find proved by the evidence, you might conclude that the crime foreseen by the accused at the time of the alleged [*encouragement and/or assistance*] differed from the crime actually committed by [*the principal offender*]. If that is your finding, then the Crown must prove beyond reasonable doubt that the crime committed by [*the principal offender*] was nevertheless within the scope of the type of conduct that the accused intended to [*encourage and/or assist*] and that it was not something materially different from what the accused foresaw would be done by [*the principal offender*].**]**

[Where there is evidence of a belief that there is no real possibility of the commission of the crime

If the accused at the time of the alleged [*encouragement and/or assistance*] does not honestly believe that the commission of the offence by [*the principal offender*] is a real possibility, the accused is not guilty of being an accessory. The accused claims [*set out the details of the claim that it was believed that there was no real possibility that the crime would be committed*]. It is necessary for the Crown to prove beyond reasonable doubt that the accused did not honestly have this belief.**]**

[Where there is evidence of withdrawal by the accused of encouragement and/or assistance

The [*encouragement and/or assistance*] given to [*the principal offender*] by an accessory must be continuing. The accused has claimed [*set out basis upon which the accused claims to have withdrawn*]. The law provides that an accused may avoid criminal responsibility if:

(a) he or she did in fact withdraw his or her encouragement and/or assistance, and

(b) communicated that fact to the principal offender, and

(c) did everything reasonably possible to prevent the commission of the crime.

In these circumstances, the onus is on the Crown to prove beyond reasonable doubt a negative, that is, it must prove that any one of these facts did not occur. That means that the Crown must prove either that the accused did not in fact withdraw [*his/her*] [*encouragement and/or assistance*] or that the accused did not communicate that fact to [*the principal offender*], or that the accused did not do everything reasonable possible to prevent the commission of the crime.**]**

[2-720] Suggested direction — accessory at the fact – aider and abettor

As to the distinction between an aider and abettor, and a principal: see *R v Stokes and Difford* (1990) 51 A Crim R 25. The Crown can prove an offence by proving that the accused was either a principal or an aider and abetter without proving which the accused was: *R v Stokes and Difford* at 35; *R v Clough* (1992) 28 NSWLR 396 at 398–400. See *Mann v R* [2016] NSWCCA 10 for the elements of affray for a principal in the second degree or a participant in a joint criminal enterprise.

The Crown does not allege that the accused committed the crime of [*specified offence*]. The Crown's allegation is that the accused was what the law calls an aider and abettor in the commission by the principal offender of that crime.

An aider and abettor is a person who is present at the place where, and at the time when, a crime is committed by another person and who intentionally assists or gives encouragement to that other person to commit that crime.

The fact that a person was simply present at the scene of the crime is not enough to make that person an aider and abettor even if the person knew the crime was to be committed. A bystander at the commission of a crime is not guilty of any offence. The Crown must prove beyond reasonable doubt that the person was present at the scene of the crime intending to assist or encourage the person who commits the crime. A person is guilty as an aider and abettor only if the Crown proves beyond reasonable doubt that the person was present when the crime was committed for the purpose of aiding and assisting the principal offender if required to do so. If the person is present for that purpose, that makes the person an aider and abettor in that crime even if such encouragement or assistance is not actually required.

Before you can convict the accused as being an aider and abettor to the commission of an offence, you must first be satisfied beyond reasonable doubt that [*the principal offender*] committed the crime of [*specify offence*]. [*This fact may, or may not, be an issue at the trial and what is said to the jury will vary accordingly.*]

If the Crown has satisfied you of that fact, you must then consider whether, at the time when that crime was being committed, the accused was present, intending to assist or to encourage [*the principal offender*] in its commission.

Before you could find that the accused intentionally assisted or encouraged [*the principal offender*] in the commission of the crime, you must be satisfied beyond reasonable doubt that the accused knew all the essential facts or circumstances that gave rise to the commission of the crime by [*the principal offender*]. The accused does not have to know that what is being done by [*the principal offender*] is in law a crime. The accused does not need to have legal knowledge that the conduct being carried out by [*the principal offender*] actually amounts to a criminal offence. But [*he/she*] must know that [*the principal offender*] intends to commit all the acts that amount to a crime with the state of mind that makes those acts criminal.

The Crown relies on the following matters in support of its allegation that the accused gave assistance or encouragement to [*the principal offender*] [*set out the matters on which the Crown relies*].

In short then, to establish that the accused is guilty of the offence charged on the basis that the accused was an aider and abettor, the Crown must prove beyond reasonable doubt each of the following:

1. the commission of the crime by [*the principal offender*]
2. the presence of the accused at the scene of the crime when the crime was committed
3. the accused's knowledge of all the essential facts or circumstances that must be proved for the commission of the offence by [*the principal offender*]
4. that with that knowledge the accused intentionally assisted or encouraged [*the principal offender*] to commit that crime.

For you to be satisfied that [*the principal offender*] committed the crime, the Crown must prove each of the following facts beyond reasonable doubt [*set out the elements of the crime committed by the principal offender*].

[2-730] Suggested direction — accessory after the fact

As to accessory after the fact, see s 347 *Crimes Act* which makes provision for how the accessory may be tried. Sections 348–350 contain provisions relating to punishment, depending upon the nature of the principal offence. The offence of being an accessory after the fact can be committed by rendering assistance either to the principal offender or to a person who aids and abets the principal. The prosecution must establish the accused had knowledge of the precise crime committed by a principal offender: *Gall v R* [2015] NSWCCA 69 at [164] (confirming a submission at [155]), [249]–[251], [257]).

The Crown does not allege that the accused was involved in the commission of the crime carried out by [*the principal offender*].

The charge brought against the accused is that [*he/she*] assisted [*the principal offender*] after [*he/she*] committed the crime of [*nature of crime*] and gave that assistance with knowledge that [*the principal offender*] had committed that crime.

Where a person knowingly assists an offender after a crime has been committed, the person is an accessory after the fact to the crime committed by the other person. This allegation is known in law as being an accessory after the fact to the offence that was earlier committed by a person who I will describe as a principal offender. A charge that a person is an accessory after the fact to a crime committed by another is an allegation that the person giving that assistance has himself or herself committed a crime. It is a separate and distinct offence from that committed by the principal offender but it is dependent upon the fact that the principal offender committed a specific crime.

Here, the Crown must prove beyond reasonable doubt both the commission of the crime of [*insert crime*] by [*the principal offender*] and that the accused assisted [*the principal offender*] knowing that the crime had been committed. A person is an accessory after the fact to the commission of a crime if, knowing that the crime has been committed, the person assists the principal offender. It could be, for example, by disposing of the proceeds of the crime, or by doing an act intending to hinder the arrest, trial or punishment of the principal offender.

In this case, the Crown alleges that the accused assisted [*the principal offender*] by [*state allegation by prosecution*]. The Crown says this was done with the purpose of [*specify the alleged reason for the assistance rendered by the accused*]. To be guilty of being an accessory after the fact, the Crown must also prove beyond reasonable doubt that the accused knew [*the principal offender*] acted in a way and with a particular state of mind that gives rise to a criminal offence. The accused does not need to have the legal knowledge that those facts amount to a crime, but [*he/she*] must know or truly believe that the facts and circumstances giving rise to the specific offence alleged have occurred. [*It may be necessary to set out the evidence upon which the Crown relies to establish the knowledge or belief of the accused that an offence has been committed depending upon the issues raised at the trial.*]

In summary, before you can convict the accused of the offence of being an accessory after the fact to the commission of a crime, the Crown must satisfy you beyond reasonable doubt of each of the following essential facts:

1. that the crime of [*specify offence*] was committed by [*the principal offender*]
2. that the accused intentionally assisted [*the principal offender*]
3. that at the time of that assistance, the accused was aware of all the essential facts and circumstances that give rise to the precise offence committed by the [*the principal offender*]
4. that the accused with that knowledge, intentionally assisted [*the principal offender*] by [*specify the allegation and particularise concisely*]
5. that the accused gave that assistance so that [*the principal offender*] could escape arrest, trial or punishment for the offence committed by [*him/her*].

[Where applicable — explanation of belief and knowledge

For the purposes of the offence with which the accused is charged, a well-founded belief is the same as knowledge. A person may know that an event has occurred even

though he or she has not witnessed the occurrence of that event personally. A person can accept what he or she is told by some person about the occurrence of an event and, therefore, believe that the event has taken place. It will often be the case in a charge of accessory after the fact that the accused is said to have known of the commission of a crime simply on the basis of what he or she is told by the principal offender or some other person who witnessed the commission of the crime. The accused may come to know that a crime has been committed by the principal offender from inferences that the accused has drawn from facts which he or she believes have occurred.**]**

In the present case, the Crown must prove that the accused did [*set out the allegation of assistance*] knowing or believing that the crime of [*set out the alleged crime committed by the principal offender*] had been committed by [*the principal offender*] and gave assistance in the way the Crown alleges with the intention of assisting [*the principal offender*] to escape [*arrest, trial or punishment*] for the crime committed by [*him/her*].

Joint criminal enterprise and common purpose

[2-740] Joint criminal liability

In the usual case it will be necessary for the judge to instruct the jury in relation to the elements of the offence and, where appropriate, the principles governing accessorial or joint enterprise liability: *Huynh v The Queen* (2013) 228 A Crim R 306 at [31]. Joint criminal liability between two or more persons for a single crime may be established by the Crown in different ways:

(a) where the crime charged is the very crime that each of the participants agreed to commit: *Gillard v The Queen* (2003) 219 CLR 1 at [109]–[110],

(b) where the crime committed fell within the scope of the joint criminal enterprise agreed upon as a possible incident in carrying out the offence the subject of the joint criminal enterprise: see *McAuliffe v The Queen* (1995) 183 CLR 108 at 114–115 affirmed in *Miller v The Queen* (2016) 259 CLR 380 at [29]; *Clayton v The Queen* (2006) 168 A Crim R 174 at [17],

(c) where the crime committed was one that the accused foresaw might have been committed during the commission of the joint criminal enterprise although that crime was outside the scope of the joint criminal enterprise: see *McAuliffe v The Queen* at 115–118 affirmed in *Miller v The Queen* at [10], [51], [135], [148].

Joint criminal liability arises from the making of the agreement (tacit or express) and the offender's participation in its execution: *Huynh v The Queen* at [37]. A person participates in a joint enterprise by being present when the agreed crime is committed: *Huynh v The Queen* at [38]; *Youkhana v R* (2015) 249 A Crim R 424 at [13]. Although presence at the actual commission of the crime is sufficient, it is not necessary if the offender participated in some other way in furtherance of the enterprise: *Dickson v R* (2017) 94 NSWLR 476 at [47]–[48]; *Sever v R* [2010] NSWCCA 135 at [146]; *Osland v The Queen* (1998) 197 CLR 316 at [27]. If participation by the accused is not in issue a specific direction explaining the concept may not be required: *Huynh v The Queen* at [32]–[33].

