Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 71

December 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 71

Update 71, December 2022

Update 71 amends the *Criminal Trial Courts Bench Book* to incorporate recent case law and legislative developments. The following chapters have been revised:

Outline of trial procedure:

- [1-005] **Pre-trial procedures** to add reference to *Alameddine v R* [2022] NSWCCA 219, where the principles to be applied under ss 131–132A of the *Criminal Procedure Act* 1986 are discussed.

The jury:

- [1-495] **Offences and irregularities involving jurors** to add reference to *Vella v R* [2022] NSWCCA 204 regarding the admission of evidence concerning jury deliberations in appeals against conviction.
- [1-510] **Discretion to discharge whole jury or continue with remaining jurors** to add reference to *Watson v R* [2022] NSWCCA 208 regarding the "high degree of necessity" required to prevent a miscarriage of justice before a jury will be discharged.

Privilege against self-incrimination:

- [1-720] **Notes** to add reference to *Spence v The Queen* [2016] VSCA 113 regarding disclosing to the jury the granting of a s 128(3) *Evidence Act* 1995 certificate to a witness.

Accusatory statements in the presence of the accused:

- [2-000] **Introduction** to add reference to *DPP (NSW) v Sullivan* [2022] NSWCCA 18 regarding the discretion to exclude evidence of admissions under s 90 *Evidence Act*.

Admissions to police:

- [2-120] **Position under the Evidence Act** to add reference to *Decision Restricted v R* [2022] NSWCCA 95 and *Nguyen v The Queen* (2020) 269 CLR 299 regarding the caution to be exercised when out-of-court statements admitted into evidence may be mixed and complex.

Circumstantial evidence:

- [2-500] **Introduction** to add reference to *Gwilliam v R* [2019] NSWCCA 5, *Wiggins v R* [2020] NSWCCA 256 and *Davidson v R* (2009) 75 NSWLR 150 regarding the applicable principles for assessing what is a reasonable inference in circumstantial evidence cases.
- [2-510] **"Shepherd direction" — "link in the chain case"** to add reference to *Davidson v R* (2009) 75 NSWLR 150 and *D'Agostino v R* [2019] NSWCCA 259 regarding the test for what constitutes an indispensable "intermediate fact" in a circumstantial evidence case.

Tendency, coincidence and background evidence:

- [4-225] **Tendency evidence** to add reference to *TL v The King* [2022] HCA 35 regarding applicable principles governing similarity between tendency evidence and charged offences.
- [4-226] **Standard of proof — s 161A Criminal Procedure Act 1986** to add reference to *JS v R* (2009) 75 NSWLR 150 regarding the application of s 161A *Criminal Procedure Act* to charged acts and observations concerning jury directions on standard of proof.
- [4-230] **Tendency evidence in child sexual assault proceedings — s 97A** to add reference to *JW v R* [2022] NSWCCA 206 regarding the application of transitional provisions for s 97A *Evidence Act* and the commencement of "hearings", including special hearings.

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

- [4-320] **Part 4 procedure** to update the Procedure Table and add reference to *R v Woodham* [2022] NSWSC 1154, regarding the meaning of "will not" in s 47(1)(b) of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020, and to add reference to *AG (NSW) v Bragg (Preliminary)* [2021] NSWSC 439 and *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* [2022] NSWSC 537 regarding the statutory requirements to be applied when determining whether to grant an extension order over a forensic patient.
- [4-330] **Extension orders** to add reference to *AG (NSW) v Bragg (Preliminary)* [2021] NSWSC 439 and *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* [2022] NSWSC 537 regarding the interpretation of ss 121–122 of the *Mental Health and Cognitive Impairment Forensic Provisions Act*.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 71

Note: Before filing this Update please ensure that Update 69 has been filed.

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Outline of trial procedure

[1-000] Introduction

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

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

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

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

[1-005] Pre-trial procedures

Trial court's jurisdiction

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

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

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

The indictment

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

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

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

After presentation, the court has general powers to conduct proceedings on that indictment, including the issuing of subpoenas: *KS v Veitch* [2012] NSWCCA 186. The indictment can be amended at any time with leave of the court or the consent of the accused: s 20. The amendment can include the addition of further charges. Before

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

Arraignment

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

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

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

Generally, the accused is placed in the dock, but may be permitted to remain outside the dock, particularly where self-represented: s 34. The history of s 34 was considered in *R v Dirani (No 7)* [2018] NSWSC 945 and *R v Stephen (No 2)* [2018] NSWSC 167. It is not prejudicial to require an accused to sit in the dock: *R v Dirani (No 7)* at [56]; *R v Stephen* at [13]. The dock is the traditional symbol of what is at stake in a criminal trial and is a means of impressing on the community, and the jury, the gravity of the proceedings: *R v Dirani (No 7)* at [32]; *R v Stephen (No 2)* at [11].

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

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

There will be no arraignment where:

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

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

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

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

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

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

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

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

Pre-trial rulings

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

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

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

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

(a) order for a separate trial of offences or offenders: s 21, see [3-360]

(b) (for State offences only) an order for trial by judge alone: ss 131–132A and see *R v Belghar* [2012] NSWCCA 86. For a discussion of the principles to be applied under ss 131–132A, see *Alameddine v R* [2022] NSWCCA 219 at [15]–[24]. The provisions do not apply to Commonwealth offences: *Alqudsi v The Queen* (2016) 258 CLR 203 at [115].

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

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

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

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

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

Sexual assault communications privilege

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

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

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

[1-010] The trial process

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

Any interpreter who is present to assist the accused need not be sworn. The interpreter should be placed so that he or she may communicate with the accused.

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

Empanelling the jury

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

A jury panel is summoned by the sheriff and brought into court when required. Practice varies as to whether the judge is on the Bench when the panel is brought into court.

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

The judge can determine whether to excuse any person in the panel: s 38 *Jury Act*. Generally, the sheriff's officer will bring written applications for excusal to the judge for approval. The judge can determine to have the prospective juror make the application in person after the panel is brought into court.

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

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

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

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

See s 38(1) *Jury Act* and cl 5 Jury Regulation 2015 in relation to the non-disclosure of the identity of certain officers and protected witnesses.

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

In a trial where it is anticipated there will be a large number of witnesses, it may be desirable that the panel members be provided with a list of witnesses (and other people who may be mentioned). The jury panel may be sent to the jury assembly area for members to have an opportunity to consider the list. They should be directed not to have discussions with other panel members. Those wishing to make an application to be excused may then be returned to the court room for it to be considered by the judge.

There are various ways in which applications to be excused may be received and considered. The person may be asked to come forward and inform the judge of the basis of the application. It is preferable that they do not speak in a manner audible

to the balance of the jury panel. The person may make the request in writing if the circumstances relate to the person's health or may cause embarrassment or distress (s 38(3) *Jury Act*). Another option for the making of excusal applications is for writing material to be made available in the body of the court where the panel members are located for all applications to be made by way of a note. The sheriff or court officer can then provide the note, and the panel member's card, to the judge to consider the application. However the application is made, the judge may clarify with counsel whether the matter raised should warrant the person being excused (eg, in the case of the person knowing a witness).

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

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

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

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

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

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

After members of the jury have been chosen, the jury is sworn by oath or affirmation: s 72A *Jury Act*. It is a matter for the practice of the individual judge whether the jury is sworn as a group or individually and also as to whether a religious text is to be held by those taking an oath: s 72A(5) *Jury Act*. It is not necessary for the accused to be arraigned again after the jury is selected: *DS v R* [2012] NSWCCA 159 at [64]. After the jurors are sworn the balance of the panel is returned to the sheriff and leaves the courtroom.

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

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

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

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

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

Adjournment after empanelling

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

Judge's opening

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

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

It is suggested that each member of the jury be provided with a written document which can be referred to in the course of the opening and left with the jury during the trial (see the suggested written directions at [1-480]). It is a matter for the judge what issues should be addressed in the written document but it is suggested that it should at least include a brief explanation of the following:

- the respective role of a judge and a jury
- the nature of a criminal trial

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

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

- sitting hours
- breaks and refreshments
- selecting a foreperson
- introducing counsel
- the jury can request transcript at any time and in respect of any witness, although they should also be informed that this does not apply to evidence which is pre-recorded.

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

[1-015] The course of the evidence

Opening addresses

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

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

Witnesses in the Crown case

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

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

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

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

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

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

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

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

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

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

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

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

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

Directions and warnings

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

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

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

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

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

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

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

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

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

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

Warnings and exculpatory evidence

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

However there are some types of evidence, such as identification evidence and hearsay evidence, that are potentially unreliable no matter whether they exculpate or

inculpate an accused: *R v Rose* (2002) 55 NSWLR 701 at [297]. Some warning is required about the potential unreliability of the evidence: *R v Rose* at [297].The judge should exercise care before giving a s 165 warning to evidence led by the defence.

Section 165A *Evidence Act* also addresses judicial warnings in relation to the evidence of children, see [1-130]ff. Section 165B *Evidence Act* provides for a warning where there is a delay in prosecution, see [5-070]ff.

A direction is usually required in relation to:

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

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

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

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

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

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

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

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

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

Views

As to the procedure in respect of carrying out a view, see [4-335]ff. It is usual to appoint a "shower" being a person who will indicate various aspects of the scene to the jury in accordance with the evidence. This is often the police officer in charge of the investigation. The accused does not have to be present at the view but he or she has the right to attend: *Jamal v R* [2012] NSWCCA 198 at [41]. It often occurs that the accused chooses not to because of the prejudicial effect if the accused is in custody.

It is suggested that the police be asked to take a video recording of the view so that it can later be tendered in evidence. The recording should be made so as not to disclose members of the jury, but to record what is said by the shower and, if possible any questions asked by the jury and the answers given by the shower.

Transcript

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

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

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

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

Close of Crown case

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

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

In *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9, the High Court held that a "Prasad direction" (so named from *R v Prasad* (1979) 23 SASR 161) should never be given. The direction, which it was intended would be sparingly given, was that a jury could acquit at any time without hearing any more evidence or the addresses. A Prasad direction should not be given in any case.

Defence case

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

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

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

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

See defences from [6-050]ff.

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

Case in reply

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

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

Discharge of the jury

Part 7A of the *Jury Act* deals with the discharge of jurors. The trial judge has a discretion to discharge a juror and, if the juror is discharged, a separate and distinct discretion whether to continue with the trial with less than twelve jurors (s 53C): *BG v R* [2012] NSWCCA 139 at [91]. These discretions should be exercised independently. As to the discharge of individual jurors, see [1-505], and a suggested direction following a

discharge, see [1-515]. For further information in relation to the discharge of the whole jury, see [1-520]. As to questioning jurors in relation to prejudicial material, see s 55D *Jury Act*. If the judge is required to examine a juror in respect of alleged misconduct, see s 55DA *Jury Act*.

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

[1-020] Addresses

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

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

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

Crown address

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

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

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

[1-025] Summing up

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

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

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

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

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

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

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

[1-030] Jury deliberations

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

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

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

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

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

Return of the jury

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

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

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

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

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

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

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

The exhibits and MFI's should be returned to the relevant party.

[The next page is 19]

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].

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

[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]. However, the trial judge must be satisfied to a high degree of necessity before discharging the jury. The discretion is "to be exercised in favour of a discharge only when that course is necessary to prevent a miscarriage of justice": *Watson v R* [2022] NSWCCA 208 at [25], [34], [36]; *Crofts v The Queen* (1996) 186 CLR 427. An inquiry into a substantial miscarriage of justice focuses principally upon the impact of the irregularity on an accused person's ability to obtain a fair trial: *Watson v R* at [69].

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

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

[1-515] Suggested direction following discharge of juror

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]

Privilege against self-incrimination

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

[1-700] Introduction

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

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

[1-705] Explanation to witness in the absence of the jury

[*Note:* *If it appears to the court that a witness may have grounds for making an objection under s 128, the court must satisfy itself that the witness is aware of the effect of that provision: s 132 Evidence Act. The court must do so in the absence of the jury.*]

You may object to answering that question [*and any directly related question*] on the ground that your answer may tend to prove that you have committed an offence [*or that you are liable to pay a penalty or otherwise be punished in non-criminal proceedings*]: ss 128(1), 132.

If you do not object to answering that question [*or any directly related question*] upon that basis, the trial will proceed: s 128(2).

If you do object to answering that question, it will become necessary for me to decide whether there are reasonable grounds for that objection.

If I decide that there are no reasonable grounds for your objection, the trial will proceed, and you will be required to answer the question.

If I decide in your favour, by finding that there are reasonable grounds for your objection, I will uphold that objection. You will then be given a choice as to whether you wish to answer the question. Whether or not you will be required to answer the question (if you do not wish to do so willingly) will depend, in turn, upon whether or not it is in the interests of justice that you be required to answer it: s 128(3), (4).

Before continuing to explain what may now happen, I need to consider some jurisdictional issues …

[*It is necessary for the judge at this stage to determine whether the possible offence or liability to which any objection relates arises under the laws of NSW, the ACT or the Cth.*

- *If the possible offence or liability arises under the law of some Australian jurisdiction other than NSW, the ACT or the Cth, then a certificate cannot be granted which protects the witness against prosecution or penalty in that jurisdiction, and a certificate must not be offered as an inducement to the witness to answer voluntarily: see Evidence Act 1995, s 128(2)–(7); Evidence Act 1995 (Cth), s 128(2)–(7), (10)–(15).*
- *If the possible offence or liability arises under the law of a foreign country, a certificate cannot be granted under s 128 Evidence Act 1995.***]**

[If it is found that the possible offence or liability arises other than under the laws of NSW, the ACT or the Cth, add

It is a matter for you as to whether you answer the question or not. If you do not wish to answer the question, you need not do so. However, you must clearly understand that if you decide to answer the question, the evidence which you give may be used against you in a prosecution [*or in proceedings to recover a penalty*].**]**

[If it is found that the possible offence or liability does arise under the laws of NSW, the ACT or Cth, and that it does not also arise under the laws of any other Australian jurisdiction, add

If you do answer the question willingly, a certificate will be granted to you by this court, the effect of which is that neither that evidence nor any information, document or thing obtained as a direct or indirect consequence of you having given that evidence can be used against you in other proceedings. However, if the evidence which you give is false, criminal proceedings for giving that false evidence may be brought against you: s 128(3)(c), (5), (7).

But, even if you say that you do not wish to answer the question, I have the power to order you to answer it if I am satisfied that the interests of justice require you to do so. I will hear what you want to say about that before any order is made that you answer the question. If I order you to answer the question, a certificate will still be granted to you by this court, the effect of which is that neither that evidence, nor any information, document or thing obtained as a direct or indirect consequence of you having given that evidence, can be used against you in other proceedings. However, if the evidence which you give is false, criminal proceedings for giving that false evidence may be brought against you: s 128(3)(c), (4), (5), (7).**]**

[1-710] Granting a certificate and certificates in other jurisdictions

If a certificate is to be granted, an appropriate order is:

> Pursuant to s 128(3) of the *Evidence Act* 1995, I direct the preparation of a certificate for my signature, and that the certificate thereafter be given to the witness.

Clause 7.1 *Evidence Regulation* 2010 provides that the form of the certificate may be in accordance with Schedule 1 Form 1 of that Regulation.

For administrative certainty, it is advisable to physically issue the form of the certificate at a time proximate to when the certificate is granted: *Cornwell v The Queen* (2007) 231 CLR 260 at [197].

The *Evidence Amendment Act* 2010 amends s 128 of the Act so that a certificate provided by another court of a prescribed State or Territory has the same effect as if it had been given under s 128: s 128(12)–(14).

[1-720] Notes

1. Section 128(10) (previously s 128(8)) provides that s 128 does not apply where the evidence given by the defendant is that he or she did an act, the doing of which is a fact in issue, or that he or she had a state of mind, the existence of which is a fact in issue. In *Cornwell v The Queen* (2007) 231 CLR 260, the court held that the former s 128(8) (now s 128(10)) is not limited to direct evidence that the accused did some act or had the state of mind the subject of the offence. It also denies the privilege for evidence given by an accused of facts from which the doing of the act or the having of the state of mind can be inferred. This includes, inter alia, circumstantial evidence of opportunity, means or motive that infer the doing of the act which is the fact in issue: at [84].
2. In *Cornwell v The Queen,* the High Court suggested the protection in s 128 applied to questions asked under cross-examination of a witness and did not extend to questions asked in-chief and in re-examination. The High Court also doubted, without finally deciding the issue, whether an accused can "object" in the relevant sense under s 128 when the accused is answering questions in-chief from his or her own counsel: at [112]–[113]. Given these comments were obiter and given apparently contradictory remarks by the Full Family Court in *Ferral v Blyton* (2000) 27 Fam LR 178, the Court of Appeal of NSW considered the issue afresh in *Song v Ying* [2010] NSWCA 237. The court concluded, consistently with the views above expressed by the High Court in *Cornwell v The Queen*, that when a witness who is a party to the proceedings is being asked questions by their own legal representative (whether in chief or re-examination) there would "rarely if ever be a question" that that evidence "was given under compulsion": at [24], [27]. The court held that a witness who "wishes" to give evidence but " is not willing to do so" except under the protection of a s 128 certificate does not "object" within the meaning of s 128(1).
3. In *Song v Ying*, the court identified the following propositions, at [24], [27]–[29], that:
   (a) unless a party to the proceedings is giving evidence in response to questions from their own legal representative, witnesses are compellable to give evidence
   (b) compellability of this nature makes sense of the word "objects" in s 128(1) and of "require" in s 128(4): see also *Cornwell v The Queen* at [112]. A motivation to give evidence which avoids a judgment being made against a defendant does not amount to relevant compellability
   (c) a party to proceedings who wishes to give particular evidence in response to questions from his or her own legal representative "but is not willing to do so" without a s 128 certificate does not "object" within the meaning of s 128(1)

(d) a witness who is compelled by a party to give evidence during the proceedings (for example under cross-examination) can raise an objection at any stage during their evidence: see, in particular, *Song v Ying* at [30].

4. If the witness in question is the accused, it is customary for him or her to be given an opportunity to consult with his or her legal representative prior to deciding whether to answer the question willingly. If the witness is not the accused, and therefore not legally represented, it may be appropriate to grant the witness the opportunity to obtain independent legal advice in relation to the matter.

5. The *Evidence Act* provides no guidance as to what might constitute "reasonable grounds" for an objection under s 128(2). In *R v Bikic* [2001] NSWCCA 537, Giles JA said that "it seems to me to be a matter of commonsense that reasonable grounds for an objection must pay regard to whether or not the witness can be placed in jeopardy by giving the particular evidence": at [15]. "Reasonable grounds" must be established on the balance of probabilities: s 142 *Evidence Act*. Some assistance may be obtained from s 130(5) *Evidence Act* in determining what factors may be taken into account in determining whether "the interests of justice" require the witness to give the evidence within the meaning of s 128(4)(b). Other factors to be taken into account include the probative value of the evidence, the nature of the proceedings, and the consequences for the witness: *R v Ronen (No 2)* [2004] NSWSC 1284; *R v Lodhi* [2006] NSWSC 638; *R v Collisson* (2003) 139 A Crim R 389.

6. Section 128(7) prevents the evidence in respect of which a certificate has been given from being used against the person in a proceeding. A "proceeding" under subs (7) does not include a retrial for the same offence or an offence arising out of the same circumstances: s 128(9).

7. The certificate does not give immunity from prosecution: *R v Macarthur* [2005] NSWCCA 65 at [41]. It does no more than prevent the evidence given by the witness being used against him or her in any subsequent prosecution. Further, the grant of a s 128 certificate does not of itself provide sufficient grounds for a warning under s 165 *Evidence Act* that the evidence of the witness may be unreliable: *R v Macarthur* at [43]–[46].

8. In *Spence v The Queen* [2016] VSCA 113 at [82]–[88] the court held, *inter alia*,:

   (a) Reliance on the privilege against self-incrimination is not relevant to credit.

   (b) The granting of a s 128 certificate may affect a witness's credibility, depending on the circumstances.

   (c) If it is plain the witness's credit will be attacked and the protection afforded by the certificate is relevant, it will be proper to reveal to the jury the existence of the certificate.

   (d) Where the existence of the certificate has been revealed to a jury, it is desirable the judge provide directions explaining its effect and the extent of the protection; that it does not provide immunity from prosecution (consistent with the direction in *R v Macarthur*); and that it does not protect against perjury.

9. Part 2 cl 3 Dictionary (s 3 *Evidence Act*) defines "civil penalty". It provides that "[f]or the purposes of the Act, a person is taken to be liable to a civil penalty if,

in an Australian or overseas proceeding (other than a criminal proceeding), the person would be liable to a penalty arising under an Australian law or a law of a foreign country". Civil penalties have been held to include:

- disciplinary proceedings against a police officer, reduction in rank, dismissal from employment: *Police Service Board v Morris* (1985) 156 CLR 397 at 403, 408, 411
- penalties for failure to produce documents in non-judicial proceedings: *Pyneboard v Trade Practices Commission* (1983) 152 CLR 328 at 341
- forfeiture and punishment: s 21 *Interpretation Act* 1987.

However, they do not include the payment of compensation: *R v Associated Northern Collieries* (1910) 11 CLR 738 at 742. As to the scope of what constitutes a civil penalty see The Honourable AM Gleeson AC, "Civil or criminal — What is the difference" (2006) 8(1) *TJR* 1.

10. Section 133 provides that if a question arises under Pt 3.10 (Privileges) "relating to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question".

[The next page is 141]

Accusatory statements in the presence of the accused

[2-000] Introduction

This section contains a suggested direction to be given where the Crown relies upon the adoption, by words or conduct, of an accused, of the truth of an accusatory statement made in his or her presence by a person who is not an "investigatory official": cf s 89 *Evidence Act* 1995. As to the admissibility of such evidence at common law: see *R v Christie* [1914] AC 545 at 554; applied in *Woon v The Queen* (1964) 109 CLR 529 and *R v Freeman* (unrep, 18/12/86, NSWCCA) at 4–5 where it was noted:

> It is of course well established that, where an accusatory statement is made in the presence of an accused person, it is not evidence against him of the facts stated except insofar as he accepts it. Acceptance may be by way of word, conduct, action or demeanour. Whether there is acceptance is a matter for the jury. A mere denial by an accused does not render the statement inadmissible but its evidential value when he denies it is limited and the judge may well think it proper to exclude such evidence. *Where failure to deny is relied on, it is necessary to ensure that, before any such evidence is admitted, the circumstances are such as to leave it fairly open to conclude that silence is such as to convey a tacit admission of the truth of what is being asserted. This will, of course require consideration of whether the circumstances were such that some denial or explanation might reasonably be expected* . [Emphasis added.]

As to silence amounting to an admission: see generally *R v Rose* (2002) 55 NSWLR 701; [2002] NSWCCA 455 at [260]ff.

Evidence of the accused's response to an accusatory statement is receivable as an admission subject to Pt 3.4 *Evidence Act* including whether the reception of the admission would be unfair within the meaning of s 90, as to which: see *Em v The Queen* (2007) 232 CLR 67 at [109], [112], [179], [196]. Section 90 permits the exclusion of evidence of admissions to prove a fact if the prosecution seeks to adduce it and it would be unfair to a defendant to use the evidence. In *DPP (NSW) v Sullivan* [2022] NSWCCA 18, the accused's admissions in a police interview were found to be unreliable as the accused did not have an actual recollection of events and was instead speculating or hypothesising about them. It was unfair to permit the prosecution to use these admissions for their truth: [53]–[54].

As an admission or as hearsay evidence, in such a case, a warning may be required under s 165 of the Act.

It is desirable to give the jury a direction or explanation, along the lines suggested at [2-010], at the time when the evidence is given, as well as in the summing-up.

As to admissions generally: see **Admissions to police** at [2-100].

[2-010] Suggested direction — accusatory statements in the presence of the accused

You have heard evidence from [*name of witness*] that [*he/she*] said to [*the accused*], [*accusatory statement*]. The accused is said to have made no reply to that statement [*the accused is alleged to have replied to that statement with the words*, [*quote evidence*]].

What one person says to another is not normally relevant evidence. Here the evidence is being led before you because the Crown asserts that the lack of response [*response*] by the accused to the statement made to [*him/her*] or in [*his/her*] presence is an admission

by the accused that what was contained in the statement was true. It would be different had the accused denied the allegation made or had given some innocent explanation to rebut the allegation. The evidence is only relevant if you find that the accused's lack of response [*response*] when confronted with the allegation amounted to an admission that it was true.

Let us take an example away from the facts of the present case. Assume that a man has been the driver of a motor vehicle which has struck a child, causing serious injuries. Assume that the mother of the injured child immediately after the accident approaches the driver and says to his face, "This is your fault you are always driving too fast around this street ignoring the children playing on the road". If the driver says nothing to that allegation, a jury could find that the failure to respond amounted to a silent acceptance of the truth of what was said because the driver had nothing to say in defence to the allegation made to him.

In that case, the statement made by the mother would not, of itself, be relied upon by the Crown as evidence that what she asserted was true. Before any part of that statement made in the presence of the driver could be used as evidence against him, a jury would have to be satisfied that the statement was made; that the driver heard it; and that he had the opportunity to respond to it but did not respond because he accepted the truth of what was said. There may be an alternative explanation for the driver not responding. It may be that he did not hear what the mother said, or that he heard it but was too upset to respond. Or it could be the case that he treated the allegation of the mother as unworthy of a response.

In the present case, you need to first decide whether you accept that [*name of witness*] made the statement to the accused; whether the accused heard it; and whether [*he/she*] had an opportunity to respond. You also need to decide whether you accept that the accused did not respond [*or, did respond by saying* [*quote evidence*]]. If you do accept the evidence about each of those things, you then need to consider whether you accept that by [*his/her*] lack of response [*or response*] the accused had acknowledged that what [*name of witness*] had said was, either in whole or in part, true.

It is really a matter for you to apply your common sense and your experience of life and what you might expect a person in the position of the accused to do or say when faced with such an allegation, although you should also consider that people do not always act predictably in certain situations. Here you are considering the conduct of the accused, and not the conduct of some hypothetical person in [*his/her*] position. You must also consider whether there is an alternative explanation for the accused's lack of response [*or response*], other than that [*he/she*] accepted the truth of what [*name of witness*] said. In this case it has been put that [*refer to defence response*].

If you accept this alternative explanation then this part of the evidence would not advance the Crown case at all and may be put completely to one side. However, if after considering all of the circumstances I have mentioned, you are satisfied that the accused did acknowledge, either in whole or in part, the truth of what [*name of witness*] said, then this is something you can take into account along with all of the other evidence in the case in your assessment of whether the Crown has proved the guilt of the accused beyond reasonable doubt.

[The next page is 175]

Admissions to police

***Evidence Act* (NSW) 1995, Pt 3.4, s 165(1)(f)**

[2-100] Introduction

The following will only be relevant where disputed admissions have been admitted into evidence notwithstanding s 281 *Criminal Procedure Act* 1986. See *Bryant v R* [2011] NSWCCA 26 at [147]ff for examples of where that has occurred.