In *IL v The Queen* (2017) 260 A Crim R 101 there was disagreement as to what the High Court had held in *Osland v The Queen* (1998) 197 CLR 316 (see Special Bulletin 33 which explains *IL's* case). Bell and Nettle JJ at [65] opined that in a joint criminal enterprise the only acts committed by one participant that are attributed to another participant are those acts that comprise the actus reus of the commission of a crime. Kiefel CJ, Keane and Edelman JJ did not agree: "… joint criminal liability involves the attribution of acts. The attribution of acts means that one person will be personally responsible for the acts of another". Gaegler J at [106] agreed with Kiefel CJ, Keane and Edelman JJ. See also Gordon J at [152]. The direction below follows the prevailing view in *IL's* case.

In *Miller v The Queen*, the plurality at [6]–[45] reviewed the history of the doctrine of extended joint criminal enterprise, including the UK decision of *R v Jogee* [2016] 2 WLR 681, and the current law as stated in *McAuliffe v The Queen* at 114–115. The High Court declined to alter the law following *R v Jogee*. If any change to the law is to be made, it should be made by the Parliament: *Miller v The Queen* at [41].

The concept of extended common purpose only arises where the offence committed is different from the offence which is the subject of the joint criminal enterprise (referred to as the foundational offence): see *May v R* [2012] NSWCCA 111 at [249]–[252].

For the purposes of the following suggested directions on extended criminal liability, (b) and (c) above are merged because the distinction may be confusing to a jury. Whether the crime committed is foreseen as a possible incident in carrying out the joint criminal enterprise, (b) above, or foreseen as a possible consequence of the commission of the joint criminal enterprise, (c) above, is not so significant a distinction as to require separate directions to meet those particular factual situations. The accused is criminally liable for the commission of the further offence, if he or she foresees the possibility of it being committed during the course of carrying out the joint criminal exercise no matter what the reason is for that foresight. The suggested directions use the term "additional crime" rather than "incidental crime" or "consequential crime" to avoid the distinction which seems to be of theoretical more than of practical significance. It may be that, where the additional offence is viewed as incidental to the commission of the joint criminal enterprise, it will be more easily proved that the commission of that offence was foreseen as a possibility by a particular participant. The suggested directions are based on a scenario where the crime, the subject of the joint enterprise is committed *and* an additional crime is also committed.

[2-750] Suggested direction — (a) joint criminal enterprise

The law is that where two or more persons carry out a joint criminal enterprise, that is an agreement to carry out a particular criminal activity, each is held to be criminally responsible for the acts of another participant in carrying out that enterprise or activity. This is so regardless of the particular role played in that enterprise by any particular participant. The Crown must establish both the existence of a joint criminal enterprise and the participation in it by the accused.

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime.

The agreement need not be expressed in words, and its existence may be inferred from all the facts and circumstances surrounding the commission of the offence that are found proved on the evidence.

The agreement need not have been reached at any particular point in time before the crime is committed, provided that at the time of the commission of the crime the participants have agreed that the crime should be committed by any one or all of them.

The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish that at some point in time an agreement has been reached between them that the crime should be committed. For example, if two people are at the very same time punching a third person, a jury could infer or conclude that they had agreed to assault that person.

It does not matter whether the agreed crime is committed by only one or some of the participants in the joint criminal enterprise, or whether they all played an active part in committing that crime. All of the participants in the enterprise are equally guilty of committing the crime regardless of the actual part played by each in its commission.

The Crown must prove beyond reasonable doubt that the crime which was the subject of the joint agreement was in fact committed. It therefore must prove beyond reasonable doubt that each of the essential facts or ingredients, which make up that crime, was committed, regardless of who actually committed them [*specify the ingredients of the crime charged*]. Further in respect of a particular accused, the Crown must prove beyond reasonable doubt that he or she was a participant in the commission of that crime as part of a joint criminal enterprise with one or more persons.

Note: *It is essential to identify the elements of the offence the subject of the joint criminal enterprise and to direct the jury that the participants agreed to do all the acts with the relevant intention necessary to establish the offence: TWL v R [2012] NSWCCA 57 at [36].*

[The following example may be given if thought appropriate in assisting the jury to understand the concept of a joint criminal enterprise. Care should be taken in not making the example more serious than the actual offence before the court. The following is an example of a possible scenario that might appropriately be given to the jury.]

You may take the following as an example of the operation of the law relating to joint criminal enterprise. Suppose that three people are driving in the same vehicle and they see a house with a lot of newspapers at the gate. One says to the others, "Let's check out this place". The car pulls up, two of them get out and one of them stays in the car behind the steering wheel with the engine running, while the other two go to the front door. One of the two persons breaks the glass panel on the outside of the door, places a hand through the panel, unlatching the door and opening it. The other goes inside and collects some valuables and comes out. Meanwhile, the one who opened the door has returned to the vehicle without entering the house. The question arises whether the three of them have by their acts and intentions committed the offence of breaking into the house and stealing objects from it.

Only one of them broke into the house (being the person who broke the glass panel and put a hand inside to open the door). Only one of them entered the house and stole something (that is the one who removed the valuables from the house) and the third person did neither of those things. But the law provides that, if a jury were

satisfied that by their actions (rather than merely by their words) all three had reached an understanding or arrangement which amounted to an agreement between them to commit the crime of break, enter and steal from a house, each of the three is criminally responsible for the acts of the others. On this example all three could be found guilty of breaking, entering and stealing from the house regardless of what each actually did.

[2-760] Suggested direction — (b) and (c) extended common purpose

Note: The suggested direction is based on a scenario where the crime the subject of the joint enterprise is committed and an additional crime is also committed.

The law is that where two or more persons carry out a joint criminal enterprise, that is an agreement to carry out a particular criminal activity, each is responsible for the acts of another participant in carrying out that enterprise or activity. This is so regardless of the role taken by a particular participant. The Crown must establish both the existence of a joint criminal enterprise and the participation in it by the accused.

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The agreement need not be expressed in words, and its existence may be inferred from all the facts and circumstances surrounding the commission of the offence that are found proved on the evidence.

The agreement need not have been reached at any particular time before the crime is committed, provided that at the time of the commission of the crime, the participants have agreed that the crime should be committed by any one or all of them.

The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish that at some point in time an agreement has been reached between them that the crime should be committed. For example, if two people are at the very same time punching a third person, a jury could infer or conclude that they had agreed to assault that person.

It does not matter whether the agreed crime is committed by only one or some of the participants in the joint criminal enterprise, or whether they all played an active part in committing that crime. All of the participants in the enterprise are equally guilty of committing the crime regardless of the actual part played by each in its commission.

The Crown must prove beyond reasonable doubt that the crime which was the subject of the joint agreement was in fact committed. It therefore must prove beyond reasonable doubt that each of the essential facts or ingredients, which make up that crime, was committed, regardless of who actually committed them. Further, in respect of a particular accused, the Crown must prove beyond reasonable doubt that he or she was a participant in the commission of that crime as part of a joint criminal enterprise with one or more persons.

But it may be that in carrying out the joint criminal enterprise, one of the participants commits an additional offence that was not the crime that they had agreed to commit but was one that at least one or some of the other participants foresaw might be committed. In such a case, not only would each of those participants be guilty of the offence that they agreed to commit, but those participants who foresaw the possibility of the commission of the additional offence would also be guilty of the additional offence.

Here, the Crown alleges the accused was a participant in a joint criminal enterprise to commit the offence of [*insert offence alleged by the Crown*] and [*he/she*] foresaw that the additional crime of [*insert additional offence alleged by the Crown*] might be committed. So for the accused to be guilty of the additional crime, the Crown must prove beyond reasonable doubt that [*he/she*] foresaw the possibility that this crime might be committed in carrying out the joint criminal enterprise. The Crown alleges that the additional crime committed is [*insert alleged offence*].

Note: *It is essential to identify the elements of the additional offence and to direct the jury that the accused must foresee the other participant or participants might do all the acts with the relevant intention necessary to establish the commission of the additional offence: McAuliffe v The Queen (1995) 183 CLR 108 at 114–115. This part of the direction will vary according to the facts.*

[An example of the commission of an additional crime outside the scope of the joint enterprise might be as given to the jury if appropriate as follows.]

As an example of the principle that I have just explained to you, let us suppose that three people plan to rob a bank. The plan is that one person will drive the getaway car, another is to stand guard at the doorway to warn of any approach by the police and assist in their getaway from the bank, and the third is to enter the bank itself with a sawn-off shotgun. It is the third person's job to use the shotgun to threaten the teller into handing over the money. That is, the crime to which they have jointly agreed is to be committed by them carrying out their assigned roles, and all three could be found guilty of the crime of armed robbery on the bank staff. The person who drives the car is just as guilty as the one to whom the money is handed over by the teller. You may think that that is only common sense.

The three members of this joint criminal enterprise accordingly reach the bank: one is sitting in the get-away vehicle, another is keeping guard at the door and the third is armed with the gun and inside the bank. However, suppose that things do not go as planned and the teller reaches over to press an alarm button despite a warning not to do so. As a result, the robber in the bank deliberately fires the gun at the teller to stop the alarm being sounded and wounds the teller.

At the time this is happening, of course, the robber in the bank is alone and has no opportunity to consult with the other two persons as to what should be done as a result of the actions of the teller. The other two have no control over what the third person does. The question may arise as to whether the other two persons are criminally responsible for the more serious crime that has been committed by the third man being an armed robbery with wounding.

First of all, as I have explained, each of the three is guilty of the crime which was the immediate subject of their original agreement: that is the armed robbery of the bank. That is because everyone who embarks upon a joint criminal enterprise is criminally responsible for all of the acts done by each of them in the execution or carrying out of the agreed crime.

Because things do not always turn out precisely as planned, the law makes each participant in the joint enterprise criminally responsible, not only for the acts done as part of that enterprise, but also for any additional acts that the participant foresees as possibly being committed in carrying out the joint criminal enterprise. If any one of

the participants does an act which they all foresaw may possibly be done in the course of committing the agreed crime, then all of them are criminally responsible for that act. Thus, to take the example which I have already given you, if the person guarding the door pushed a bystander out of the way to prevent that person from interfering with their escape after the armed robbery was complete, all three would be guilty of that assault as well as of the armed robbery, if the possibility that the person on guard may have to do something like that was, obviously enough, originally foreseen by them in carrying out the robbery.

On the other hand, and to take perhaps an extreme example, if the person guarding the door (unknown to the others) had a hand grenade, removed the pin and lobbed it inside the bank to prevent those inside from interfering with their escape, you might think that this is hardly an act that the others would foresee as possibly happening during the robbery, and, therefore, they would not be guilty of any offence resulting from the injuries caused by the explosion. This person's act of throwing a grenade would not have been foreseen as incidental to or as a consequence of the execution of the joint criminal enterprise to carry out an armed robbery

In relation to the wounding of the teller by the person with the sawn-off shotgun however, the question is whether the discharge of the weapon was foreseen by the others as a possible occurrence in carrying out the armed robbery. That question is answered by a consideration of what a particular participant knew about the circumstances in which the robbery was to take place. If, for example, the other members of the joint criminal enterprise were aware that the robber in the bank would be armed with a loaded weapon, a jury might conclude that in those circumstances the agreement to threaten the teller with the weapon might possibly include the commission of an additional crime being that in carrying out that threat the weapon would be fired, if the teller resisted, and some person may be injured as a result. The jury in such a case would be entitled to convict all three participants in the armed robbery of the more serious crime of armed robbery with wounding, even though the wounding was not part of the agreement and even though only one of them was actually involved in the wounding. Such a conviction would follow if the Crown proves beyond reasonable doubt that each of the participants foresaw the possibility of the shotgun being fired and injuring someone as a result.

[***If appropriate*** *— where the Crown alleges different liability between participants, that is, there is different evidence as to each participant's knowledge of the events surrounding the enterprise which the Crown alleges leads to different conclusions as to the foreseeability of the additional offence, add*]:

Let us now consider a further situation, one where not everyone engaged in the joint criminal enterprise foresaw the possibility that the shotgun would be fired injuring someone in the bank. Let us assume, for example, that there had been a discussion amongst the three participants to the joint enterprise beforehand as to whether the gun should be loaded, and there had been a clear agreement reached between them that it would be unloaded. If, notwithstanding this agreement and unbeknown to the others, the man with the shotgun had loaded it, then the others would not be criminally responsible for any injury caused by the discharge of the weapon during the robbery. This is because the discharge of the weapon was not part of the agreement and could not have been foreseen by the others as a possible incident or consequence occurring in the course of carrying out the robbery.

But let us now assume another scenario. Suppose that one of the other two participants, let us say the driver of the getaway car, knew that the person who was to carry the shotgun was unhappy with the agreement that the gun should not be loaded, that this person had access to ammunition and that he or she was someone who could not always be trusted to keep his or her word. In such a case, a jury might find it proved beyond reasonable doubt that despite the agreement reached that the gun should not be loaded, the driver foresaw that the person armed with the gun might load it and so foresaw that there was a possibility that the gun would be discharged during the robbery injuring some person in the bank. If the jury found beyond reasonable doubt that the driver had this possibility in mind and yet nevertheless continued to take part in the armed robbery, they could convict the driver of the more serious crime of armed robbery with wounding, even though there was a clear agreement between the parties that the gun was not to be loaded, and even though the third member of the group had no idea that the gun might be loaded. In such a case, the jury might convict the robber and the driver of the more serious offence involving the wounding but not the third member.

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

As to the liability of a participant in a joint enterprise for murder based upon the commission of an offence punishable by imprisonment for life or 25 years (constructive murder), see *R v Sharah* (1992) 30 NSWLR 292 at 297–298. The directions for constructive murder must address both the liability of the accused for the offence punishable by imprisonment for life or 25 years (the foundational offence) and the liability of the accused for murder based upon his or her liability for the foundational offence: see *R v Thurston* [2004] NSWCCA 98 at [3]–[9] and *Batcheldor v R* (2014) 49 A Crim R 461 at [80]–[82] where the judge failed to direct the jury as to the appellant's liability for the foundational offence of specially aggravated kidnapping. The judge must direct the jury that it is for them to:

(a) identify the act causing death; and

(b) decide whether the act causing death was voluntary or accidental: *Penza v R* [2013] NSWCCA 21 at [167].

See further discussion in **Voluntary act of the accused** at [4-350]. It has been noted that the decision in *R v Sharah*, introduced an element of knowledge on the part of the accomplice of the possibility of the discharge of the weapon, even though that knowledge was not a requirement under the common law: see the NSW Law Reform Commission, *Complicity*, Report 129, 2010 at p 148 and RA Hulme J's discussion in *Batcheldor v R* at [128]–[132].

In *IL v The Queen* (2017) 260 A Crim R 101, some of the Justices passed comment about *R v Sharah*. Gordon J opined at [166] that constructive murder under s 18(1)(a) *Crimes Act* 1900 did not require any additional foresight on the part of the accomplice; Bell and Nettle JJ noted at [89] that although *R v Sharah* has been "questioned" by the NSWCCA resolution of the issue can await another day; Gageler J at [102] said *R v Sharah* was not challenged (in *IL v The Queen*) but it is not inconsistent with Jordan CJ's explanation of felony murder in *R v Surridge* (1942) 42 SR (NSW) 278 at 282. Kiefel CJ, Keane and Edelman JJ in *IL v The Queen* did not comment on *R v Sharah*.

In *R v Sharah*, the foundational offence relied upon by the Crown was armed robbery with wounding. A suggested direction based upon *R v Sharah* for such a case follows.

Of course, the particular direction given will have to be adapted to the particular foundational crime upon which the charge of murder is based and the peculiar facts of the particular case before the jury. The person actually causing the death of the victim of the murder charge is described as "the principal offender". In *R v Sharah*, the victim of the foundational offence was different to the victim of the murder.

The Crown must first prove, beyond reasonable doubt, that the accused is criminally liable for the foundational offence of armed robbery with wounding by proving each of the following:

1. that there was a joint enterprise between the accused and [*the principal offender*] to rob [*the victim*] while [*the principal offender*] was, to the knowledge of the accused, armed with an offensive weapon, namely [*describe weapon*] (proof of these facts gives rise to criminal liability of the accused for the offence of armed robbery), and
2. that during the course of the armed robbery [*the principal offender*] wounded [*the victim*], and
3. that the accused foresaw that, in carrying out the joint criminal enterprise of armed robbery, such a wounding might occur (proof of this fact gives rise to criminal liability of the accused for armed robbery with wounding).

In order to prove that the accused is liable for murder, the Crown must further prove beyond reasonable doubt:

1. that during the course of commission of the offence of armed robbery with wounding, or immediately after the commission of that offence, [*the principal offender*] discharged the gun, causing the death of [*the deceased*], and
2. the discharge of the gun by [*the principal offender*] during, or immediately after, the armed robbery with wounding of [*the victim*] was a possibility which the accused had in mind when agreeing to participate in the armed robbery. It does not matter whether the gun was fired intentionally or whether it was necessary for the gun to be fired for the purpose of carrying out the armed robbery.

[2-780] Suggested direction — withdrawal from the joint criminal enterprise

As to withdrawal from a joint criminal enterprise, see *R v Tietie* (1988) 34 A Crim R 438 at 445–447 applying *White v Ridley* (1978) 140 CLR 342 at 348–351. It is a question of fact to be decided by the jury whether a co-accused has withdrawn from a criminal enterprise: *Tierney v R* [2016] NSWCCA 144 at [19]. The jury must be satisfied beyond reasonable doubt that the accused did not intend to withdraw or did not take reasonable steps to prevent the co-accused from committing the crime: *Tierney v R* at [19]. There is no obligation to direct jury specifically in the terms of *R v Sully* (2012) 217 A Crim R 446: *Tierney v R* at [19].

A person who is part of a joint criminal enterprise to commit a particular crime may withdraw from that enterprise. If [*he/she*] does withdraw, [*he/she*] ceases to be criminally responsible for that crime if the other members of the enterprise go on to commit the offence after the withdrawal.

To withdraw from a joint criminal enterprise to commit a crime, a person must take such action as [*he/she*] can reasonably perform to undo the effect of [*his/her*] previous encouragement or participation in the joint enterprise and thereby to prevent the commission of the crime. What is reasonable depends upon all the circumstances.

[Where applicable, add

Usually, this will involve, if it is reasonable and practicable to do so, the person communicating the fact of [*his/her*] withdrawal, verbally or otherwise, to the other members of the joint enterprise, in sufficient time before the crime is committed, trying to persuade the other members not to proceed, and notifying the police or the victim of the intended crime.]

[Where applicable, add

Where an accused decides to withdraw at the last minute, that is, immediately before the offence is committed, [*he/she*] must take all reasonable and practicable steps to prevent the commission of the crime and to frustrate the joint enterprise of which [*he/she*] had been a member. Otherwise [*he/she*] may have left it too late to withdraw. The example which is often given is that, if the enterprise is to dynamite a building, it is not enough for a member of the enterprise simply to declare an intent to withdraw from the enterprise. If the fuse has been lit, the person must attempt to put out the fuse.]

There is no onus placed upon the accused to establish that [*he/she*] withdrew from the joint criminal enterprise. As part of its overall onus of proof, the Crown must prove beyond reasonable doubt that the accused did not withdraw. It will do so by proving beyond reasonable doubt that the accused either:

1. did not intend to withdraw from the joint enterprise, or
2. if [*he/she*] did so intend, the accused did not take such action as [*he/she*] reasonably could to prevent the others from proceeding to commit the crime.

It is sufficient if the Crown has proved one of these alternatives. Unless the accused did what [*he/she*] reasonably could to prevent the commission of the crime, the accused remains criminally responsible for that crime even though the accused took no further part. It is sufficient if the action taken by the accused was capable of being effective, even though the action failed to frustrate the commission of the crime.

[The next page is 319]

Consciousness of guilt, lies and flight

[2-950] Introduction

The Crown can rely upon the accused's post-offence conduct as evidence of a consciousness of guilt. This will usually be in the form of a lie (either in or out of court) or flight (absconding to avoid arrest or trial). But it can include other forms of conduct: *McKey v R* (2012) 219 A Crim R 227; see *Pollard v R* (2011) 31 VR 416, where the evidence of the accused hiding his mobile phone was admitted on this basis. Such evidence will generally be part of a Crown's circumstantial case or evidence supporting direct evidence such as an admission.

[2-953] Alternative charges and included offences

Difficulties can arise in the case of alternative charges. Generally it will be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them rather than to some other culpable act: *The Queen v Baden-Clay* (2016) 258 CLR 308 at [73] approving *R v White* [1998] 2 SCR 72. Where there is an alternative charge, whether on the indictment or not, an assessment needs to be made as to whether consciousness of guilt reasoning can serve to prove one or the other: *R v Ciantar* (2006) 16 VR 26 at [40]–[42], [64]–[68], [77]–[78], [81]–[87]. The judge should ask the Crown Prosecutor how the Crown seeks to use the accused's post-offence conduct to show a consciousness of guilt of the alternative charge.

The issue is determined in light of the specific facts of the case — there are no "… rigid prescriptive rules as to when and in what precise terms an *Edwards*-type direction should be given …": *Zoneff v The Queen* (2000) 200 CLR 234 at [15]. In *The Queen v Baden-Clay*, the issue arose as to whether post-offence conduct could be used to specifically prove the accused's murderous intent. The court held that there is no hard and fast rule that evidence of post-offence concealment and lies is always intractably neutral as between murder and manslaughter and that the issue will turn on the nature of the evidence in question and its relevance to the real issue in dispute: *The Queen v Baden-Clay* at [74]. In some cases, an accused's post-offence conduct may go to such lengths in concealing or distancing themselves from the death as to provide the jury with a basis to conclude the accused had committed an extremely serious crime and warrant a conclusion beyond reasonable doubt as to the accused's responsibility for the death and the concurrent existence of the intent necessary for murder: *The Queen v Baden-Clay* at [74]. In *Lane v R* (2013) 241 A Crim R 321 at [111] (cited with approval in *The Queen v Baden-Clay* at [75]), the court held that the jury were entitled to take the post-offence conduct of the accused into account as evidencing consciousness of guilt of murder.