[2-110] Pre-Evidence Act position

Prior to the *Evidence Act* 1995, the decision of the High Court in *McKinney v The Queen* (1991) 171 CLR 468 required a trial judge to warn the jury that, because of the apparent vulnerability of an accused person in police custody, they should give careful consideration to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is an oral admission allegedly made while in police custody, the making of which is not reliably confirmed: *McKinney v The Queen* at 476.

In the course of that warning, the jury had to be told:

(a) that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of confirmation to have evidence available to support a challenge to police evidence alleging that an oral admission had been made, than it is for such police evidence to be fabricated,

(b) that police officers are trained to give evidence in court, and

(c) that it is not an easy task to decide whether a practised witness is telling the truth.

Those requirements were directed to ensuring that the accused person obtained the fair trial to which he or she is entitled: *McKinney v The Queen* at 476; *Dietrich v The Queen* (1992) 177 CLR 292 at 327–328, 333. This decision has to be read in light of the provisions of the *Evidence Act* set out at [2-120].

[2-120] Position under the Evidence Act

Section 165 *Evidence Act* requires a warning to be given to the jury that the evidence of witnesses within the various categories of suspect witnesses may be unreliable, with information as to the matters which may cause it to be unreliable, and a warning of the need for caution in determining whether to accept the evidence and the weight to be given to it: s 165(2). This must be done whenever any party so requests, unless the judge is satisfied that there are good reasons for not doing so (s 165(2) and (3)), and it is not restricted to the cases to which *McKinney v The Queen* was directed — where, generally, the oral admissions form the only (or substantially the only) evidence of guilt and where they were made in police custody: *McKinney v The Queen* at 476; *R v Small* (1994) 33 NSWLR 575 at 602–604. The warning, if sought by counsel, should be given where the Crown is relying upon evidence coming within the category described in the section.

The category of evidence identified by s 165(1)(f) *Evidence Act* is:

> [O]ral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant.

"Investigating official" is defined in the Dictionary to the Act.

Those directions must be given with the weight of the judge's own authority: *R v Richards* (unrep, 03/04/98, NSWCCA) at 3 and 15. But it should be made clear that it is an issue for the jury to determine whether and to what degree weight should be given to evidence falling within s 165: *R v Wilson* (2005) 62 NSWLR 346; [2005] NSWCCA 20 at [38].

A judge is entitled to direct the jury that evidence of pre-trial exculpatory statements of an accused could be given less weight than inculpatory admissions in the absence of testimony from the accused at trial but it is for the jury to determine the weight to be given to parts of the evidence: *Mule v The Queen* (2005) 79 ALJR 1573 at [21]ff. However, caution should be exercised in this area generally and before instructing the jury in such a way, particularly when the out-of-court statements may be mixed and complex: *Decision Restricted v R* [2022] NSWCCA 95 at [142]–[148]; see also *Nguyen v The Queen* (2020) 269 CLR 299 at [24], [59]. If mixed statements are admitted into evidence "they are invariably subject to a direction to the jury that they may give less weight to exculpatory assertions than to admissions and that it is for them to decide what weight is to be given to a particular statement": *Nguyen v The Queen* at [24]. In a separate judgment, Edelman J stated it was not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state: at [59].

[2-130] Suggested direction — where disputed admissions

Where the evidence of an admission can be used by the jury as the only evidence upon which to convict an accused, the reliability of the admission must be proved beyond reasonable doubt. If it is not relied upon as the only evidence of guilt, then the warning must be given, if asked for, but the admission does not have to be proved to the criminal standard.

Evidence has been given, that the accused made certain admissions to the police. The accused has denied that [*he/she*] made those admissions and has suggested that this evidence is deliberately false.

[*Outline the evidence and the nature of the dispute in sufficient detail to suit the circumstances of the case*.]

It is not unknown for a guilty person to make full admissions to the police and then to have second thoughts and dishonestly deny having made them. However, and unfortunately, it is also not unknown for police officers to manufacture evidence against a person whom they believe has committed an offence.

There are two issues for you to decide. Were the admissions made and, if you decide that they were made, were they true?

You may think that a person would not usually admit to committing a crime unless the admissions were true, but there may be situations where a person may make a false admission. The main issue in this case, as I understand it, is whether the admissions

were made at all. But the Crown must also prove that they are truthful admissions and, if there is any evidence to suggest that they are not, the Crown must refute that suggestion. [*Indicate what evidence, if any might call the truth of the admissions into question, such as, for example, mental illness, personality defect or intoxication.*]

In relation to the first issue, that is, whether the admissions were made, you must approach the evidence of the police with caution. This is because the circumstances in which it is alleged that the admissions were made may make the evidence unreliable. I am not telling you that you should regard this evidence as unreliable. The reliability of the evidence is a matter for you to decide. I cannot make that decision for you and nor am I trying to suggest what decision you should make. It is, however, my duty to warn you of the possibility that evidence of this kind may be unreliable and to explain why that is so. It is up to you to decide whether you accept this evidence and what weight, or significance, it should have.

There are a number of reasons why the evidence may be unreliable. Generally, they indicate that it is easier for police officers to fabricate their evidence than it is for the accused to have evidence available to challenge what they have said.

First, although police do have available to them equipment and facilities to record interviews with suspects, in this case there was no electronic recording made. Even if you accept the explanation that was given for no electronic recording being made, the fact remains that there is no confirmation that those admissions were made independent of the police who say that they were made by the accused.

Second, there was no-one present at that interview except the accused and the police. That state of affairs is not improper. The police officers were perfectly entitled to interview the accused alone. What this means, however, is that there was no independent person present who might have been able to support the accused's challenge to the police evidence.

Another matter you should take into account is that the accused had no opportunity to make any note of [*his/her*] conversation with the police officers at the time of that conversation. A note made by the accused at the time might have enabled [*him/her*] to challenge the evidence of the police officers more persuasively.

[*Where applicable*

You should also take into account that police officers are generally experienced in giving evidence in court. It is not an easy task to decide whether a practiced witness is telling the truth or not. If a witness appears to be confident and self-assured, it does not necessarily follow that the witness is giving honest evidence.]

[*Refer to any other matters that may not be apparent to the jury and which may bear upon the reliability of the evidence*.]

All of these matters mean that the evidence of the police as to the disputed admissions may be unreliable. For this reason, it is necessary that you approach their evidence with caution in deciding whether to accept it and what weight, or significance, you should give to it.

I repeat that I am not giving you this warning because of any opinion I have about the evidence. As I have already said, the reliability of the evidence is a matter for you to decide. This warning is one which is given in every case where this type of evidence is relied upon by the Crown.

[*Indicate the arguments relied upon on this issue by both parties*.]

Those are the arguments put before you. As I have said, there are two matters for you to decide. Were the admissions made? If so, were they truthful?

If you decide that the admissions were made, and that they were truthful, then you may take them into account in deciding whether the Crown has proved the guilt of the accused beyond reasonable doubt. If the admissions are the sole evidence of the accused's guilt [**if appropriate add** *and in this case they are*], then because of the requirement that the accused's guilt be proved beyond reasonable doubt, it follows that you must be satisfied beyond reasonable doubt that the admissions were made and that they were true.

[The next page is 201]

Circumstantial evidence

[2-500] Introduction

Where the Crown case rests substantially on circumstantial evidence a jury cannot return a guilty verdict unless the Crown has excluded all reasonable hypotheses consistent with innocence: *The Queen v Baden-Clay* (2016) 258 CLR 308 at [46], [50]; *Barca v The Queen* (1975) 133 CLR 82 at 104. For an inference to be reasonable it must rest upon something more than mere conjecture: *The Queen v Baden-Clay* at [47] quoting *Peacock v The King* (1911) 13 CLR 619 at 661; *Gwilliam v R* [2019] NSWCCA 5 at [101], [104]. It is not incumbent on the defence either to establish that some inference other than guilt should be drawn from the evidence or to prove particular facts tending to support such an inference: *The Queen v Baden-Clay* at [62] citing *Barca v The Queen* at 105. It is sufficient that an accused's hypothesis consistent with innocence can be derived reasonably from the evidence in the Crown case. No standard of proof applies: *Wiggins v R* [2020] NSWCCA 256 at [65].

It is the duty of the trial judge to put to the jury with adequate assistance any matters which the jury, upon the evidence, could find for the accused: *The Queen v Baden-Clay* at [62]. This includes directing attention to alternative hypotheses not the subject of evidence but available and consistent with the accepted evidence: *Wiggins* at [87]. The trial judge can invite defence counsel to state any reasonable hypothesis consistent with innocence that may be put to the jury in the summing up: *The Queen v Baden-Clay* at [60].

Where an accused with peculiar knowledge of the facts is silent, "hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused": *The Queen v Baden-Clay* at [50] quoting *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227–228, which was cited with approval in *RPS v The Queen* (2000) 199 CLR 620 at 633.

A direction in relation to a circumstantial Crown case is an amplification of the proposition that the Crown must prove its case beyond reasonable doubt where the evidence relied upon by the Crown may give rise to another reasonable explanation for the facts other than that the accused is guilty of the offence charged: see generally *Shepherd v The Queen* (1990) 170 CLR 573; *R v Keenan* (2009) 236 CLR 397 at [126]. The usual circumstantial case is often referred to as a "strands in a cable case".

In considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence: *The Queen v Baden-Clay* at [47] citing *The Queen v Hillier* (2007) 228 CLR 618 at [46]. The evidence must be considered as a whole and not by a piecemeal approach to each particular circumstance: *The Queen v Hillier* at [46]. Individual items of evidence, on their own inadequate to found a conviction, may take strength from other items: *Davidson v R* (2009) 75 NSWLR 150 at [61].

See also *Criminal Practice and Procedure NSW* at [2-s 161.15]; *Criminal Law (NSW)* at [CLP.580].

[2-510] "Shepherd direction" — "link in the chain case"

Generally, no particular fact or circumstance relied upon in a circumstantial case needs to be proved beyond reasonable doubt. There may, however, be a circumstantial case where one or more of the facts relied upon by the Crown is, or are, so fundamental to the process of reasoning to the guilt of the accused that the fact or facts must be proved beyond reasonable doubt. Such a fact is referred to as an "intermediate fact" being an indispensable link in a chain of reasoning toward an inference of guilt: *Shepherd v The Queen* (1990) 170 CLR 573. There is no settled way of determining what constitutes an indispensable intermediate fact, however Simpson J in *Davidson v R* (2009) 75 NSWLR 150 at [74] said it may be tested by asking whether, in the absence of evidence of that fact, there would nonetheless be a case to go to the jury: *D'Agostino v R* [2019] NSWCCA 259 at [64]. This is often referred to as a "link in a chain case". As to the appropriateness of such a direction, see *Davidson v R* at [8], [14], [18] and *Burrell v R* [2009] NSWCCA 163 at [95]ff. Such a direction should not be given where it would be likely to confuse the jury. It is ultimately for the jury to determine whether the particular fact has such significance.

[2-520] Suggested direction — "strands in a cable case"

It is assumed for the purposes of this direction that the jury have already been directed in terms of the **Onus and standard of proof** at [3-600] and as to **Inferences** at [3-150]. It is also assumed that the legal ingredients of each charge in the indictment will have been the subject of directions: see **Summing-up format** at [7-000].

Of course, where the Crown is relying upon direct evidence as well as a circumstantial case, the directions will have to acknowledge the existence of the two different types of case and the different approach to direct evidence which can prove the offence if it is accepted beyond reasonable doubt. The following directions are to be adapted if the Crown is intending to prove a particular element or elements of the offence charged by a circumstantial case rather than the guilt of the accused generally.

As I have already told you, the onus of proving [*the accused's*] guilt in respect of the [*charge(s)*] which it brings against [*the accused*] is on the Crown. It must establish [*his/her*] guilt beyond reasonable doubt. This means that, in respect of each of the essential legal ingredients or elements of the [*charge(s)*], you must be satisfied beyond reasonable doubt that the Crown has established its case before you would be entitled to bring in a verdict of "guilty" of [*that charge/those charges*].

I have also told you that your function as the judges of the facts in this case extends beyond coming to a conclusion as to whether you find that any particular fact has been established by the evidence. Your function also extends to drawing reasonable inferences or conclusions from the facts you find established. "Inference" and "conclusion" mean the same thing. I will use the word "conclusion" to refer to the line of reasoning that the Crown intends to prove by its circumstantial case.

In this case, the Crown relies [*wholly/partly*] … [*if partly, identify which part*] on what is called "circumstantial evidence". In relying upon circumstantial evidence, the Crown asks you to find certain basic facts and then from those facts to draw a conclusion as to the existence of a further fact(s).

Circumstantial evidence can be contrasted with direct evidence. Direct evidence is what a witness says that he or she saw or heard or did. It may be a witness saying that he or she saw an accused person do the act which the Crown says constitutes the alleged crime charged. It may be a video recording showing an accused person committing an act that the Crown relies upon as part of its case or it can be evidence from a witness that he or she heard an accused person admit to committing the crime. In a direct evidence case, if the evidence is accepted beyond reasonable doubt, it is capable of proving the guilt of the accused.

In a circumstantial case, the Crown lacks direct evidence of that kind. This does not mean that a circumstantial case is for that reason weaker than a case based upon direct evidence. Some direct evidence can be of very dubious quality. For example, direct evidence from a witness identifying an accused person as being the offender can be very unreliable because identification evidence can be honest but mistaken.