In some cases, post offence conduct may be relevant to negative a defence such as self-defence or provocation: *Gall v R* [2015] NSWCCA 69 at [92]–[93]. In other cases, it may only prove the accused committed the act in question but say nothing about the accused's state of mind: *R v Ciantar* at [40]–[42], [64]–[68], [77]–[78], [81]–[87].

Where the act is admitted and the only issue in dispute is the accused's state of mind, the jury may need to be warned about misusing post-offence conduct as evidence of a consciousness of guilt: *SW v R* [2013] NSWCCA 103 at [62]–[65]. In *SW v R*, some post-offence conduct was used to prove the mental state for murder while other conduct was not: at [62]–[63].

[2-955] Lies

Care is necessary when the issue of lies arises: *R v Ray* (2003) 57 NSWLR 616 at [98]; *Healey v R* [2008] NSWCCA 229 at [43]. It is important to distinguish between lies being used to attack the credit of the accused and lies being used as evidence of guilt, and the Crown should make it clear what use it is seeking to make of an allegation that the accused lied: *R v GJH* (2001) 122 A Crim R 361. Where the issue is one of credit, the jury should not usually be directed as to consciousness of guilt: see *Zoneff v The Queen* (2000) 200 CLR 234 at [14]–[17]. It is not always necessary for a judge to give a direction on lies: *Dhanhoa v The Queen* (2003) 217 CLR 1 at [34]; *Ahmed v R* [2012] NSWCCA 260 at [44]–[45]; *KJS v R* [2013] NSWCCA 132 at [56]–[57]. It may be necessary for the judge to warn the jury against using lies as evidence of guilt because of the conduct of the Crown in cross-examination or addresses: *McKey v R* (2012) 219 A Crim R 227 at [26]–[35]. Generally, the Crown will not have to prove the evidence beyond reasonable doubt unless the lie is being relied upon as an implied admission: *Edwards v The Queen* (1993) 178 CLR 193 at 201, 210–211; *R v Adam* (1999) 106 A Crim R 510 at [55].

As to the use of lies to prove a consciousness of guilt: see generally: *Edwards v The Queen* at 210 and *R v Lane* (2011) 221 A Crim R 309 where the lies could be used for that purpose and *R v ST* (1997) 92 A Crim R 390 where they could not.

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

[2-960] Flight

Evidence that the accused fled from a place to avoid arrest or trial can be admitted as evidence of consciousness of guilt in a similar way to the use of a lie. The suggested directions at [2-965] concerning the use of lies can be adapted. The most significant direction is that the jury must be satisfied that the accused fled because of a consciousness of guilt of the offence for which he or she stands charged and not for some other unrelated reason.

As to the admission of evidence of flight: see generally *R v Adam*; *R v Cook* [2004] NSWCCA 52 (where the evidence was wrongly admitted) but compare *Quinlan v R* (2006) 164 A Crim R 106 and *Steer v R* (2008) 191 A Crim R 435 (where the evidence was correctly admitted).

As to the need for a direction to meet a specific case: see for example, *Steer v R*.

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

[2-965] Suggested direction — lies used as evidence of a consciousness of guilt

The direction should be tailored to the circumstances of each case. It is essential that the alleged lie (or lies) is precisely identified in the summing-up. The suggested direction may need to be adapted where there are alternative charges: *SW v R* [2013] NSWCCA 103 and *The Queen v Baden-Clay* (2016) 258 CLR 308 at [73]–[74].

The next direction I must give you concerns the evidence of [*the accused*] saying [*set out evidence of accused's statement that the Crown alleges amounts to a lie*]. The Crown says that this was a lie because [*set out evidence that is capable of establishing that the statement was a lie*].

First, you must be clear about what a lie is. A lie is to say something untrue, knowing at the time of making the statement that it is untrue. If a person says something which is untrue, but does not realise at the time that it is untrue, then that is not a lie. The person is simply mistaken or perhaps confused. Even if the person later comes to realise that what [*he/she*] said was incorrect, that does not transform the statement into a lie. To be a lie, the person must say something that the person knows, at the time of making the statement, is untrue.

If you find that [*the accused*] made the statement I have just referred to, and you find it was a lie, then I must give you a direction about the care with which you must approach the task of deciding what significance, if any, it has. You may take this lie into account as evidence of [*the accused's*] guilt but you can only do that if you find two further things which I will refer to shortly. When I say you can take it into account as evidence of [*the accused's*] guilt, I am not suggesting that it could prove [*his/her*] guilt on its own. What I mean is that it can be considered along with all of the other facts that the Crown relies upon and which you find established on the evidence in considering whether the Crown has proved its case beyond reasonable doubt. The Crown does not suggest that if you found [*the accused*] told a lie that this finding can prove the guilt of [*the accused*] by itself.

Apart from the fact that [*the accused*] made the statement and that it amounted to a deliberate lie, before you can use the lie as some evidence of [*the accused's*] guilt you must find two further matters proved.

First, you must find that what [*the accused*] said that amounts to a lie relates to an issue that is relevant to the offence the Crown alleges that [*the accused*] committed. It must relate to some significant circumstance or event connected with that alleged offence. The Crown says it is relevant because [*set out Crown case on this issue*].

Second, you must find that the reason [*the accused*] told this lie is because [*he/she*] feared that telling the truth might reveal [*his/her*] guilt in respect of the charge [*he/she*] now faces. In other words, [*he/she*] feared that telling the truth would implicate [*him/her*] in the commission of the offence for which [*he/she*] is now on trial.

[*Where manslaughter is an alternative charge in appropriate cases, the above paragraph can be substituted with:*

Second, you must find that the reason [*the accused*] told this lie is because [*he/she*] feared that the truth would implicate [*him/her*] in relation to the commission of the offence for which [*he/she*] is now on trial because it would indicate [*he/she*] [*modify*

next part of direction as required (see [2-953]): had an intention to kill or inflict grievous bodily harm/was not acting under provocation/did not reasonably believe the actions were necessary in self-defence, etc].]

The Crown says you would be satisfied of that because [*set out Crown case on this issue*].

You must remember, however, that people do not always act rationally, and that conduct of this sort, that is, telling a lie, may sometimes be explained in other ways. A person may have a reason for lying quite apart from trying to conceal [*his/her*] guilt. For example, a lie may be told out of panic; to escape an unjust accusation; to protect some other person; or to avoid a consequence unrelated to the offence. [*It is dangerous to give too many examples for the reasons stated in R v Jeffrey (1991) 60 A Crim R 384.*]

If you think that the lie may have been told for some reason other than to avoid being implicated in the commission of the offence for which [*the accused*] is now on trial, then it cannot be used as evidence of [*the accused's*] guilt. If that is the case, you should put it to one side and focus your deliberations upon the other evidence in the case.

Let me summarise what I have just said. Before you can use what [*the accused*] said as something which points towards [*his/her*] guilt, you must be satisfied that [*he/she*] lied deliberately. You must find that the lie related to some significant circumstance or event connected with the alleged offence. You must find that the reason [*the accused*] told this lie was because [*he/she*] feared that the truth would implicate [*him/her*] in relation to the commission of the offence for which [*he/she*] is now on trial.

The defence case in relation to this issue is [*set out the defence response in detail appropriate to the circumstances of the case*].

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

If the prosecution has not suggested that the accused told lies because he or she knew the truth would implicate him or her in the commission of the offence, there may nevertheless be risk of misunderstanding on the part of the jury about the significance of possible lies. The suggested direction below takes account of *Zoneff v The Queen* (2000) 200 CLR 234 at [23].

You have heard it suggested that [*the accused*] lied.

[*Refer to the evidence said to constitute lie(s).*]

Whether [*the accused*] did in fact lie is a matter for you to decide. To decide that a lie was (or lies were) told, you must be satisfied that [*the accused*] said something that was untrue and that at the time of making the statement, [*he/she*] knew that it was untrue. Saying something that is untrue by mistake, or out of confusion or forgetfulness, is not a lie.

If you decide that a lie was (or lies were) told, you cannot use that fact in support of a conclusion that [*the accused*] is guilty. A lie cannot prove [*the accused's*] guilt and nor can a lie be used in conjunction with the other evidence that the Crown relies upon to prove [*the accused's*] guilt.

The only use you can make of the fact that [*the accused*] told a lie (or lies) is in your assessment of [*his/her*] credibility. If you are satisfied that [*he/she*] did lie, then that may be considered by you as having a bearing upon whether you believe the other things that [*he/she*] has said.

[The next page is 325]

Directions — misconceptions about consent in sexual assault trials

[2-980] Introduction

Sections 292 to 292E in Ch 6, Pt 5 Div 1, Subdiv 3 of the *Criminal Procedure Act* 1986 were inserted by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 and provide for particular directions to be given during certain sexual assault trials. These provisions follow certain recommendations by the Law Reform Commission after its review of the law on consent: New South Wales Law Reform Commission *Consent in relation to sexual offences* Report No 148, 2020, recommendations 8.1–8.7; Ch 8.

These provisions apply to proceedings which commence on and from 1 June 2022, regardless of when the relevant offence was committed: Sch 2, Pt 42.

The Attorney General said the purpose of these provisions was to "address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially by the tribunal of fact": Second Reading Speech, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, NSW, Legislative Assembly, *Debates*, 19 November 2021, p 58.

The Court of Criminal Appeal has made a number of statements concerning the futility of making assumptions based on misconceptions about how a sexual assault complainant might behave: see, for example, *Khamis v R* [2018] NSWCCA 131 at [56]–[58] (Gleeson JA), [533] (Button J); *Rao v R* [2019] NSWCCA 290 at [98]; *Xu v R* [2019] NSWCCA 178 at [92]; *Maughan v R* [2020] NSWCCA 51 at [2] (RA Hulme J), [13] (Adamson J), [99] (Ierace J). In *Maughan v R* at [2], RA Hulme J described:

> … the futility of assessing the behaviour of sexual assault complainants by reference to stereotypical expectations. The criminal law has moved past the era in which this was often prominent in a defence to a sexual assault allegation. Jurors applying a sensible and mature understanding of human behaviour are far less likely now to be persuaded by such propositions.

[2-982] Summary of the statutory framework

Section 292(1) provides that each of the consent directions in ss 292A – 292E apply to the following offences (or attempts to commit those offences) in the *Crimes Act* 1900:

- sexual assault, aggravated sexual assault and aggravated sexual assault in company: ss 61I, 61J, 61JA
- sexual touching and aggravated sexual touching: ss 61KC, 61KD
- carrying out a sexual act and carrying out an aggravated sexual act: ss 61KE, 61KF.

Section 292(2) provides that a judge *must* give any one or more of the consent directions:

(a) if there is a good reason to give the consent direction, or

(b) if requested to give the consent direction by a party to the proceedings, unless there is a good reason not to give the direction.

The directions do not require a particular form of words: s 292(3).

A judge should give reasons explaining the basis of a decision as to whether, or not, to give a direction.