But in a circumstantial case no individual fact can prove the guilt of the accused. Where the Crown's case depends either wholly or in part on circumstantial evidence, then the jury is asked to reason in a staged approach. The Crown first asks the jury to find certain basic facts established by the evidence. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves they cannot prove the guilt of the accused. The jury is then asked to infer or conclude from a combination of those established facts that a further fact or facts existed. The ultimate fact the Crown asks the jury to find based upon the basic facts is that an accused person is guilty of the offence charged.

A case based on circumstantial evidence may be just as convincing and reliable as a case based upon direct evidence. This will depend upon the number and nature of the basic facts relied upon by the Crown when considered as a whole (not individually or in isolation). And it will depend upon whether all of the evidence leads to an unavoidable conclusion that the Crown has established the guilt of the accused. It is important that you approach a circumstantial case by considering and weighing, as a whole, all the facts you find established by the evidence. It is wrong to consider any particular fact in isolation and ask whether that fact proves the guilt of [*the accused*], or whether there is any explanation for that particular fact or circumstance which is inconsistent with [*the accused's*] guilt.

The correct approach is first to determine what facts you find established by the evidence. As I have already told you, any particular fact to be taken into account by you does not need to be proved beyond reasonable doubt. You then consider all of those facts together as a whole and ask yourself whether you can conclude from those facts that [*the accused*] is guilty of the offence charged. If such a conclusion does not reasonably arise, then the Crown's circumstantial case fails because you are not satisfied of guilt beyond reasonable doubt. Of course, it follows that you must find [*the accused*] not guilty.

But if you find that such a conclusion is a reasonable one to draw based upon a combination of those established facts then, before you can convict [*the accused*], you must determine whether there is any other reasonable conclusion arising from those facts that is inconsistent with the conclusion the Crown says is established. If there is any other reasonable conclusion arising from those facts that is inconsistent with the guilt of [*the accused*], the circumstantial case fails because you are not satisfied beyond reasonable doubt of [*the accused's*] guilt.

You should understand that drawing a conclusion from one set of established facts to find that another fact is proved involves a logical and rational process of reasoning. You must not base your conclusion upon mere speculation, conjecture or supposition.

[*Specify the nature of the Crown's circumstantial case and what fact(s) the Crown asks the jury to conclude or infer from a consideration of the evidence.*]

In order to satisfy you beyond reasonable doubt of [*the accused's*] guilt of the offence, the Crown must first persuade you that the inference or conclusion it relies upon is a reasonable one to draw from the facts that you find established by the evidence. It then must prove to you that the only reasonable inference or conclusion that can be drawn from a consideration of all the established facts viewed as a whole is that [*the accused*] is guilty of the offence. If there is any other reasonable conclusion open on those facts that is inconsistent with the conclusion the Crown asks you to find, then the Crown's circumstantial case has failed.

[*Summarise the Crown's circumstantial case and the defence arguments in reply.*]

[2-530] Suggested direction — "link in a chain case"

If it is a case in which there is a fact or facts essential to a finding of guilt or a finding in favour of the Crown (in respect of an essential matter which it must prove) and it is thought helpful to identify that fact or those facts, then after it/they have been identified, continue as follows:

The Crown asks you to draw an inference or conclusion of guilt [*as to an essential ingredient of the charge*] … [*specify ingredients*] beyond reasonable doubt from the [*fact(s)*] which I have summarised.

It will not be open to you to come to a conclusion favourable to the Crown unless you were, first to find as a fact that … [*refer to the essential intermediate fact*]. As that fact is essential to your coming to a conclusion in favour of the Crown — because the Crown must prove its case beyond reasonable doubt — then you would first have to be satisfied as to the existence of that particular fact beyond reasonable doubt. This particular fact must be proved beyond reasonable doubt not because it alone proves the guilt of [*the accused*] but because it is an essential step in the reasoning that the Crown asks you to follow in order to establish its case. Unless that fact is proved beyond reasonable doubt, the reasoning relied upon by the Crown must fail.

As I have already said, in relation to facts which are not essential to your process of reasoning, you would not consider those facts you find established by the evidence in isolation, but you would have regard to them as a whole.

If you were satisfied beyond reasonable doubt as to the existence of the essential fact, then you can take that fact together with all the other facts you find established and ask whether you can draw an inference or conclusion in favour of the Crown from those facts considered as a whole. If such a conclusion that the Crown asks you to find is not available then the Crown's circumstantial case fails. But it is for you to determine what conclusion, if any, can reasonably be drawn from the established facts, and then consider whether there is any other reasonable explanation for those facts

other than that of [*the accused's*] guilt. If there is no other explanation consistent with all the established facts considered together, then it would be open to you to convict [*the accused*].

If, however, you are not satisfied beyond reasonable doubt as to the essential fact to which I have referred, you must return a verdict of not guilty. You should also find [*the accused*] not guilty if, looking at the established facts as a whole you cannot conclude beyond reasonable doubt that [*he/she*] is guilty. As I have said, this would also be the position if, at the end of your deliberations, you are of the view that some other reasonable explanation exists for those facts other than that [*the accused*] is guilty.

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Trial instructions R–Z

Unfavourable witnesses

Procedure for fitness to be tried (including special hearings)

Views and demonstrations

Voluntary act of the accused

Witnesses — not called

Witness reasonably supposed to have been criminally concerned in the events

[The next page is 605]

Tendency, coincidence and background evidence

Pt 3.6 *Evidence Act* 1995 (NSW)

[4-200] Introduction

This section deals with directions to be given in relation to evidence that raises the bad character of an accused (sometimes referred to as "propensity evidence") where it is relevant to an issue in the trial.

Part 3.6 *Evidence Act* 1995 contains provisions dealing with the admissibility of tendency and coincidence evidence. This is the use of evidence of other acts of misconduct for a propensity purpose: that is, to reason that because of the accused's conduct in the past he or she is more likely to have committed the offence(s) charged.

However, there is a third category of evidence of a similar nature that is not dealt with by the *Evidence Act* explicitly but which falls within s 95 of the Act. This is evidence which is not being used to prove tendency or coincidence even though it may raise the accused's past misconduct. It is often referred to as relationship or background evidence. In sexual assault cases it is called "context evidence". This category of evidence is not used for propensity reasoning, as it is under ss 97 and 98, but to explain the conduct of the accused and/or another person (usually the alleged victim) against the background of the incident giving rise to the offence charged. This type of evidence is based upon the common law and has not been excluded by the provisions of the *Evidence Act*: *R v Quach* [2002] NSWCCA 519.

Evidence can be admitted for various reasons on a non-propensity basis within s 95: eg to rebut good character, *R v OGD (No 2)* (2000) 50 NSWLR 433; or to prove the state of mind of another person, *R v Fordham* (unrep, 2/12/97, NSWCCA) (non-consent of complainant).

It is always necessary for the trial judge to require the Crown to specify the purpose for which the evidence is to be placed before the jury as that will determine what sections of the Act apply: *DJV v R* [2008] NSWCCA 272 at [16]. Where evidence is not admitted as tendency or coincidence evidence then the issues will be whether the evidence is relevant and whether it should be rejected under ss 137 or 135 of the Act.

Generally where evidence is admitted under Pt 3.1 it will be necessary to give a warning against tendency reasoning where there is a real possibility that the jury might use it in that way: *Toalepai v R* [2009] NSWCCA 270 at [48]; *JMW v R* [2014] NSWCCA 248 at [147]–[150]; *R v Jiang* [2010] NSWCCA 277 at [44].

At the time tendency and/or coincidence evidence is adduced, consideration should be given to directing the jury as to the permissible use of the evidence and warning them against its misuse, particularly where they may wonder about the purpose of such evidence, for example, if it is not the subject of a charge in the indictment: *Qualtieri v R* [2006] NSWCCA 95 at [80].

The judge should avoid using the term "uncharged acts" in relation to evidence of this nature for whatever purpose it is being admitted: *HML v The Queen* (2008) 235 CLR 334 at [1], [129], [251], [399], [492]; *KSC v R* [2012] NSWCCA 179 at [64].

[4-210] Context evidence

Although not confined to particular offences, context evidence is most often admitted in child sexual assault cases. The complainant is permitted to give evidence of other acts of a sexual nature allegedly committed against him or her by the accused even though those acts are not charges in the indictment. The purpose of the evidence is to place the specific allegation(s) in the indictment in the context of the complainant's overall allegations against the accused in order to assist the jury in understanding the particular allegation(s) in the charge(s).

It is essential to identify the purpose of the evidence tendered by the Crown. Evidence is not admissible simply because it proves the relationship between the complainant and the accused: *R v ATM* [2000] NSWCCA 475. It must be necessary and capable of providing context to the complainant's allegations: *Norman v R* [2012] NSWCCA 230, otherwise the evidence is irrelevant or proves a tendency: *DJV v R* at [17], [29]–[30], [39]; *RWC v R* [2010] NSWCCA 332 at [130].

A discussion by the judge of "context evidence" as "relationship evidence" can cause confusion and result in a misdirection, because of the risk of the jury applying tendency reasoning: see for example *DJV v R*, *JDK v R* [2009] NSWCCA 76 at [37] and *SKA v R* [2012] NSWCCA 205 at [280]–[281].

As to the purpose of context evidence, see *RG v R* [2010] NSWCCA 173 at [38]. It answers hypothetical questions that may be raised by the jury about the allegations giving rise to the charges in the indictment. It may overcome false impressions conveyed to the jury such as that the incident "came out of the blue": *KTR v R* [2010] NSWCCA 271 at [90] or "occurred in startling isolation": *KJS v R* [2014] NSWCCA 27 at [38]. It may also be admitted to explain lack of complaint by the complainant: *DJV v R* at [28]; *KJS v R* at [34](v).

As to the distinction between context and tendency evidence see *Qualtieri v R* [2006] NSWCCA 95 particularly at [119]ff which was applied in *SKA v R*, above. In particular the evidence is not admitted to prove the guilt of the accused but may have the effect of bolstering the credit of the complainant.

As to context evidence see generally: P Johnson "Admitting evidence of uncharged sexual acts in sexual assault proceedings" (2010) 22(10) *JOB* 79; *Criminal Practice and Procedure NSW* at [3-s 97.15]; *Uniform Evidence Law* (15 ed, 2020) at [EA.101.150]; *Uniform Evidence in Australia* (3 ed, 2020) at 59-10.

[4-215] Suggested direction — context evidence

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

In addition to the evidence led by the Crown specifically on the count/s in the indictment, the Crown has led evidence of other acts of alleged misconduct by the accused towards the complainant. I shall, for the sake of convenience, refer to this evidence as evidence of "other acts".

The evidence of other acts is as follows:

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

It is important I explain to you the relevance of this evidence. It was admitted solely for the purpose of placing the complainant's evidence towards proof of the charges into what the Crown says is a realistic and intelligible context. By context I mean the history of the conduct by the accused toward the complainant as [*he/she*] alleges it took place.

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

Without the evidence of these other acts the Crown says, you may wonder, for example, about the likelihood of apparently isolated acts occurring suddenly without any reason or any circumstance to link them in anyway. If you had not heard about the evidence of other acts, you may have thought the complainant's evidence was less credible because it was less understandable. So the evidence is placed before you only to answer questions that might otherwise arise in your mind about the particular allegations in the charges in the indictment.

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

If, for example, the particular acts charged are placed in a wider context, that is, a context of what the complainant alleges was an ongoing history of the accused's conduct toward [*her/him*], then what might appear to be a curious feature of the complainant's evidence — that [*she/he*] did not complain about what was done to [*her/him*] on a particular occasion — would disappear. It is for that reason the law permits a complainant to give an account of the alleged sexual history between herself or himself and an accused person in addition to the evidence given in support of the charge/s in the indictment. It is to avoid any artificiality or unreality in the presentation of the evidence from the complainant. The complainant's account of other acts by the accused allows [*him/her*] to more naturally and intelligibly explain [*her/his*] account of what allegedly took place.

The Crown can therefore lead evidence of other acts of a sexual nature between the accused and the complainant to place the particular charge/s into the context of the complainant's account of the whole of the accused's alleged conduct.

However, I must give you some important warnings with regard to the use of this evidence of other acts.

Firstly, you must not use this evidence as establishing a tendency on the part of the accused to commit offences of the type charged. You cannot act on the basis that the accused is likely to have committed the offence/s charged because the complainant made other allegations against [*him/her*]. This is not the reason the Crown placed the evidence before you. The evidence has a very limited purpose as I have explained it to you, and it cannot be used for any other purpose or as evidence that the particular allegations contained in the charges have been proved beyond reasonable doubt.

Secondly, you must not substitute the evidence of the other acts for the evidence of the specific charges in the indictment. The Crown is not charging a course of misconduct by the accused but has charged particular allegations arising in what the complainant says, was a course of sexual misconduct. You are concerned with the particular and precise occasion alleged in [*the/each*] charge.

You must not reason that, just because the accused may have done something wrong to the complainant on some or other occasion, [*he/she*] must have done so on the occasion/s alleged in the indictment. You cannot punish the accused for other acts

attributed to [*him/her*] by finding [*him/her*] guilty of the charge/s in the indictment. Such a line of reasoning would amount to a misuse of the evidence and not be in accordance with the law.

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

[4-220] Background evidence

This is usually evidence of the misconduct of an accused that is being tendered for a non-propensity purpose and, therefore, is admissible under Pt 3.1.

The term "background evidence" is adopted here to refer to relationship and transactional evidence. Relationship evidence is used here in a narrow sense and is to be clearly distinguished from "context evidence" in child sexual assault offences. Not only is the use to be made of the evidence different from context evidence, but also the nature of the evidence will usually be different.