A judge may:

(a) give a consent direction at any time during a trial: s 292(4)(a)

(b) give the same consent direction on more than 1 occasion during a trial: s 292(4)(b).

[2-984] Suggested procedure when considering whether consent directions required

At the earliest opportunity, it is suggested it would be good practice to ask the parties to identify the issues in the trial and which, if any, of the consent directions in ss 292A–292E may be required. The potential timing, and frequency, of the directions to be given could also be addressed then.

The directions will require adaptation to suit the charges and the evidence of the particular case. It is unlikely a "one size fits all" approach could be taken, particularly in cases involving multiple offences and multiple complainants.

Sections 292A–292C and 292E concern consent and the circumstances in which non-consensual sexual activity might occur. Whether any of these directions should be included in the summing-up when addressing proof of consent may require consideration. Certain of them might need to be discussed when dealing with the evidence of the complainant more generally (for example, ss 292C and 292D). Consider the relationship between these provisions and the provisions related to proof of consent in the *Crimes Act* 1900 such as, for example, ss 61HI (Consent generally), and 61HJ (Circumstances in which there is no consent). Directions concerning the same or similar topics might be given at the same time.

Section 292D concerns misconceptions about a person's response to giving evidence: see LRC Report at 8.111–8.119 for an explanation of the rationale for this provision.

[2-986] Suggested direction — responses to giving evidence

[*Summarise the submissions about the conclusions that might be drawn from the manner in which the evidence was given*.] You must bear in mind that trauma may affect people differently, which means some people may show obvious signs of emotion or distress when giving evidence about an alleged sexual offence, but others may not. The absence of emotion or distress does not necessarily mean a person is not telling the truth about an alleged sexual offence, any more than the presence of emotion or distress means they are telling the truth about it.

[2-988] Suggested directions — ss 292A–292C, 292E

Note: Consider the relationship between these provisions and provisions related to proof of consent in the *Crimes Act* 1900 such as, for example, ss 61HI (Consent generally), and 61HJ (Circumstances in which there is no consent). Directions concerning the same or similar topics might be given at the same time.

Circumstances in which non-consensual sexual activity occurs — s 292A

You must bear in mind that non-consensual sexual activity can occur in many different circumstances and between different kinds of people including people who know one another/people who are married to one another/people who are in an established relationship with one another.

Note: Consider the limitation imposed by s 294CB on cross-examination of a complainant about past sexual activity. The need for this direction will only arise if there has already been a ruling admitting evidence of this kind. See further [1-347] **Cross-examination concerning complainant's prior sexual history**.

Responses to non-consensual sexual activity — s 292B

You must avoid making an assessment about whether or not the complainant consented to the sexual activity the subject of the charge/s on the basis of any preconceived ideas you might have about how people respond to non-consensual activity. There is no typical or normal response to non-consensual sexual activity and people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything.

Lack of physical injury, violence or threats – s 292C

[*Summarise the evidence and the parties' arguments on this issue*]. People who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence. The absence of injury or violence, or threats of injury or violence, does not necessarily mean the complainant was not telling the truth about [*describe relevant sexual activity*].

Behaviour and appearance of complainant – s 292E

In cases involving the consumption of alcohol or another drug, consideration should also be given to the evidence in the particular case and whether a direction of this kind is required given s 61HJ(1)(c) identifies, as a circumstance where a person cannot consent, if "the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity".

It is difficult to envisage a case where evidence of a complainant's clothing or appearance would be relevant. It is more likely a direction addressing these aspects of s 292E may be required if other evidence was led in the trial, such as videos or photographs of the complainant taken at the time of the relevant offence, and/or submissions made about those matters.

You should not assume the complainant consented to [*describe relevant sexual activity*] because [*she/he*] [*was wearing particular clothing and/or had a particular appearance / consumed alcohol or another drug / was present in a particular location*].

[The next page is 331]

Election of accused not to give evidence or offer explanation

[2-1000] Introduction

The power of a judge to comment upon the failure of the accused to give or call evidence is contained in s 20 *Evidence Act* 1995. As to the effect of s 20 see generally:

- *Azzopardi v The Queen* (2001) 205 CLR 50 especially at [50]–[56]
- *Dyers v The Queen* (2002) 210 CLR 285
- *R v Wilson* (2005) 62 NSWLR 346
- *Criminal Practice and Procedure NSW* at [3-s 20.1]
- Anderson, Williams & Clegg, *The New Law of Evidence*, 2nd edn, 2009 at 20.2ff
- Odgers, *Uniform Evidence Law*, 16th edn, 2021 at [EA.20.90]ff.

The majority in *Azzopardi v The Queen* summarised, at [51], the four aspects of a direction it is almost always desirable to give concerning the accused's silence in court. The High Court, in *GBF v The Queen* [2020] HCA 40, reiterated that an *Azzopardi* direction is required in almost all cases where the accused does not give evidence: at [23]. The direction is particularly important in those cases where the accused bears the onus of establishing a defence: *Ahmed v R* [2021] NSWCCA 280 at [44]. It cannot necessarily be implied from the right to silence direction: *Ahmed v R* at [48]–[53]. Cases where a judge may comment on the failure of an accused to offer an explanation will be rare and exceptional, and comment will never be warranted merely because the accused has failed to contradict some aspect of the prosecution case: *Azzopardi v The Queen* at [68]; *GBF v The Queen* at [23]. A failure to give a full direction on the decision of the accused not to give evidence may, in some cases, result in a miscarriage of justice: *R v Wilson* at [25], [35]; *Martinez v R* [2019] NSWCCA 153 at [113]. Examples of cases where the failure to give a full direction was said to be an error are *Martinez v R*, particularly at [114]–[117], and *Ahmed v R* at [44]–[53].

[2-1010] Suggested direction — failure of accused to give or call evidence

The accused has not given [*or called*] any evidence in response to the Crown's case.

The Crown bears the onus of satisfying you beyond reasonable doubt that the accused is guilty of the offence charged.

The accused bears no onus of proof in respect of any fact that is in dispute. Although an accused person is entitled to give or call evidence in a criminal trial, there is no obligation upon [*him/her*] to do so. [*He/She*] is presumed to be innocent until you have been satisfied beyond reasonable doubt by the evidence led by the Crown that [*he/she*] is guilty of the offence charged. Therefore, it follows that the accused is entitled to say nothing and make the Crown prove [*his/her*] guilt to the high standard required.

The accused's decision not to give evidence cannot be used against [*him/her*] in any way at all during the course of your deliberations. That decision cannot be used by you

as amounting to an admission of guilt. You must not draw any inference or reach any conclusion based upon the fact that the accused decided not to give (or call) evidence. You cannot use that fact to fill any gaps that you might think exist in the evidence tendered by the Crown. It cannot be used in any way as strengthening the Crown case or in assisting the Crown to prove its case beyond reasonable doubt.

You must not speculate about what might have been said in evidence if the accused had given evidence (or what might have been said by [*name of person*] if that person had been called by the accused as a witness in the trial).

[2-1020] Failure of offer explanation

Where the accused has failed to give an explanation in response to the circumstantial case led by the Crown, a comment can be made on the inference that a jury can draw from that failure. The effect of the comment is that, in the absence of any explanation for the evidence produced by the Crown by way of facts that are peculiarly within the accused's knowledge, the jury can more safely infer the guilt of the accused. This is usually referred to as a "*Weissensteiner* direction". It will be a rare and exceptional case where such a comment would be appropriate. The fact that the accused could have contradicted facts in the Crown case is not sufficient to warrant such a comment. It will usually be prudent for the trial judge to ask the parties about the appropriateness of such a comment.

As to the failure to give an explanation see:

- *Weissensteiner v The Queen* (1993) 178 CLR 217
- *RPS v The Queen* (2000) 199 CLR 620
- *Azzopardi v The Queen* (2001) 205 CLR 50 especially at [64]–[68]
- *Criminal Practice and Procedure NSW* at [3-s 20.1]
- Anderson, Williams & Clegg, *The New Law of Evidence*, 2nd edn, 2009, at 20.7
- Odgers, *Uniform Evidence Law*, 16th edn, 2021 at [EA.20.90ff].

[2-1030] Weissensteiner comments

Because a *Weissensteiner* comment is so rarely appropriate and because what is said will depend upon the peculiar facts of the case, it is not appropriate to give a general direction. However, what is said should be made by way of a comment and not a direction. The jury should be informed that is only a comment made by the trial judge and that they are free to disregard it. The comment should be in terms of a failure to explain rather than as a failure to give evidence. The jury should be given directions in accordance with [2-1010] above.

[The next page is 355]

Expert evidence

[2-1100] Introduction

As to the admissibility of expert evidence see generally: Pt 3.3 *Evidence Act* 1995 and note the effect of s 60 of the Act; see also *HG v The Queen* (1999) 197 CLR 414; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [30]–[32]; *Wood v R* (2012) 84 NSWLR 581; *Honeysett v The Queen* (2014) 253 CLR 122 at [23]–[25]; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]; *Taub v R* [2017] 95 NSWLR 388 at [19]ff; *Criminal Practice and Procedure NSW* annotations to [3–s 76]ff; *Uniform Evidence Law* [1.3.4060]ff; and *New Law of Evidence* at [76.2]ff.

As to DNA evidence: see *Aytugrul v The Queen* (2012) 247 CLR 170 at [23]–[24], [30] where it was held that it was not erroneous to direct a jury on the basis of an exclusion percentage where a frequency ratio had also been given and where the relationship between the two figures had been explained. The "prosecutor's fallacy" is discussed in *R v GK* (2001) 53 NSWLR 317; *R v Keir* [2002] NSWCCA 30 and cf *Keir v R* [2007] NSWCCA 149. The method by which fingerprint evidence is admitted is discussed in *JP v DPP (NSW)* [2015] NSWSC 1669 at [39]ff.

As to the role of the jury in relation to expert evidence: see *Velevski v The Queen* (2002) 76 ALJR 402 where there is a discussion as to when it is open to a jury to make a determination between conflicting expert evidence. However, there was no majority decision in respect of whether there was a category of expert evidence that a jury could not resolve: see *Velevski v The Queen* at [38], [85], [182]. The case does indicate that careful directions need to be given to the jury about expert evidence especially where it is in conflict.

[2-1110] Specialised knowledge concerning child behaviour: ss 79(2), 108C

Section 79(2) *Evidence Act* 1995 provides that "specialised knowledge" based on a person's "training, study or experience" in s 79(1) extends to "specialised knowledge of child development and behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse": s 79(2)(a). The opinion of such a person includes an opinion relating to the development and behaviour of children generally and/or the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences: s 79(2)(b).

Section 108C(1) also permits a party to call evidence from an expert but when it is relevant to the credibility of their own, or the other party's, witness. Section 108C(2) is in identical terms to s 79(2).