Background evidence places the accused's alleged conduct and/or state of mind within the surrounding events including the relationship between the accused and the victim, or a series of other incidents which form part of chain of events. Background evidence tends to have a close temporal connection with the incident giving rise to the charge. Background evidence is admissible to prove that the accused committed the offence charged as circumstantial evidence.

Background evidence, however, is not tendency evidence. It does not require tendency reasoning to make it relevant although as circumstantial evidence it relies upon available inferences or conclusions arising from the background evidence to prove the charge.

See generally: *Criminal Practice and Procedure NSW* at [3-s 97.1] and [3-s 97.10] and *Uniform Evidence Law* (15 ed, 2020) at [EA.101.150]; *Uniform Evidence in Australia* (3 ed, 2020) at 97-7.

(a) Relationship evidence

Simply because the evidence concerns the relationship between the accused and the alleged victim it does not follow that the evidence is admissible: *Norman v R* [2012] NSWCCA 230 at [33]. The significant questions on admissibility are:

(i) Is the evidence relevant?

(ii) What is the purpose for which it is being tendered?

The evidence can be admitted to show why certain persons acted as they did where that is a relevant consideration: *R v Toki (No 3)* [2000] NSWSC 999; *R v FDP* (2009) 74 NSWLR 645.

It can prove animosity between the accused and the deceased in order to rebut accident: see *Wilson v The Queen* (1970) 123 CLR 334; or to prove the accused's state of mind: *R v Serratore* [2001] NSWCCA 123; or to prove identification of the offender: *R v Serratore* (1999) 48 NSWLR 101.

It can be used to prove that the relationship between two persons was not an innocent one but was based upon the supply of drugs, see *Harriman v The Queen* (1989) 167 CLR 590; *R v Quach* [2002] NSWCCA 519, *R v Cornwell* (2003) 57 NSWLR 82.

Admissibility can depend upon the temporal connection between the evidence and the offence: *R v Frawley* [2000] NSWCCA 340 (6 weeks was considered not to be too long).

(b) Transactional evidence

Evidence showing a set of connected events (or a course of conduct) can be admissible even though revealing misconduct by the accused. Transactional evidence is distinguishable from tendency evidence and evidence proving an accused had a continuing state of mind: *Haines v R* [2018] NSWCCA 269 at [219], [224]–[226]. It will be admissible whether it occurred before or after the alleged offence: *R v Mostyn* [2004] NSWCCA 97 at [119]; *Haines v R* at [224]. It can be used to identify the accused as the offender or the state of mind of the accused at a particular time proximate to the time of the offence. The following are some further examples:

- Conduct during a massage before an alleged sexual assault: *Jiang v R* [2010] NSWCCA 277.
- Identification of the accused as the offender, see *O'Leary v The King* (1946) 73 CLR 566; *Haines v R* [2018] NSWCCA 269.
- Evidence which shows the state of mind of the accused at a time close to the commission of the alleged offence: see *R v Adam* [1999] NSWCCA 189 at [26]; *R v Player* [2000] NSWCCA 123 at [22]; *R v Serratore* [2001] NSWCCA 123; *R v Mostyn* at [135].
- A system of work: see *R v Cittadini* [2008] NSWCCA 256 at [26]–[27].

A direction warning the jury against tendency reasoning is necessary where there is a real possibility that the jury might use the evidence for a tendency purpose: *Jiang v R* at [44].

[4-222] Suggested direction — background evidence

The function of a direction in the case of background evidence is to inform the jury of the limited purpose for which the evidence is admitted and to direct them against using the evidence for tendency reasoning. The content of the direction will depend substantially upon the nature of evidence and the purpose it is being admitted. For example, if it is admitted to rebut a defence of accident. The direction should contain the following components:

The evidence led by the Crown [*recite the form of the background evidence*] was placed before you as evidence of background to the incident giving rise to the charge/s before you. The Crown's argument is that without that evidence you would not have the whole history necessary to understand the full significance of the incident upon which the charge is based. The Crown argues that this evidence:

[*State Crown argument eg explains why the accused and the victim acted in the way they did or reveals the state of mind of the accused at the relevant time or rebuts accident or identifies the accused as the offender*].

That is why this evidence was placed before you and how the Crown relies upon it in proof of the charge. However, that is the only reason the evidence is before you and

you cannot use it for any other purpose. Whether you give it the significance the Crown asks you to place on the evidence is a matter for you. But that is the only relevance it has to your deliberations.

In particular you must not use that evidence to reason that, because the accused has behaved in a certain way on a particular occasion, [*he/she*] must have behaved in that or a similar way on the occasion giving rise to the charge. You must not use that evidence to reason that the accused is the type of person who would commit the offence with which [*he/she*] has been charged. You cannot punish the accused for other conduct attributed to [*him/her*] by finding [*him/her*] guilty of the charge/s in the indictment. That is not the Crown's argument and it would be contrary to the law and your duty as a juror to use the evidence for a purpose other than the specific basis relied upon by the Crown.

[4-225] Tendency evidence

The admission of tendency evidence is governed by Pt 3.6 *Evidence Act*. It requires two preconditions: (a) the giving of notice and (b) that the evidence has "significant probative value".

(a) The requirement to give notice was considered in *R v Gardiner* [2006] NSWCCA 190 at [128], *Bryant v R* [2011] NSWCCA 26 and *Bangaru v R* (2012) 269 FLR 367 at [256] where the tendency of the accused was not specified. See also *R v AC* [2018] NSWCCA 130 at [21]ff. As to dispensing with the requirement of notice for the tendering of tendency evidence, see s 100 and *R v Harker* [2004] NSWCCA 427.

(b) As to the admissibility of evidence under s 97 see *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56; *IMM v The Queen* (2016) 257 CLR 300 and *Hughes v The Queen* (2017) 263 CLR 338. Tendency evidence should be distinguished from coincidence evidence: *R v Nassif* [2004] NSWCCA 433.

See generally *Criminal Practice and Procedure* at [3-s.94.1]ff; *Uniform Evidence Law* at [EA.96.30]ff; *Uniform Evidence in Australia* (3 ed, 2020) at Pt 3.6-1ff.

Section 94(4), which was inserted into the Act in 2020 and affects hearings which commenced from 1 July 2020, states that any principle or rule of the common law or equity preventing or restricting the admissibility of tendency or coincidence evidence is not relevant when applying Pt 3.6.

The following discussion of the caselaw must be read with the terms of s 94(4) in mind. *Taylor v R* [2020] NSWCCA 355 contains a useful summary of the caselaw: at [94]–[122].

In determining the probative value of evidence for the purposes of ss 97(1)(b) and 137, a trial judge should assume the jury will accept the evidence and, thus, should not have regard to the credibility or reliability of the evidence: *IMM v The Queen* at [51]–[52], [54], [58]; *The Queen v Bauer* at [69].

For evidence to be admissible as tendency it is not necessary that it exhibit an "underlying unity", "a modus operandi" or a "pattern of conduct": *Hughes v The Queen* at [34] approving the approach in *R v Ford* [2009] NSWCCA 306, *R v PWD* [2010]

NSWCCA 209, *Saoud v R* (2014) 87 NSWLR 481 and disapproving *Velkoski v R* (2014) 45 VR 680 at 682. There is no general rule requiring close similarity between the tendency evidence and the offence: *TL v The King* [2022] HCA 35 at [29]. Depending upon the issues in the trial, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it: *Hughes v The Queen* at [37]. Section 97(1) does not condition the admissibility of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. Commonly there may be a similarity between the tendency asserted and the offences charged: *Hughes v The Queen* at [39].

A "close similarity" between the tendency evidence and the charged offence will almost certainly be required where the evidence is adduced to prove the identity of an offender: *Hughes v The Queen* at [39]. However, this should be understood as referring to situations where there is little or no other evidence of identity apart from the tendency evidence and the identity of the perpetrator is "at large": *TL v The King* at [30], [38].

The test posed by s 97(1)(b) is whether the disputed evidence, together with other evidence, makes significantly more likely any facts making up the elements of the offence charged: *Hughes v The Queen* at [40]. In the case of multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible: *Hughes v The Queen* at [40].

Matters that must be considered under s 97

In assessing whether evidence has significant probative value in relation to each count, two interrelated but separate matters must be considered: first, the extent to which the evidence supports the tendency; and, second, the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but of whether an offence was committed, it is important to consider both matters: *Hughes v The Queen* (2017) 263 CLR 338 at [41].

Therefore, there is likely to be a high degree of probative value where: (i) the evidence, alone or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged: *Hughes v The Queen* at [41].

Unlike the common law preceding s 97(1)(b), the statutory words do not permit a restrictive approach to whether probative value is significant. However, the open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means it is inevitable that reasonable minds might reach different conclusions: *Hughes v The Queen* at [42]; *The Queen v Bauer* (2018) 266 CLR 56 at [61].

Prejudicial effect of tendency evidence

If the evidence is admissible under s 97, it must then satisfy s 101, which is concerned with balancing its probative value against its prejudicial effect. Since 1 July 2020, the test in s 101(2) is whether the probative value of the evidence outweighs the danger of unfair prejudice — the word "substantially" was removed. In *The Queen v Bauer* (2018) 266 CLR 56 at [73], the High Court described prejudice as conveying the idea of harm to an accused's interests by reason of a risk the jury would use the

evidence improperly in some unfair way. See also *Hughes v R* [2015] NSWCCA 330 at [189]–[193]. In *Hughes v The Queen* (2017) 263 CLR 338 at [17], the High Court articulated how tendency evidence may occasion prejudice to an accused:

> The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

In determining the prejudicial effect that evidence may have on an accused, it is legitimate and appropriate for the judge to take into account the ameliorating effect of any directions that may reduce the prejudicial effect: *Mol v R* [2017] NSWCCA 76 at [36]; *DAO v R* (2011) 81 NSWLR 568 at [171]. It is important that the prejudice to a defendant be specifically identified for the purposes of the weighing exercise required by s 101 and in considering appropriate directions: *BC v R* [2015] NSWCCA 327 at [107]–[110]; *Mol v R* at [36].

Concoction and contamination

Section 94(5) of the Act, which took effect on 1 July 2020, provides that in determining the probative value of tendency or coincidence evidence the court must not have regard to the possibility the evidence may be the result of collusion, concoction or contamination. Previously, *The Queen v Bauer* (2018) 266 CLR 56 at [69]–[70] had exempted from an exclusion of consideration of credibility and reliability a risk of contamination, concoction or collusion that is so great it would not be open to the jury rationally to accept the evidence. The Second Reading Speech of the Attorney General (Evidence Amendment (Tendency and Coincidence) Bill 2020, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1917) included: "Proposed section 94(5) … closes that small gap left open by the courts …".

[4-226] Standard of proof — s 161A Criminal Procedure Act 1986

Section 161A of the *Criminal Procedure Act* 1986 was inserted by the *Stronger Communities Legislation Amendment (Miscellaneous) Act* 2020 and took effect on 1 March 2021: s 2, *Stronger Communities Legislation Amendment (Miscellaneous) Act*.

Section 161A(1) states that when evidence is adduced as tendency or coincidence evidence, the jury must not be directed that evidence needs to be proved beyond reasonable doubt. The only exception is provided for in s 161A(3) when the case is one where there is a significant possibility the jury will rely on that evidence as being essential to its reasoning in reaching a finding of guilt: see *Shepherd v The Queen* (1990) 170 CLR 573; *The Queen v Bauer* at [86]. Such cases are likely to be rare. An example is *Adams v R* [2017] NSWCCA 215.

In *JS v R* [2022] NSWCCA 145, it was held at [47] that s 161A(1) was not restricted to only uncharged acts but also had application to charged acts which were cross-admissible on a tendency basis.

It is appreciated that the structure of a summing-up is a matter for the personal preference of judges. However, consideration should be given as to when a tendency direction might best be given to minimise the risk of confusion on the jury's part as to any standard of proof to be applied. For example, it may be given before the directions about the onus and standard of proof and the essential elements of the offence/s. Alternatively, it may be given shortly after directions concerning the drawing of inferences. The timing may vary depending on the issues in the particular trial.

The suggested direction at [4-227] is based on the text of s 161A. As with all suggested directions, the direction will require adaptation to suit the evidence and issues arising in the case at hand. The observations in *JS v R* should also be taken into account, including at [40] that the directions need to be crafted carefully to avoid undermining general directions concerning proof beyond reasonable doubt for each charge, and at [41] that the important direction is, that having weighed *all* of the relevant evidence, the jury must be satisfied beyond reasonable doubt that each element of each charge has been established. It was held in *JS* that such directions may also be necessary in relation to cross-admissible charged acts: [41].

In *BRC v R* [2020] NSWCCA 176, it was held that a warning a jury should not reason that because the accused had committed one or more other acts relied upon to establish a tendency the accused was a person of "bad character" may negate a tendency direction: Simpson AJA at [72]; Hamill J similarly at [96]. It was also held that a warning the jury "cannot punish" an accused for conduct the subject of other charges in the indictment would be inapposite: Simpson AJA at [74]. Hamill J likened this to a "no substitution" warning and agreed it was only apposite in respect of uncharged conduct: at [103], [105].

[4-227] Suggested tendency evidence direction — applies to charged acts, other acts or combinations thereof

The following suggested direction complies with s 161A(1) *Criminal Procedure Act* 1986 in not directing that tendency evidence needs to be proved beyond reasonable doubt. It will require modification by directing as to that standard of proof where the exception in s 161A(3) applies.

A tendency may be proved by evidence of "the character, reputation or conduct of a person, or a tendency that a person has or had": s 97(1) *Evidence Act*. The suggested direction refers only to "conduct" and will require modification in a case in which it is sought to be proved in an alternative way.

Inferential reasoning is usually involved in deciding whether a tendency has been established so it will be helpful if the jury has already been directed as to the care required in the drawing of inferences generally.

Trial judges should be alive to any possible prejudicial misuse of tendency evidence that might arise in a particular case and add any further warning that may be required.

Part of the Crown case is that the accused had a tendency to [*short description of the tendency*].

The Crown says you would be satisfied the accused had this tendency because of [*his/her*] conduct in [*describe the conduct relied upon by the Crown, be it the subject of counts in the indictment, or not, or both*].

The Crown says this conduct reveals the accused had a tendency to [*short description of the tendency*] which makes it more likely [*he/she*] committed the offence(s) charged in the indictment.

You will need to consider the evidence relating to this alleged conduct of the accused and decide whether [*he/she*] did in fact conduct [*him/herself*] in the way the Crown alleges. In doing so, you do not consider each of the acts in isolation. You should consider all the evidence and decide what conduct you are satisfied occurred.

If you decide that all, or at least some, of the conduct occurred, you then need to consider whether it enables the inference to be drawn that the accused had the tendency to [*short description of the tendency*].

You will recall the direction I gave to you about the care that needs to be applied to the drawing of inferences. I directed you to consider whether there might be alternative explanations for the evidence. I directed you that you should not draw an inference from the direct evidence unless it is a rational inference in the circumstances. You should bear in mind those directions when you are considering this part of the evidence.

If you are not satisfied that any of the conduct the Crown relies upon occurred, then there is no basis upon which the tendency could be inferred. In these circumstances, you must put the whole issue of tendency to one side and confine your consideration to the other parts of the Crown's case.

If you find the accused did [*short description of the tendency*], then you can use that in considering whether it is more likely [*he/she*] committed the specific offences with which [*he/she*] is charged. However, it is essential you consider in relation to each charge whether the accused [*acted in that particular way/had that particular state of mind*] on that specific occasion.

Finding the accused did have the tendency the Crown alleges is not enough to prove guilt. It may assist the Crown to prove the accused committed the offences, but it is not enough by itself. The question is whether it makes it more likely the accused conducted [*him/herself*] in the way the Crown alleges on any of the occasions that are the subject of the charges. That is the only way the accused's tendency to [*short description of the tendency*] may be used.

Ultimately, you must decide whether the specific offences with which the accused has been charged have been proved. That decision must be based upon the evidence relevant to each of the charges. This includes the evidence of the complainant about what the accused did. It will include the tendency alleged by the Crown, provided you are satisfied it has been established. It will also include [*briefly describe other categories of evidence that are relied upon*].

When considering whether a charge has been proved, you will have to decide whether the Crown has proved the essential elements of that charge. Shortly I will be telling you what those essential elements are for each of the charges.

[Add, if appropriate — usually where the conduct relied upon is not the subject of a count in the indictment: In directing you that the tendency evidence cannot be used other than in the way I have described, part of what I am saying is that you must not substitute the conduct of the accused on some other occasion for the conduct that is relied upon by the Crown to prove a particular charge.**]**

[Add, if appropriate: The evidence the Crown relies upon to establish that the accused had this tendency is of a type that might provoke people to have an emotional response to it because it might be regarded as a distasteful way for a person to have behaved. You must be careful to avoid allowing any emotional response or prejudice to distract you from a calm and objective assessment of this issue.**]**

[Add, if appropriate: Some of the evidence before you that is relied upon by the Crown to prove the tendency alleged concerns incidents that are not the subject of any charge in the indictment. If you are not satisfied that an incident that is not the subject of a charge occurred, then the evidence relating to it should be put completely aside. There is no other issue in the case to which it is relevant.**]**

I will now summarise the case for the Crown and the case for the accused on this issue of tendency.

The Crown argues [*summarise arguments as to how the conduct is said to establish the tendency and how the tendency is said to be relevant in proving the charges*].

The defence argues [*summarise the counter arguments*].

[4-230] Tendency evidence in child sexual assault proceedings — s 97A

Section 97A applies to proceedings in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue. It took effect on 1 July 2020. The Attorney General described the provision as altering the operation of s 97(1)(b) for child sexual abuse prosecutions in order to facilitate greater admissibility of tendency evidence (see Second Reading Speech, Evidence Amendment (Tendency and Coincidence) Bill 2020, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1914).

The transitional provisions for the amendment state s 97A does not apply where the hearing of proceedings began before the amendment commenced: Sch 2, cl 28. Where the application of the transitional provisions is in issue, it will be necessary to identify the relevant "hearing" of the proceedings and to determine when it began: *JW v R* [2022] NSWCCA 206 at [54]. For example, with respect to fitness to plead inquiries and special hearings under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (and its predecessor, the *Mental Health (Forensic Provisions) Act* 1990 (rep)), fitness inquiries are a preliminary step and the special hearing is the substantive hearing of the underlying proceedings: *JW v R* at [57]–[58].

Under s 97A(2) there is a presumption that tendency evidence about the following will have significant probative value for the purposes of ss 97(1)(b) and 101(2):

(a) the sexual interest the defendant has or had in children (regardless of whether they have acted on the interest)

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

A court retains a discretion to determine such evidence does not have significant probative value if satisfied there are sufficient grounds to do so: s 97A(4). However,

s 97A(5) lists the following matters (whether considered individually or collectively) the court is *not* to take into account in determining whether there are sufficient grounds, unless there are exceptional circumstances in relation to those matters:

(a) the tendency sexual interest or act is different from the sexual interest or act alleged in the proceeding

(b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred

(c) the personal characteristics of the subject of the tendency sexual interest or act (for example their age, sex or gender) are different to those of the subject of the alleged sexual interest or act

(d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act

(e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act,

(f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features

(g) the level of generality of the tendency to which the tendency evidence relates.

The terms "sufficient grounds" (in s 97A(4)) and "exceptional circumstances" (in s 97A(5)) are not defined. As to the former, the Attorney General, during the Second Reading Speech introducing this amendment, said (Second Reading Speech, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1915):

> such grounds should be considered in light of the objective of this reform to facilitate greater admissibility of tendency evidence and, specifically, the intent of the proposed section 97A to facilitate greater admission of tendency evidence in child sexual offences.

And of the latter:

> The threshold of exceptional circumstances … was chosen intentionally … to set a high bar. Further, it is intended that the exceptional circumstances must relate to those specific matters [identified in s 97A(5)], either individually or [in] combination, rather than relating to any other aspects of a particular matter. Matters outside those specifically enumerated in [s 97A(5)] should not be taken into account … to determine whether the exceptional circumstances threshold has been met.

[4-235] Coincidence evidence

The admissibility of coincidence evidence is governed by s 98 *Evidence Act*. It requires two preconditions: (a) the giving of notice and (b) that the evidence has "significant probative value".

See generally *Criminal Practice and Procedure NSW* at [3-s 98.1]ff; *Uniform Evidence Law* (15 ed, 2020) at [EA.98.60] ff; *Uniform Evidence in Australia* (3 ed, 2020) at 98-1.

(a) The requirement to give notice was considered in *R v Zhang* [2005] NSWCCA 437 at [131] and *Bryant v R* [2011] NSWCCA 26. As to the dispensing of the requirement of notice for the tendering of coincidence evidence, see s 100 and generally *R v Harke*r [2004] NSWCCA 427.

(b) The approach to the admissibility of coincidence evidence was considered in *DSJ v R* (2012) 84 NSWLR 758 at [6]–[9], [11], [56], [72]–[82], especially as to the role of the judge and that of the jury in the finding of facts. The decision approved *R v Zhang*. See also the discussion in *R v Gale* [2012] NSWCCA 174 at [29]–[31]. These three decisions were explained and applied in *R v Matonwal* [2016] NSWCCA 174 at [70]–[76]. As to the difference between coincidence and tendency evidence: see *O'Keefe v R* [2009] NSWCCA 121; *R v Nassif* [2004] NSWCCA 433 at [51]; *Doyle v R* [2014] NSWCCA 4 at [109].

If the evidence is admissible under s 98, it must then satisfy s 101, which is concerned with balancing its probative value against its prejudicial effect. The questions posed by ss 98 and 101 turn on a mode of reasoning based on the improbability that something was a coincidence: see the explanation in *Selby v R* [2017] NSWCCA 40 at [24]–[26]; *Ceissman v R* [2015] NSWCCA 74 at [42]. The improbability that something was a coincidence is not displaced by the fact that the two (or more) events bear some dissimilarities. The question is whether the dissimilarities are relevant in that they undercut the improbability of something being a coincidence and whether they detract from the strength of the inferential mode of reasoning permitted by s 98: *Selby v R* at [24], [26].

As to the possibility of concoction, see **Tendency evidence** at [4-225] above.

[4-237] Suggested direction where coincidence evidence admitted as part of a circumstantial case

In cases where the coincidence evidence is not the only evidence against the accused, there is no requirement that the coincidence evidence be proved beyond reasonable doubt: s 161A(1) *Criminal Procedure Act* 1986. However where there is a significant possibility that a jury will rely on the coincidence evidence as being essential to its reasoning in finding guilt, then it will have to be proved beyond reasonable doubt: s 161A(3) *Criminal Procedure Act* 1986. See [4-226] **Standard of proof — s 161A Criminal Procedure Act 1986**.

See the discussion at [4-200] **Introduction** concerning the timing of a direction when such evidence is given.

The coincidence evidence may arise from the charges in the indictment, in that the joinder of the charges was based upon the admissibility of each of the charges as evidence of coincidence in respect of each of the other charges, see for example *O'Keefe v R* [2009] NSWCCA 121. In such a case the suggested direction will need to be amended. However, simply because the charges are joined on the basis of the availability of coincidence reasoning, the judge is not required to direct the jury that it must find one of the offences proved beyond reasonable doubt before it can use that charge as basis of coincidence reasoning: *Folbigg v R* [2005] NSWCCA 23 at [103].

The suggested direction concerns proving the accused's identity but the coincidence evidence can be used as proof of a state of mind, for example, to rebut accident. Coincidence evidence is a form of circumstantial evidence and will usually form part of the circumstantial case together with other evidence that may indirectly prove the guilt of the accused.

As should be apparent to you, the accused is charged only with the offence/s stated in the indictment. You have before you evidence the Crown relies upon as establishing [*he/she*] committed [*that/those*] offence/s.

[*Briefly refer to that evidence other than the coincidence.*]

However, as part of its case against the accused, the Crown has led evidence the accused … [*specify the coincidence evidence*].

That evidence is before you because sometimes there may be such a strong similarity between two different acts and the circumstances in which they occur that a jury would be satisfied the person who did one act (or set of acts) must have done the other/s. That is to say, there is such a significant similarity between the acts, and the circumstances in which they occurred, that it is highly improbable the events occurred simply by chance, that is, by coincidence. The improbability of two or more events occurring by chance, or coincidently, may lead to a conclusion an accused person committed the act (or had the state of mind) the subject of the charges.

In this case, the Crown says that, provided you are satisfied the accused did … [*specify conduct which is the basis of the coincidence evidence*], then [*that/those*] act/s, and the circumstances in which [*it/they*] [*was/were*] done, were so similar to the act/s alleged in the indictment, that you would conclude beyond reasonable doubt that the accused must have committed the offence/s with which [*he/she*] has been charged.

The evidence of the pattern of behaviour can only be used in the way the Crown asks you if you find two matters: firstly, that the accused did the other acts; and secondly, that they are so similar to the acts giving rise to the charge, that you find it is highly improbable both acts were committed by a different person. If you accept those two matters, then you can use that evidence, together with the other evidence in the Crown's case, to be satisfied beyond reasonable doubt that the accused committed the acts giving rise to the offence/s charged in the indictment.

However this is the only way you can use the evidence of other acts. You cannot reason that because the accused may have committed the other acts [*he/she*] is the type of person who will commit criminal activity generally or that [*he/she*] is a person who is likely to have committed the offence/s charged. The evidence is not placed before you for that type of general reasoning. You cannot punish the accused for other conduct attributed to [*him/her*] by finding [*him/her*] guilty of the charge/s in the indictment.

[4-240] Suggested direction where coincidence evidence relied upon for joinder of counts of different complainants

Coincidence evidence may be admitted to bolster the evidence of the witnesses, for example in a case where the evidence of two complainants is admitted in respect of

charges in the indictment of offence committed against each: *R v F* [2002] NSWCCA 125; *Saoud v R* (2014) 87 NSWLR 481 at [49]–[53]. If the evidence of the two witnesses shows sufficient similarity to be admissible as coincidence evidence, it can be used to prove that the two witnesses would not make up those versions independently and by chance. In such a case the issue of concoction may arise and require a direction to the jury that they should reject the possibility of concoction before using the evidence for coincidence reasoning.

On the indictment there are allegations against the accused made by two complainants [*complainant A and complainant B*]. Of course what [*complainant A*] says about what [*he/she*] alleges the accused did to [*him/her*] is primary evidence relied upon by the Crown to prove the charge/s in respect of [*her/him*]. It is the same situation with [*complainant B*]. Ultimately you have to be satisfied beyond reasonable doubt that each complainant is honest and accurate in [*his/her*] allegations upon which the charges are based.

[*Detail in respect of each complainant the allegation and the evidence in respect of each complaint, for example, evidence of complaint, if any.*]

As I have explained to you, although the trial of the accused in respect of each of the complainant's allegations is being heard at the same time you still have to reach separate decisions on each of the allegations made by each of the complainants.

The trials of the charges concerning the two complainants are being heard together because the Crown says you can use the evidence given by one of the complainants as evidence against the accused in respect of the charges involving the other complainant. The Crown argues that, in determining whether it has proved beyond reasonable doubt the allegations made by [*complainant A*] and giving rise to the charges involving [*her/him*], you can take into account, in the way I shall explain to you, the evidence given by [*complainant B*] and visa versa.