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

Notes:

1. In child sexual assault cases it is likely the Crown may seek to rely upon expert evidence regarding children's behaviour. This will be indicated on the Crown Readiness Hearing Case Management Form filed with the District Court. If the defence proposes to rely upon such evidence this will be indicated on the corresponding defence Case Management Form. In such cases, it is prudent to raise this with the parties at the earliest opportunity to ensure any questions related to expertise, relevance and admissibility are dealt with before the trial commences.
2. Where reliance is placed on lengthy expert reports, and a ruling on admissibility is sought, the trial judge should require the adducing party to identify the parts of the report it seeks to adduce in oral evidence. A determination can then be made as to the facts in issue with respect to which the evidence is tendered: *Aziz (a pseudonym) v R* [2022] NSWCCA 76 at [94].

Section 108C [*Evidence Act* 2008 (Vic)] was considered in *MA v R* (2013) 40 VR 564. The provision is materially similar to the NSW provision. The court held that general opinion evidence concerning how a child may react to sexual abuse was admissible. However, it would be a rare case that an expert should be invited to express an opinion as to the actual behaviour of the alleged victim: *MA v R* at [100].

In *Aziz (a pseudonym) v R* [2022] NSWCCA 76 expert evidence regarding the behaviour of child sexual abuse victims was found to be opinion evidence and admissible under s 108C even though, unlike in *MA v R*, the expert did not express an opinion about the particular complainant's credibility. The evidence was relevant as it was capable of assisting the jury in making its own assessment of the truthfulness of the complainant's account: [92]. In the circumstances of that case, where the evidence was admitted without objection, the expert's evidence was "opinion evidence" because it drew conclusions based on the published research of others in that particular field and was not simply a "literature review": [77], [80].

In *Clegg v R* [2017] NSWCCA 125 at [122], it was held the judge correctly directed the jury that evidence admitted under s 108C could not be used to decide the truth of

charges. The content of a direction for evidence adduced under s 108C will depend on the nature of the opinion evidence led by the Crown. The direction below should be adapted accordingly.

[2-1130] Suggested direction — expert witnesses

In this case, [*CD and EF*] have been called as expert witnesses. An expert witness is a person who has specialised knowledge based on that person's training, study or experience. Unlike other witnesses, a witness with such specialised knowledge may express an opinion on matters within his or her particular area of expertise. Other witnesses may speak only as to facts, that is, what they saw or heard, and are not permitted to express their opinions.

The value of any expert opinion is very much dependent on the reliability and accuracy of the material which the expert used to reach his or her opinion. It is also dependent upon the degree to which the expert analysed the material upon which the opinion was based and the skill and experience brought to bear in formulating the opinion given. Experts can differ in the level and degree of their experience, training and study, yet each can still be an expert qualified to give an opinion where that opinion is based on that witness's specialised knowledge.

Expert evidence is admitted to provide you with … [*specify, for example, scientific/medical/accountancy/etc*] information and an opinion on a particular topic which is within the witness's expertise, but which is likely to be outside the experience and knowledge of the average lay person.

The expert evidence is before you as part of all the evidence to assist you in determining … [*set out the particular aspect(s), for example, the mental condition of the accused; whether the accused's act was voluntary; the nature and effect of a series of financial transactions; the properties of a particular drug and its effects; the mechanical condition of a truck, etc, as the case may be*]. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the [*expert(s)*], you do not have to act upon it. This is particularly so where the facts upon which the opinion is based do not accord with the facts as you find them to be. You are also, to a degree, entitled to take into account your common sense and your own experiences if they are relevant to the issue upon which the expert evidence relates.

[Where there is a conflict between the experts, add

In this case, there is a conflict between the expert evidence of [*AB*] called on behalf of the Crown and that of [*CD*] called on behalf of the accused. It goes to the issue of … [*specify the issue(s)*]. It is not a case of simply choosing between their evidence as a matter of simple preference. [*Where the accused has the onus of proof, emphasise the relevant standard of proof and how it operates in relation to the expert evidence*].

It is for you to decide whose evidence and whose opinion you accept in whole or in part, or whose evidence you reject altogether. You should remember that this evidence relates only to part of the case, and that while it may be of assistance to you in reaching a verdict, you must reach your verdict having considered all the evidence.

[*There has been no challenge to the qualifications of any of the expert witnesses, all of whom you may think are well qualified*].**]**

[*Summarise the arguments of the parties as to why a particular expert should be preferred or discuss with the jury, matters relevant to the resolution of the evidence, such as the reliability of the information relied upon and the level of expertise of a particular witness.*]

In resolving the conflict in the expert evidence, you are entitled to consider that particular evidence in the context of all of the evidence that is before you, and especially that part of the evidence which may have a bearing on the acceptance or otherwise of a particular opinion.**]**

[Where there has been no challenge to the expert evidence either in cross-examination or by calling evidence to the contrary, add

The expert evidence has not been challenged. Accordingly, if it is not inherently unbelievable, you would need to have a good reason to reject it — for example, because it does not fit with other facts which you have found proved.**]**

[Where there is conflict as to the facts or assumptions underlying the opinion, add

The expert evidence of [*GH*], called on behalf of the Crown, relating to … [*specify points*], appears to be based on facts which [*he/she*] has been told, or on assumptions which [*he/she*] has been asked to make [*specify the facts or assumptions*]. You should analyse the evidence of [*GH*] and determine the extent to which [*his/her*] opinion depends upon the facts or assumptions being correct.

If the opinion is based upon facts which you are satisfied have been proved, or assumptions that you are satisfied are valid, then it is a matter for you to consider whether the opinion that is based upon those facts or assumptions is correct. On the other hand, if you decide that the facts have not been proved, or the assumptions are not valid, then any opinion based upon them is of no assistance because it has no foundation. If that is the case, the opinion should be disregarded.

[*This direction can be modified where the opinion is relied upon by the defence, bearing in mind which party bears the onus of proof in respect of the issue, the subject of the evidence*].**]**

[Where the expert witness relies on statements by the accused and/or others, and they do not give evidence, and no direction is given under s 136 limiting the use to be made of that material, add

The expert [*GH*] recounted what [*he/she*] had been told by [*the accused and/or members of [his/her] family*] and that formed part of the history on which [*he/she*] relied to form [*his/her*] opinion. That is why that material was admitted despite the fact that it was hearsay evidence, that is, evidence of statements made outside the courtroom by persons not called as witnesses before you. However, that material is evidence before you and you are entitled to rely on it, not merely as statements made to the expert and upon which to evaluate [*his/her*] opinion, but also as evidence of the truth of the facts contained in those statements. However, I warn you that as those statements are hearsay they may be unreliable. The person or persons making those

statements did not give evidence before you and, therefore, could not be tested by cross-examination [*give other reasons for the possible unreliability of the statements depending upon the facts and circumstances of the particular case*].**]**

[The next page is 401]

Offences

False instruments

False or misleading statements

Fraud

House, safe and conveyance breaking implements in possession

Indecent assault

Kidnapping — take/detain for advantage/ransom/serious indictable offence

Larceny

Maintain unlawful sexual relationship with a child

Manslaughter

Murder

Negligence and unlawfulness

Receiving stolen property

Robbery

Sexual intercourse without consent

Sexual intercourse — cognitive impairment

Sexual touching

Supply of prohibited drugs

Kidnapping — take/detain for advantage/ransom/serious indictable offence

[The next page is 711]

Sexual intercourse without consent

***Crimes Act* 1900 (NSW), ss 61I–61J**

Important note: The directions in ss 292–292E *Criminal Procedure Act* 1986 apply to proceedings for these offences which commence from 1 June 2022, regardless of when the offence was committed: Sch 2, Pt 42. See further [2-980] **Directions — misconceptions about consent**. The procedure for filing a Crown or Defence Readiness Hearing Case Management Form requires the parties to identify, amongst other matters, which directions under ss 292A–292E may be required at trial. It would be prudent to commence a discussion early in the trial concerning which of these directions, if any, might be required.

1. It is good practice to provide the elements of the offence to the jury in written form. The list of elements in the suggested directions could form the basis of this document.
2. It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.
3. It is unnecessary and unhelpful to direct the jury about elements of consent not relevant to issues in the case: *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4], [42].
4. The suggested directions are framed in terms of what the Crown is required to prove. It is a matter of discretion as to how often it is appropriate to remind the jury that the accused is not obliged to prove anything.

[5-1550] Suggested direction — sexual intercourse without consent (s 61I) for offences committed before 1 January 2008

The following suggested direction must be adapted to the issues in the case.

The accused is charged with sexual intercourse without consent knowing the complainant was not consenting to the sexual intercourse.

The Crown case is [*briefly outline the incident/s to which the charge/s relate*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the three elements which make up the offence:

1. that, at the time and place alleged, the accused had sexual intercourse with the complainant,
2. without the complainant's consent,
3. knowing the complainant did not consent.

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

1. The accused had sexual intercourse with the complainant

This element concerns the nature of the act alleged in the indictment. The Crown must prove beyond reasonable doubt that, at the time and place alleged, the accused had sexual intercourse with the complainant … [*here make some reference to the allegations of time and place, to the extent relevant*].

Sexual intercourse means … [*describe the relevant part of the definition of sexual intercourse, as defined in s 61H(1) Crimes Act 1900 and summarise the evidence relied upon by the Crown*].

[If applicable

The Crown does not have to prove that full penetration occurred or that the accused ejaculated or that the sexual intercourse was for the accused's sexual gratification.]

[*Summarise the evidence and arguments of the parties*.]

2. Without the complainant's consent

This element concerns the complainant's state of mind. The accused does not have to prove the complainant consented. The Crown must prove beyond reasonable doubt that [*she/he*] did not.

Consent involves a conscious and voluntary agreement on the part of the complainant to engage in sexual intercourse with the accused. It can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways such as the offering of resistance although this is not necessary as the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse … [*see repealed s 61R(2)(d) Crimes Act 1900*]. Consent which is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.

[If applicable — circumstances where consent is vitiated — repealed s 61R(2)

A person who consents to sexual intercourse with another person under a mistaken belief —

[*refer to applicable mistaken belief in repealed s 61R(2), for example: a mistaken belief about the identity of the other person (s 61R(2)(a)(i)), or that the other person is married (s 61R(2)(a)(ii)); or that the sexual intercourse is for medical or hygienic purposes (s 61R(2)(a1))*]

— is taken not to consent to the sexual intercourse …]

[*refer to the evidence*].**]**

[If applicable — threats of terror — repealed s 61R(2)(c)

A person who submits to sexual intercourse with another person as a result of threats or terror is, by law, not to be regarded as consenting to the sexual intercourse

[*refer to the relevant arguments by the parties*].]

3. The accused knew the complainant did not consent

This element concerns the accused's state of mind. The Crown must prove beyond reasonable doubt that the accused knew the complainant did not consent.

You might ask how the Crown can prove that the accused knew the complainant did not consent without an admission from [*him/her*]. The Crown asks you to infer or conclude from other facts which it has set out to prove, that the accused must have known and in fact did know … [*summarise the relevant evidence and arguments of the parties*].

[*Give direction as to inferences* [*see [3-150]*] *or remind jury if already given.*]

In a situation where the complainant does not in fact consent, the accused's state of mind at the time of the act of intercourse might be that [*he/she*] actually knew that the complainant was not consenting. That is a guilty state of mind. If the Crown satisfies you beyond reasonable doubt that that was the accused's state of mind at the time of the act of intercourse, then the third element of the charge has been made out.