The Crown argues that, because the allegations made by each of the complainants against the accused are so similar in the particular conduct attributed to the accused, it is highly likely that each is telling you the truth in giving [*his/her*] separate accounts. The Crown in effect says the accused has a particular and unusual way of conducting [*himself/herself*] or a peculiar pattern of behaving which is apparent from the accounts given by [*complainant A and complainant B*] when they are considered together. The Crown's argument is that the possibility of each making allegations that are so similar by chance or coincidence is so remote that the only explanation is the accused acted in the same way towards both of them and, therefore, their accounts are true. The Crown alleges that the similarities in the allegations are as follows:

[*Outline the similarities relied upon by the Crown as its coincidence evidence*].

The Crown's argument can only succeed if: firstly, you find that those similarities are present in respect of the allegations made by [*complainant A and complainant B*] and, secondly, that they are so similar they amount to a particular and peculiar pattern of behaviour such that it is highly improbable that each could be giving such an account by sheer chance or coincidence. In other words the Crown argues the accounts are such that the only explanation for their similarity is that they are true accounts of what the accused did to each. The more similar the accounts, then the less likely it may be that the accounts can be explained by chance or invention.

Of course if you do not accept that such similarities exist, or you reject the argument that they disclose a particular pattern of behaviour attributed to the accused, then you would reject the Crown's argument and look at the evidence of [*complainant A and complainant B*] independently without having regard to the evidence of the other.

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

You should understand that this argument of the Crown is the only reason why the allegations made by [*complainant A and complainant B*] are being dealt with together in the one trial. If you do not accept the Crown's argument, then you must disregard any similarities in the accounts and deal with the charges involving [*complainant A and complainant B*] completely separately. You cannot use the evidence of one to prejudice the accused in respect of the charges involving the other if you reject the Crown's argument as to the accounts disclosing a pattern of behaviour that can be relied upon as proof of the charges.

[The next page 651]

Procedures for fitness to be tried (including special hearings)

[4-300] Introduction

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

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

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

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

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

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

[4-302] Application of the Act

The Act applies to:

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

Section 38 of the 1990 Act continues to apply to proceedings where the defence of not guilty by reason of mental illness was raised before 27 March 2021 until a determination is made as to whether a special verdict should be entered or the defence is no longer being raised. However, if a special verdict of not guilty by reason of mental illness would, but for the new Act, have been found the court must instead find the special verdict of act proven but not criminally responsible: Sch 2, Pt 2, cl 5. In *R v Tonga* [2021] NSWSC 1064, Wilson J considered what was meant by "the commencement of proceedings" in the context of a mental illness (or impairment) defence under Pt 3 of the new Act, and concluded the proceedings commenced when the Crown presented the indictment: at [6]–[10]; see also *R v Siemek (No. 1)* [2021] NSWSC 1292 at [9].

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

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

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

Introducing these separate categories of impairment is one of the most significant changes made by the Act to the law as it was under the 1990 Act. Each are defined in the Act. The category into which an accused person falls will have significant consequences if there is a finding that they are not fit to be tried, with the need to refer the matter to the Mental Health Review Tribunal potentially obviated. For an accused with a cognitive impairment, it is ordinarily unlikely that their condition will change, or that they will become fit to be tried with time and treatment. See further, K Eagle and A Johnson, "Clinical issues with the *Mental Health and Cognitive Impairment Forensic Provisions* Act 2021" (2021) 33(7) *JOB* 67.

The NSW Law Reform Commission in its Report 135, *People with cognitive and mental health impairments in the criminal justice system: diversion*, 2012, pp 134–135, discussed the problems associated with conflating the concepts of mental illness and cognitive impairment and the disadvantages caused to those suffering from the latter as a result. This was part of the rationale for the recommendation that a separate statutory definition be included in the legislation [see recommendation 5.1–5.2].

A "mental health impairment" is defined in s 4 of the Act. A person has such an impairment if:

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory

(b) the disturbance would be regarded as significant for clinical diagnostic purposes, and

(c) the disturbance impairs the person's emotional wellbeing, judgment or behaviour: s 4(1).

See s 4(2) for a non-exhaustive list of the disorders from which a mental health impairment may arise.

A person does not have a mental health impairment if their impairment is caused solely by the temporary effect of ingesting a substance or by a substance use disorder: s 4(3).

A "cognitive impairment" is defined in s 5. A person has such an impairment if:

(a) the person has an ongoing impairment in adaptive functioning

(b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and

(c) the impairments result from damage to or dysfunction, developmental delay or deterioration of their brain or mind that may arise from a condition set out in s 5(2) or for other reasons.

Section 5(2) provides that a cognitive impairment may arise from any of the following conditions but may also arise for other reasons:

(a) intellectual disability,

(b) borderline intellectual functioning,

(c) dementia,

(d) an acquired brain injury,

(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,

(f) autism spectrum disorder.

[4-305] Fitness — federal offences

The *Crimes Act* 1914 (Cth) makes special provision for federal offenders in Pt IB, Div 6. In *R v Baladjam [No 13]* (2008) 77 NSWLR 630, it was held that the issue of the fitness of an accused charged with a federal offence could be determined by a judge in accordance with the relevant State procedures without infringing s 80 of the Constitution.

The State procedures for special hearings (conducted when an accused has been found unfit) found in Pt 4, Div 3 do not apply to federal offenders. The procedure to be followed is set out in s 20B of the *Crimes Act*. See, in particular, ss 20B(3) and 20B(5)–(7). Following commencement of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 on 27 March 2021, there is some greater commonality between the two fitness schemes. For example, ss 20BB and 20BC of the *Crimes Act* require a court determining the fitness to be tried of a federal offender to also determine whether or not they will become fit to stand trial within 12 months.

However, differences remain between the two schemes. Once a court finds a federal offender unfit to be tried, a determination must be made as to whether there is a prima facie case in respect of the offence: s 20B(3). The evidence that may be given to assist in determining this, and the course that may be taken by the accused is set out in s 20B(7). Once that decision is made, the court then goes on to determine whether or not the accused will become fit within 12 months.

Note: where fitness is raised with respect to an accused charged with State and federal offences, it is necessary to ensure that the requirements of both regimes are complied with.

[4-306] The procedural pathways when fitness is raised

When Pt 4 applies, at various stages of the proceedings the court will need to make decisions about the interim or long-term placement of the person facing criminal charges before the court. A court may seek assistance in such decisions from Justice Health and the Forensic Mental Health Network (FMHN) and/or the Mental Health Review Tribunal (MHRT).

The **Table** at [4-320] informs judicial officers and practitioners as to the procedural steps and how and when information and/or recommendations may be sought from the FMHN and the MHRT. Not every procedural detail of Pt 4 of the Act is addressed. See the glossary of relevant terms after the **Table** at [4-320].

The FMHN is part of NSW Health and provides:

- direct mental health care to those in correctional centres and the high security Forensic Hospital, and
- oversees the care provided by Local Health Districts to forensic patients in hospital and community settings.

When the accused has a cognitive impairment Justice Health and the FMHN will not assess and manage them. In such cases, it will be necessary for the defence to obtain an appropriate report, which is usually prepared by a psychologist or neuropsychologist. The **Procedure Table** at [4-320] indicates when that might be necessary. If the accused has a mental health impairment and dementia (a cognitive impairment) then the FMHN is likely to be involved.

The MHRT has prescribed statutory functions under Pts 5 and 7 of the Act. When a court is considering disposition decisions, the FMHN, the MHRT or, in the case of an accused who is cognitively impaired, an appropriately qualified professional may be able to assist with a report which includes recommendations concerning the appropriate care and treatment of the person.

[4-310] Part 4, Div 2 — procedures when fitness raised

Part 4 of the Act is headed "Fitness to stand trial". It applies to criminal proceedings in the Supreme and District Courts: s 35. The question of a person's unfitness to be tried for an offence:

- may be raised by any party to the proceedings or by the court: s 39
- should, so far as practicable, be raised before the person is arraigned but may be raised at any time during the hearing of the proceedings and more than once: ss 37(1), (2)
- is to be determined by the judge alone on the balance of probabilities: ss 38, 44(1).

An inquiry into an accused's unfitness to be tried must not be conducted in an adversarial manner and the onus of proof does not rest on a particular party: ss 44(4), (5).

The fitness test

Section 36 now creates an explicit statutory test for fitness, based on the principles set out in *R v Presser* [1958] VR 45, which were applied in *Kesavarajah v The Queen* (1994) 181 CLR 230. Section 36(1) provides that a person will be unfit to be tried if, because they have a mental health or cognitive impairment, they cannot do one or more of the following:

(a) understand the offence the subject of the proceedings,

(b) plead to the charge,

(c) exercise the right to challenge jurors,

(d) understand generally the nature of the proceedings as an inquiry into whether the person committed the offence with which the person is charged,

(e) follow the course of the proceedings so as to understand generally what is going on,

(f) understand the substantial effect of any evidence given against the person,

(g) make a defence or answer to the charge,

(h) instruct the person's legal representative so as to mount a defence and provide the person's version of the facts to that legal representative and to the court if necessary,

(i) decide what defence the person will rely on and make that decision known to the person's legal representative and the court.

The list is not exhaustive and does not limit the grounds on which a court may consider a person to be unfit to be tried for an offence: s 36(2).

Once fitness is raised, the pathways in the proceedings, and the points during proceedings at which FMHN assistance and information may be available, are set out in the **Table** at [4-320].

[4-315] Part 4, Div 3 — procedures for special hearings

Where a court determines the accused is unfit to be tried, it conducts a special hearing: ss 54, 56. The procedures for special hearings only apply to State offences. For Commonwealth offences see Pt IB, Div 6 *Crimes Act* 1914 (Cth).

A special hearing is conducted by judge alone unless an election for a jury is made by the accused, their lawyer or the prosecutor: s 56(9).

Special hearings are conducted as nearly as possible as a criminal trial, although the court may, if it considers it appropriate, modify the court's procedures to facilitate the accused's effective participation: ss 56(1), (2).

The accused is taken to have pleaded not guilty and may raise any defence that could properly be raised if the special hearing was an ordinary criminal trial: ss 56(5), (6). This permits the accused to raise the defence of mental health impairment or cognitive impairment in Pt 3 of the Act.

The verdicts available include:

(a) not guilty

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

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

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

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

See step 5–5B at [4-320].

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

[4-320] Part 4 procedure

Step 1: Fitness is raised	Section
Upon fitness first being raised the court may **dismiss** the charge (without conducting an inquiry) if of the opinion, having regard to any of the following, that it is inappropriate to inflict any punishment— (a) the trivial nature of the charge or offence, (b) the nature of the accused's mental health impairment or cognitive impairment, (c) any other matter the court thinks proper to consider.	42(4)
OR the court may make orders concerning the accused before holding an inquiry into the person's fitness including to: • adjourn proceedings • grant bail • remand in custody (not exceeding 28 days) • request the accused to undergo a psychiatric or other examination • request that a psychiatric or other report relating to the accused be obtained • discharge a jury • any other order that the court considers appropriate. Under s 43 where the accused is remanded in custody or bail is granted (but not met) the standard remand warrant is issued. Where the accused is granted bail and bail is to be entered at court, standard bail forms are used. See **step 3** when bail is granted. **Note 1:** The court, the accused or the prosecutor may raise the question of an accused's unfitness to be tried: s 39. **Note 2:** If fitness is raised before arraignment, the court must determine whether an inquiry should be conducted before hearing proceedings: s 40(1). If raised after arraignment, it must be dealt with in the absence of the jury: s 41. **Note 3**: If reports are ordered under s 43(d) or (e) discuss an appropriate timetable with the parties. The FHMN does not provide reports for accused persons suffering from a cognitive impairment. Reports should address whether, if the accused is found unfit to be tried, they will be likely to become fit within 12 months. **Note 4**: In appropriate cases where the accused has a cognitive impairment discuss with the parties whether consideration should be given to adapting or modifying the trial process.	43

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

Step 2: Court holds inquiry	**Section**
After an inquiry:	
1. If the accused is found **fit** to be tried, proceedings recommence or continue in accordance with the appropriate criminal procedures. Where the accused has been committed for trial, the court may remit matter to a magistrate for a case conference.	46, 52
2. If the accused is found unfit to be tried, the court must also determine whether, on the balance of probabilities, during the next 12 months, the accused: • **will not** become fit to be tried — **see step 2A** • **may** become fit to be tried — **see step 2B**	47, 48, 49
Note 1: To assist in determining whether or not the accused is likely to become fit within 12 months, it may be necessary for the court to hear evidence from the psychiatrists and/or psychologists who prepared reports for the hearing: see, for example, *R v Risi* [2021] NSWSC 769.	
Note 2: A finding under s 47(1)(b), that an accused *will not* become fit, should only be made if there is a real certainty about their lack of fitness during the relevant 12-month period because the effect of such a finding is to exclude the MHRT from an assessment of the accused: *R v Risi* [2021] NSWSC 769 at [55].	
If the court finds the accused is unfit to be tried, it can make the following orders:	47(2)
• adjourn proceedings • grant bail (see **step 3**) • remand in custody • discharge a jury • any other order the court thinks appropriate.	
See order where bail is granted or where order is to remand the accused.	

Step 2A: Court finds accused unfit and will not become fit within 12 mths	**Section**
If the court, after an inquiry, finds the accused will not become fit within 12 months, the court holds a special hearing under Pt 4, Div 3 — **see step 5**	47(1)(b), 48
Note 1: Before holding a special hearing, the court must obtain advice from the DPP as to whether or not further proceedings will be taken: s 53(2). Where no further proceedings will be taken, the court must order the accused's release: s 53(3).	53
Note 2: As to the meaning of "will not" see *R v Woodham* [2022] NSWSC 1154 at [18]–[23].	