On the other hand, you may decide on the basis of the evidence led in the trial [*or if applicable* and relied upon by the accused] that the accused's state of mind might be that [*he/she*] genuinely, though wrongly, believed the complainant was consenting to intercourse. That is not a guilty state of mind. It is for the Crown to prove that the accused had a guilty mind, and so if the Crown has failed to prove that, at the time of intercourse, the accused did not genuinely believe that the complainant was consenting, then you would have to say that this third element of the offence is not made out, and return a verdict of "not guilty" of this charge … [*refer to relevant arguments by the parties*].

[If applicable — where recklessness is relied upon to prove the accused knew the complainant did not consent — repealed s 61R

If the Crown proves beyond reasonable doubt that the accused was reckless as to whether the complainant consented to the sexual intercourse, then the accused will be taken to know that the complainant did not consent to the sexual intercourse … [*see repealed s 61R(1) Crimes Act 1900*].

To establish that the accused had a reckless state of mind, the Crown must prove, beyond reasonable doubt, that either:

(a) the accused simply failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of sexual intercourse, even though the risk the complainant was not consenting would have been obvious to someone with the accused's mental capacity if [*he/she*] had turned [*his/her*] mind to it, or

[*The above direction should only be given when the evidence calls for it.*]

(b) the accused realised the possibility the complainant was not consenting but went ahead regardless of whether [*she/he*] was consenting or not.

[*This is a wholly subjective test. This has been referred to as advertent recklessness.*]**]**

[If applicable — accused's knowledge of mistaken belief scenarios

The law says that a person who knows that another person consents to sexual intercourse under a mistaken belief [*refer to relevant mistaken belief in ss 61R(2)(a) or 61R(2)(a1) listed above*] is taken to know that the other person does not consent to the sexual intercourse.]

[If applicable — relevance of accused's intoxication

When considering proof of the accused's state of mind (that is, whether the Crown has proved beyond reasonable doubt element 3), you must ignore any effects of intoxication. If you think that [*his/her*] ability to think or understand what was going

on was affected by alcohol, then you must put that to one side. You have to look at the accused and ask what would have been going on in [*his/her*] mind if [*he/she*] had not ingested alcohol and/or drugs.

But apart from that qualification, it is the accused's mind you should consider. It's not a question of what you would have realised, or thought, or believed. It's not a question of what a reasonable person would have thought or believed. You look at what was going on in the mind of the accused, or to be more precise, what would have been going on in the mind of the accused if [*he/she*] was unaffected by alcohol and/or drugs.]

[*If the accused is charged with aggravated sexual assault under s 61J refer to the additional direction for circumstances of aggravation* [*at [5-1570]*] *after dealing with the s 61I elements.*]

[5-1565] Notes

1. For alleged ss 61I, 61J and 61JA offences committed before 1 January 2008, the Crown must establish that the accused knew that the complainant was not consenting, and that, if the issue is raised in evidence, the Crown must negate any belief by the accused that the complainant was consenting; the Crown does not succeed in doing so on the basis that the accused's belief was not based on reasonable grounds: *South v R* [2007] NSWCCA 117 at [30]. The joint Justices in *Banditt v The Queen* (2005) 224 CLR 262 said at [37]:

   > … [i]t was not the reaction of some notional reasonable man but the state of mind of the appellant which the jury was obliged to consider and that this was to be undertaken with regard to the surrounding circumstances, including the past relationship of the parties.

2. For an offence under s 61J, the Crown must prove the absence of consent and knowledge of that absence of consent beyond reasonable doubt "irrespective of the victim's age": *McGrath v R* [2010] NSWCCA 48 at [11]. It is a misdirection to simply say the complainant is incapable of consenting to sexual intercourse by reason of her or his age: *McGrath v R* at [11]. The reasoning in *McGrath v R* would also apply to an offence against s 61I.

3. Evidence that the accused was intoxicated where it is self-induced cannot be taken into account for offences under s 61I: *R v Gulliford* [2004] NSWCCA 338 at [127] and s 61J: *R v DJB* [2007] NSWCCA 209 at [68] on the basis that neither are offences of specific intent: see s 428D *Crimes Act* 1900. See also *R v Petersen* [2008] NSWDC 9.

4. In *Banditt v The Queen* the High Court considered the meaning of "reckless as to whether the other person consents" in the repealed s 61R(1) *Crimes Act* 1900. The court held that it was proper for the trial judge to have directed the jury: "If he is aware that there is a possibility that she is not consenting but he goes ahead anyway, that is recklessness". The court accepted at [38] that in a particular case one or more of the expressions used in *R v Morgan* [1976] AC 182 (outlined at [27]) and by Professor Smith (outlined at [35]), as well as those recorded in the respondent's submission (outlined at [16]), may properly be used in explaining what is required by the repealed s 61R(1). The trial judge properly emphasised that

it was the state of mind of the appellant that the jury had to consider. A discussion of the concept of recklessness can be found in *Gillard v The Queen* (2014) 88 ALJR 606 at [26].

5. The issue whether a direction on recklessness will be required is discussed in *Bochkov v R* [2009] NSWCCA 166 at [93]–[106]; *R v Murray* (1987) 11 NSWLR 12 at 15 and *R v Kitchener* (1993) 29 NSWLR 696 at 700. A direction may be appropriate if the circumstances of the case are such that, despite rejecting the accused's version, a question of recklessness is still open to be considered on the Crown case: see *CTM v The Queen* (2008) 236 CLR 440 at [38], [84], [191] and the High Court's approach to directions for honest and reasonable mistake of fact. A direction may be appropriate where the accused's version is that the complainant in fact consented, and to his or her knowledge he or she honestly but wrongly believed that the complainant was consenting: *Bochkov v R* at [93]. Where the jury accepts the accused had an honest though wrong belief and that the accused was not reckless as to consent, the Crown will have failed to prove the accused knew the complainant did not consent. It is incorrect to refer to such a wrong belief as a "defence" or as exculpation on the basis of an honest and reasonable mistake of fact: *Bochkov v R* at [102]–[105]. Knowledge (of the accused) is an element the Crown must prove beyond reasonable doubt.

6. Section s 61R(2)(b) (rep) *Crimes Act* 1900 set out grounds on which it may be established that consent to sexual intercourse for offences under ss 61I, 61J and 61JA is vitiated. For the purposes of proving "a person knows that another person consents to sexual intercourse under a mistaken belief" under the repealed s 61R(2)(b), it is not enough for the Crown to prove the accused was reckless: *Gillard v The Queen* (2014) 88 ALJR 606 at [28]–[29]. The Crown must prove the accused knew the other person consented to sexual intercourse on the various grounds (of vitiation) set out in s 61R(2)(b): *Gillard v The Queen* at [29]. In *Gillard v The Queen*, the High Court was dealing with ACT legislation expressed in similar terms to s 61R(2)(b).

[5-1566] Suggested direction — sexual intercourse without consent (s 61I) where alleged offence committed on or after 1 January 2008 and before 1 June 2022

The accused is charged with sexual intercourse without consent knowing the complainant was not consenting.

The Crown case is that [*briefly outline the incident/s to which the charge relates*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following three elements of the offence:

1. that, at the time and place alleged, the accused had sexual intercourse with the complainant
2. without the complainant's consent
3. knowing the complainant did not consent.

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

1. **The accused had sexual intercourse with the complainant**

   [This element element concerns the act of sexual intercourse. The Crown must prove beyond reasonable doubt that an act of sexual intercourse occurred. The meaning of sexual intercourse includes [*describe the relevant act of intercourse from the definition in s 61HA, as in force before 1 June 2022*]:

   (a) penetration to any extent of the complainant's genitalia (where complainant is female) or anus by any part of the accused's body or by an object manipulated by the accused.

   (b) the introduction of the accused's penis into the complainant's mouth.

   (c) cunnilingus.

   (d) the continuation of any of the above acts.

   [*Summarise the evidence and relevant arguments of the parties.*]

   [*Where appropriate: penetration of a person's genitalia or anus for genuine medical or hygienic purposes is not sexual intercourse. As that is what the accused says was the reason for the penetration in this case, the Crown must prove beyond reasonable doubt that it was not done for such a purpose.*]

2. **The sexual intercourse occurred without the complainant's consent**

   The second element concerns the complainant's state of mind. The Crown must prove that the sexual intercourse occurred without the complainant's consent.

   Consent means that a person freely and voluntarily agrees to something. So, the Crown must prove the complainant did not freely and voluntarily agree to the sexual intercourse.

   You are concerned with whether the complainant did not consent to the sexual intercourse when it occurred. What the complainant's state of mind was before or after the sexual intercourse might prove a guide, but the question is whether the Crown has proved that [*she/he*] was not consenting at the time the sexual intercourse occurred.

   [*Where appropriate*: The complainant said in evidence that [*she/he*] did not consent to sexual intercourse. If you accept that evidence, then you could be satisfied the Crown has proved this element.]

   In deciding whether you accept that the complainant was not consenting, you may also take into account any of the following:

   (a) consent obtained after persuasion is still consent, provided that ultimately it is given freely and voluntarily.

   (b) consent, or lack of consent, may be indicated by what the complainant said or did. In other words, the complainant's words or actions, or both, may indicate whether or not there was consent.

(c) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to that intercourse. There is no legal requirement for a person to physically resist before a jury can find that the person did not consent.

[*If applicable, add one or more of the following* (*s 61HE(5)–(6)*):

The law provides that a person does not consent to sexual intercourse:

- if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
- if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or
- if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
- if the person consents to the sexual intercourse because the person is unlawfully detained, or
- if the person consented under a mistaken belief:
  - as to the other person's identity, or
  - that the other person is married to the person, or
  - that the sexual activity is for health or hygienic purposes, or
  - about the nature of the activity that has been induced by fraudulent means.]

[*If applicable, add one or more of the following* (*s 61HE(8)*):

It may be established that the complainant did not consent to sexual intercourse if:

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

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

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

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

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

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

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

The law says the Crown will have proved the accused knew the complainant did not consent to sexual intercourse if: [*refer only to those of the following matters that arise from the evidence*]

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

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

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

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

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

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

[*If the accused is charged with aggravated sexual assault under s 61J refer to the additional direction for circumstances of aggravation at [5-1570] after dealing with the s 61I elements.*]

[5-1568] Notes

1. The *Crimes Amendment (Consent — Sexual Assault Offences) Act* 2007 commenced on 1 January 2008 and applies to offences under ss 61I, 61J and 61JA committed on or after 1 January 2008. Under that Act, s 61R (consent) was repealed and replaced with a definition of consent, whereby a person consents to sexual intercourse "if the person freely and voluntarily agrees to the sexual intercourse": s 61HA(2) (now repealed and replaced with s 61HE(2)). A person who does not offer physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting: s 61HA(7) (now repealed and replaced with s 61HE(9)), previously found in repealed s 61R(2)(d).
2. Further amendments were made to Div 10 of the *Crimes Act* 1900 through the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 which commenced on 1 December 2018. The consent provisions contained in the former s 61HA were renumbered under new s 61HE. There are some differences between the repealed s 61HA and the replacement s 61HE, such as the expansion of offences to which s 61HE applies (eg, sexual touching offences: s 61K), and expansion of the term "sexual intercourse" to also include sexual touching and a sexual act.

However, although care must be taken to ensure the applicable provisions are referred to, depending on the date of the allegations, the substance of the provisions remains the same and can be addressed with the same directions. See *Beattie v R* [2020] NSWCCA 334 at [48]–[53].

3. The *Crimes Legislation Amendment Act* 2014 extended the statutory definition of consent to attempts to commit the offences under ss 61I, 61J and 61JA *Crimes Act*. It had been held that the objective test for consent in s 61HE did not apply to offences of attempting to commit those offences: *WO v DPP (NSW)* [2009] NSWCCA 275 at [80], [83]; *O'Sullivan v R* [2012] NSWCCA 45 at [112]. As there was no transitional provision for the amendment, it may be taken to apply to attempt offences alleged to have occurred on or after the date of commencement on 23 October 2014.
4. For the purpose of determining knowledge of lack of consent, the jury is to have regard to all the circumstances of the case, including any steps taken by the accused to ascertain whether the complainant consents, but excluding any self-induced intoxication on the part of the accused. The Crown does not have to show the complainant communicated her/his lack of consent to prove the accused knew that the complainant did not consent: *R v XHR* [2012] NSWCCA 247 at [47]. Section 61HE(3)(c) requires the Crown to prove beyond reasonable doubt that there were "no reasonable grounds" for the accused to believe the other person consented. It is a significant departure from the subjective test found in the common law and in repealed s 61R(1), as it imports an objective test requiring a jury to apply current community standards. Although a sentencing case, *Saffin v R* [2020] NSWCCA 246 at [50] discusses the three levels of "knowledge" (actual, reckless, belief on unreasonable grounds) and the extent to which there may be a difference between knowledge and recklessness.
5. A judge must take special care in directing the jury in relation to s 61HE(3)(c). The jury is to proceed on the assumption that if the accused honestly believed the complainant consented, the law requires it to test that belief by asking whether there were reasonable grounds for it in the circumstances of the case: *Lazarus v R* [2016] NSWCCA 52 at [155]. It is erroneous to instruct the jury or imply that the jury should ask what a reasonable person might have concluded about consent, rather than what the accused might have believed in all the circumstances and then test that belief by asking whether there might have been reasonable grounds for it: *Lazarus v R* [2016] NSWCCA 52 at [155]. The belief is that of the accused and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable: *O'Sullivan v R* [2012] NSWCCA 45 at [124]–[126].
6. If the accused knows the complainant is labouring under a mistaken belief as set out in s 61HE(6), he or she is taken to have known that the complainant was not consenting. As with consideration of the repealed s 61R(2), the Crown must prove the accused actually knew the other person consented due to a mistaken belief; mere recklessness about that fact will be insufficient: *Gillard v The Queen* (2014) 88 ALJR 606 at [28]–[29]; *Beattie v R* [2020] NSWCCA 334 at [90].
7. Substantial intoxication of a complainant under s 61HE(8)(a) is not determinative of consent being vitiated; it is a factor for a jury to consider in assessing whether the Crown has established lack of consent: *Tabbah v R* [2017] NSWCCA 55 at [142]; *Beattie v R* [2020] NSWCCA 334 at [71].

8. For further commentary on recklessness and intoxication: see **Notes** at [5-1565].

9. Where a person is charged with being an accessory to sexual intercourse without consent, the relevant state of mind as to the complainant's lack of consent is knowledge; recklessness is insufficient: *Carlyle-Watson v R* [2019] NSWCCA 226 at [59].

10. Cunnilingus need not involve penetration and refers to oral stimulation of the female genitals with the mouth or tongue: *BA v R* [2015] NSWCCA 189 at [9].

11. Sexual intercourse includes sexual connection occasioned by the penetration of the genitalia except where the "penetration is carried out for proper medical purposes": s 61HA(a). The need for the judge to give a direction in relation to "proper medical purposes" only arises if the issue was raised by the evidence and the parties: *Zhu v R* [2013] NSWCCA 163 at [78]–[79]. The exception may be excluded when the relevant acts giving rise to the offence occurred during a medical examination: *Decision Restricted* [2020] NSWCCA 138 at [51]–[65]. There is no requirement that the sole purpose of penetration in such a context be for sexual gratification. The exception is only engaged when the relevant act is carried out for proper medical purposes: at [51]. The exception will be excluded if a proper medical purpose is accompanied by a sexual purpose either from the outset of the conduct or after commencement: [99].

[5-1570] Suggested direction — s 61J circumstance(s) of aggravation

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

In company — s 61J(2)(c)

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

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

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

(a) the accused and [*alleged co-offender*] shared a common purpose that the accused would have sexual intercourse with the complainant;

and

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

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

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

or,

(b) to encourage or support the accused in having sexual intercourse with the complainant.

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

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

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

Under authority — s 61J(2)(e)

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

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

Complainant has serious physical disability or cognitive impairment — 61J(2)(f), (g)

It is an aggravating circumstance if the offence was committed while the complainant had a [*serious physical disability* OR *cognitive impairment*].

The law recognises a variety of forms of "cognitive impairment", including where a person has a [*nominate the form of cognitive impairment according to the list in s 61HD and in accordance with the evidence relied on in the particular case*].

OR

The law does not define what a "serious physical disability" is. That is a matter for you to decide. However, it is an ordinary English phrase, and you should give it its ordinary English meaning. It obviously focuses on disability of the body, as opposed to the mind and requires you to evaluate whether there was a disability that was a serious one.

To prove this element, the Crown relies upon the evidence of [*summarise relevant evidence*].

That evidence [*has/has not*] been disputed. [*Summarise defence case as necessary.*]

Conclusion

If you are satisfied the Crown has proved all four elements of the aggravated offence of sexual intercourse without consent in the indictment beyond reasonable doubt you must find the accused guilty. When asked for the verdict [*for this count*], your foreperson would simply announce, "guilty".

If you are satisfied the Crown has only proved the first three elements of the basic offence of sexual intercourse without consent, but has not proved the element of aggravation, then you would acquit the accused of the aggravated offence and return a verdict of guilty for the basic offence. When asked for the verdict [*for this count*], your foreperson would announce, "not guilty of aggravated sexual touching but guilty of sexual touching".

If you are not satisfied the Crown has proved any one of the three elements of the basic offence of sexual intercourse without consent, then you would acquit the accused completely. When asked for the verdict [*for this count*], your foreperson would simply announce, "not guilty".

[*see s 80AB Crimes Act 1900 regarding alternative verdicts*].

[5-1585] Notes

1. In *R v Button* (2002) 54 NSWLR 455 at [120] the court outlined a number of propositions about the aggravating circumstance of being in company under s 61J(2)(c), including that there must be a shared common purpose to commit the offence and both accused must be physically present. The perspective of the victim (being confronted by the combined force or strength of two or more persons) is relevant, although not determinative. If two or more persons are present, and share the same purpose, they will be "in company", even if the victim was unaware of the other person.
2. In *KSC v R* [2012] NSWCCA 179 at [124]–[126], the court held that it was not necessary for the judge to provide the jury with dictionary definitions of "care", "supervision" and "authority" for the purposes of determining if a complainant was under the accused's authority under s 61J(2)(e). They are ordinary English words which a jury would understand. The judge provided the jury with assistance as to the evidentiary matters relevant to the issue.
3. "Serious physical disability" under s 61J(2)(f) is not defined but is capable of encompassing a vast array of different conditions: *JH v R* [2021] NSWCCA 324 at [38]. In *JH v R*, it was held this term did not require explication as the words mean what they say and are capable of being applied by a jury: [24]–[25].

[5-1590] Suggested R v Markuleski (2001) 52 NSWLR 82 direction — multiple counts

Giving separate consideration to the individual counts means that you are entitled to bring in verdicts of guilty on some counts and not guilty on some other counts if there is a logical reason for that outcome.

If you were to find the accused not guilty on any count, particularly if that was because you had doubts about the reliability of the complainant's evidence, you would have to consider how that conclusion affected your consideration of the remaining counts.

Notes

1. It is suggested that the requirement to consider multiple counts separately is raised at the outset of the trial: [1-490] **Suggested (oral) directions for the opening of the trial following empanelment**.

2. McHugh J said in *KRM v The Queen* (2001) 206 CLR 221 at [36]:

> It has become the standard practice in cases where there are multiple counts … for the judge to direct the jury that they must consider each count separately and to consider it only by reference to the evidence that applies to it (a "separate consideration warning").

   Where tendency or coincidence evidence is not adduced, directions to the jury against the use of propensity reasoning will not normally be required, unless there is a feature of the evidence creating a risk that the jury would misuse the evidence: *R v Matthews* [2004] NSWCCA 259 at [43]–[51] applying *KRM v The Queen*.

3. In *R v Markuleski* (2001) 52 NSWLR 82 at [186], [257] and [280], the court held that:

> … it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count.

4. The suggested direction, above, is derived from *R v Markuleski* at [188] and [191]. Spigelman CJ added at [189]–[191] that:

> On other occasions it may be appropriate for a judge to indicate to the jury, whilst making it clear that it remains a matter for the jury, that it might think that there was nothing to distinguish the evidence of the complainant on one count from his or her evidence on another count.
>
> Or it may be appropriate to indicate that, if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.
>
> The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case.

5. A *Markuleski* direction should only be given if the complainant's credibility looms large in the trial and there is a risk that in the absence of a direction the accused would be denied the chance of an acquittal on all counts: *RWC v R* [2013] NSWCCA 58 at [80]; *Abdel-Hady v R* [2011] NSWCCA 196 at [125]–[133]. When determining whether such a direction should be given, the whole of the relevant or surrounding circumstances needs to be considered: *R v GAR* [2003] NSWCCA 224 at [34]; *Oldfield v* R [2006] NSWCCA 219 at [24]–[25]; *Keen v R* [2020] NSWCCA 59 at [76].

6. While a *Markuleski* direction is more commonly given in a "word against word" prosecution for multiple sexual assault offences against the same complainant, its use is not confined to such cases: *Keen v R* [2020] NSWCCA 59 at [63]; *Hajje v R*

[2006] NSWCCA 23 at [101]. It may also be required in cases where a complainant for some offences is also a witness to an offence/s involving another complainant: see, for example, *Sita v R* [2022] NSWCCA 90 at [36]–[42].

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Sexual touching

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

Important note: The directions in ss 292–292E *Criminal Procedure Act* 1986 apply to proceedings for these offences which commence from 1 June 2022, regardless of when the offence was committed: Sch 2, Pt 42. See further [2-980] **Directions — misconceptions about consent**. The procedure for filing a Crown or Defence Readiness Hearing Case Management Form requires the parties to identify, amongst other matters, which directions under ss 292A–292E may be required at trial. It would be prudent to commence a discussion early in the trial concerning which of these directions, if any, might be required in a particular trial.

[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.

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