Step 2B: Court finds accused unfit but may become fit within 12 mths — referral to MHRT	**Section**
If the court determines the accused is unfit to be tried and **may** become fit to be tried within 12 months it must refer them to the MHRT for review: s 49(1). **See step 4.**	49
The court may grant the accused bail for no longer than 12 months on being notified of a determination of the MHRT under s 80 that the accused has become fit to be tried: s 49(2).	

Step 2B: Court finds accused unfit but may become fit within 12 mths — referral to MHRT	**Section**
While an accused can be remanded in custody, it is doubtful the court has either the power to order they be detained in a particular facility or type of facility (*R v Risi* at [59]–[60]) or to refer the matter back to the DPP to consider whether the prosecution continue (*R v Risi* at [61]).	47(2)(d), (e)

Step 3: Bail	**Section**
If bail is granted for an accused suffering from a mental health impairment, the FMHN will, if requested, assess them for suitability for care by *community mental health services* while on bail, when the court finds the person is: (a) unfit to be tried; and (b) suffers from a mental health impairment. To arrange an assessment and report by FMHN and, where appropriate, care and/or treatment whilst on bail, it is suggested the court: 1. Include a bail condition that the person attend FMHN for assessment if directed to do so by the Statewide Clinical Director Forensic Mental Health of FMHN. 2. Adjourn the proceedings with liberty to relist the matter upon provision of a report by FMHN. 3. Contact the office of the Statewide Clinical Director Forensic Mental Health (FMHN phone: 02 9700 3027) to arrange assessment. 4. Provide any psychiatric or psychological reports filed in the proceedings. Within eight weeks FMHN will provide a report to the court, the DPP and the person's legal representative indicating the outcome of the assessment, which: (a) If the person is suitable for community care, makes a referral of the person to a *community mental health service*; or (b) If the person is not suitable for community care, makes recommendations for treatment other than in a community setting. Upon receipt of the report the court, DPP or person's legal representative may relist the matter and the court may amend bail conditions or make other appropriate orders. If bail is granted for an accused suffering from a *cognitive impairment*, note that the FMHN cannot provide reports and the defence must provide reports and information to the court as to an appropriate placement so that appropriate bail conditions may be framed.	

Step 4: Referral to MHRT	**Section**
The MHRT must review the accused as soon as practicable upon referral by the court under s 49(1) to determine whether they have become fit.	78(b), 80
1. If the MHRT determines the accused has become fit, the MHRT notifies the court, DPP and the accused's legal representative and the proceedings recommence in accordance with the appropriate criminal procedures: s 50.	50
2. If the MHRT determines the accused has not and will not, become fit within 12 months following a review, then the MHRT notifies the court, DPP and the accused's legal representative and a special hearing under Div 3 is held: s 51.	51

Step 4: Referral to MHRT	Section
The court must obtain advice from the DPP as to whether or not further proceedings will be taken by the Director in respect of the offence: s 53(2). If the DPP advises no further proceedings will be taken the court must order the accused's release: s 53(3). If further proceedings will be taken — **see step 5**.	53
3. If the MHRT determines the accused is unfit but may become fit within 12 months, the MHRT reviews the accused in accordance with Pt 5, Div 3 (s 80) — **see step 4A**. The MHRT must make the determination as to fitness on the balance of probabilities: s 80(3).	80
On review, the MHRT may make an order as to: 1. the patient's detention, care or treatment in a mental health facility, correctional centre, detention centre or other place, or 2. the patient's release (either conditionally or subject to conditions). Matters the MHRT must consider when determining whether to release a forensic patient are set out in s 84. The conditions that may be imposed on release are set out in s 85.	81

Step 4A: Ongoing MHRT review for an accused found unfit	Section
The MHRT will continue to review an accused (now a forensic patient) who is unfit and detained until the special hearing has been conducted. If the MHRT is of the opinion that a forensic patient has become fit to be tried, the MHRT will notify the court, DPP and the accused's legal representative: ss 53(1)(c), 80(2)(a).	78–80
(a) If the DPP does not proceed with the prosecution, the person is released: s 53(3).	53
(b) If the DPP proceeds with the prosecution, the person stops being a forensic patient and the matter continues as ordinary criminal proceedings (s 50(1)). The court must not hold a further fitness inquiry merely because the MHRT notifies the court the defendant has become fit: s 50(2). **Note**: A forensic patient is defined in s 72. The definition does not include an accused found unfit to be tried who has been released on bail: s 72(2).	50

Step 5: Special hearing	Section
Special hearing	59(1)
Procedures for special hearings are set out in s 56. A special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings: s 56(1). The matter is determined by judge-alone unless a party elects to have the matter determined by a jury: s 56(9).	56
There are three possible verdicts:	
1. Not guilty (a) person ceases to be a forensic patient (b) no disposition decision	59(1)(a), 60

Step 5: Special hearing	Section
2. Special verdict of act proven but not criminally responsible (NCR) **see step 5A**	59(1)(b)
3. A qualified finding of guilt based on limited evidence **see step 5B**	59(1)(c), (d)
The court may make an order for a report by a forensic psychiatrist (or person of a class prescribed in the regulations) not currently treating the defendant, addressing whether the defendant's release is likely to seriously endanger theirs or the public's safety. **Note**: If a jury is determining the special hearing, a direction such as that at [4-331] will be required: see s 56(11).	66

Step 5A: Act proven but not criminally responsible	Section
Where a special verdict of act proven but not criminally responsible (NCR) is given, the court makes orders as prescribed by s 33 including:	59(1)(b), 61
1. **Remand in custody until further order made under s 33**	33
2. **Detention in place and manner as court thinks fit until released by due process of law**; or	
3. **Unconditional or conditional release** (before making such an order, the court may request a report by a forensic psychologist not currently involved in treating the accused as to their condition and whether they are likely to seriously endanger their safety or that of any member of the public. The accused is not to be released unless the court is satisfied on the balance of probabilities that the accused's safety or that of the public will not be seriously endangered by their release).	
4. **Such other order court considers appropriate**	
Unless an order is made for the accused's unconditional release, the court must refer them to the MHRT to be dealt with under Pt 5 — see note in s 33.	67
For an accused suffering from a mental health impairment, the court may be assisted by the FMHN with recommendations as to an appropriate placement. Upon a finding of act proven but not criminally responsible the FMHN, if requested, will provide a report to the court. The procedure to obtain this information is similar to obtaining a sentence assessment report and is as follows: 1. Adjourn the proceedings (the FMHN requires at least 8 weeks to conduct an assessment and prepare a report) 2. The court may direct that during the adjournment: (a) Detention at the *Long Bay Hospital* (**not** Long Bay Forensic Hospital) unless an alternative appropriate interim placement is identified by the person's legal representative (b) The office of the Statewide Clinical Director Forensic Mental Health (FMHN phone: 02 9700 3027) arrange for FMHN to provide a disposition report to the court before the next court date. The report will address: (i) If the court is considering releasing the person: Recommended conditions as to care and/or treatment in the community.	66

Step 5A: Act proven but not criminally responsible	**Section**
(ii) If the court is considering detaining the person: Recommended placement in a prison or mental health facility. (The court later considers the recommendations of the FMHN report). See order for release under s 33 and order for detention. **Note**: The defence will need to make arrangements to obtain a report for an accused suffering from a cognitive impairment. If the accused is in custody and suffering from a cognitive impairment only, then such a report may be obtained from the Specialist Disability Service of Corrective Services.	

Step 5B: Offence committed on limited evidence	**Section**
If the court finds that on the limited evidence before it, the accused committed the offence charged or an alternative offence (a qualified finding of guilt) then:	59(1)(c), (d), 62
1. If the court would not have imposed imprisonment, the court may impose a penalty or make any other order it might have made on conviction of the accused in a normal criminal trial. The court must inform the MHRT. **Note**: in such cases, the accused is not a forensic patient and, unless an order is made requiring supervision by Community Corrections, there is no State supervision.	63(3), (6)
2. If the Court would have imposed a sentence of imprisonment, it must: (a) nominate a limiting term, (b) refer the person to the MHRT; and (c) make an interim order with respect to custody. See order under s 65. In determining a limiting term or other penalty the court must take into account factors in s 63(5). **Note 1**: See **step 5A** as to reports that may be provided pursuant to s 66. **Note 2**: The defence will need to make arrangements to obtain a report for an accused suffering from a cognitive impairment. If the accused is in custody and suffering from a cognitive impairment only, then such a report may be obtained from the Specialist Disability Service of Corrective Services. **Note 3**: On application by the Attorney General, the court may order an extension or interim extension of the defendant's status as a forensic patient under ss 121, 130 respectively and an examination under s 126(5). See *AG (NSW) v Bragg (Preliminary)* [2021] NSWSC 439 at [19]–[32] and *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* [2022] NSWSC 537 at [12]–[32] in respect of the statutory requirements and various tests to be applied when determining whether to grant an extension order.	63(2), 65

Step 6	Section
The MHRT continues to review a forensic patient who has been found unfit and ordered to be detained, following a special hearing. If the MHRT is of the opinion that a forensic patient has become fit to be tried, the MHRT will notify the Court and the DPP. **See step 4A**.	

Glossary/abbreviations

Cognitive impairment: defined in s 5 of the Act. See [4-304].

Community mental health service: generally means a Local Health District. Local Health Districts are constituted under s 17 *Health Services Act* 1997. They provide a range of health services for residents of their area including mental health services. Eight Local Health Districts cover the Sydney metropolitan region, and seven cover rural and regional NSW.

Disposition decision: an interim or final order in accordance with the powers conferred by the Act determining where a person will be placed.

FMHN: Forensic Mental Health Network. Part of the Justice and Forensic Mental Health Network, a statutory health corporation constituted under the *Health Services Act* 2011: Sch 2. The FMHN is the principal service provider and coordinating agency for forensic mental health services in NSW.

Forensic Hospital: a "high secure" forensic mental health facility located at 1300 Anzac Parade, Matraville, administered by NSW Health (Justice Health).

Forensic patient: defined in s 72 as a person who is detained in a mental health facility, correctional centre, detention centre or other place, or released from custody subject to conditions, pursuant to an order under:

1. ss 33, 47, 50, or 65 of the Act , or
2. s 7(4) *Criminal Appeal Act* 1912 (including that subsection as applied by s 5AA(5) of that Act).

A defendant who has been found unfit and released on bail is not a forensic patient: s 72(2).

A forensic patient can be made the subject of an extension order (see Pt 6 of the Act). Section 158 provides that, at least 6 months before the expiry of a limiting term or extension order to which a forensic patient is subject, the MHRT must inform the Ministers responsible for the Act of the date the limiting term (or if applicable extension order) will expire. Part 6 Div 3 sets out the process by which the Supreme Court can (on application of the relevant Minister) make an order for the extension of a person's status as a forensic patient.

Inquiry: an inquiry under Pt 4 Div 2 of the Act conducted by judge alone in order to determine whether a person is unfit to be tried for an offence.

Long Bay Hospital: A hospital within Corrections. Maximum security hospital jointly administered by Corrective Services and the NSW Department of Health (Justice Health) with three wards allocated for long-term and short-term forensic patients. Located at 1300 Anzac Parade, Matraville**.**

Mental health impairment: defined in s 4 of the Act. See [4-304].

NCR: act proven but not criminally responsible.

Reports: a report prepared, in the context of proceedings under the Act, by the FMHN at the request of a court to assist in determining a disposition decision. The power to order such a report arises under either s 33 or s 66 of the Act. The types of matters addressed by a report include, for example:

1. In the case of a person on bail or to be released into the community, suggestions as to appropriate conditions taking into account the terms of s 33(3) of the Act
2. In the case of a person detained in a mental health facility, advice on:
   (a) Placement options appropriate for the person given their mental health impairment and current clinical presentation; including:
      (i) Community release if appropriate in respect of the circumstances and permissible under the Act
      (ii) Interim placement options
      (iii) Long-term placement options (which may include Long Bay Hospital, Forensic Hospital, or another *mental health facility*)
   (b) Timeliness of placement options and interim placement options.

Special hearing: in a special hearing, the person is taken to have pleaded not guilty. The purpose is to ensure acquittal unless an offence is proved to the criminal standard: Pt 4, Div 3.

[4-325] Forms of orders for referrals to the Mental Health Review Tribunal under State law

Orders — fitness

I find the accused unfit to be tried and that they *may* become fit to be tried within twelve months.

In accordance with s 49 *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020, I refer this matter to the Mental Health Review Tribunal.

I direct the court registry to provide the following documentation to the Tribunal:

1. a copy of this finding
2. a copy of any orders made for detention or bail
3. a transcript of these proceedings
4. a copy of any psychiatric reports tendered to the court during these proceedings
5. a copy of any additional reports tendered as evidence to the court pertaining the person's fitness to stand trial, and
6. the police fact sheet (if available).

[4-327] Documentation required in referral of court matters to Mental Health Review Tribunal

The Tribunal reviews forensic patients under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 including where the court finds:

- the accused is unfit to be tried or is unfit but may become fit within 12 months
- the accused is guilty on the limited evidence available and subject to a limiting term, and
- the act constituting the offence is proven but the accused is not criminally responsible

Where a person has been referred to the MHRT by the court, the Tribunal requires a copy of:

- the order of the court finding the person unfit
- the indictment (or court attendance notices for defendants not yet committed for trial)
- the transcript of the court proceedings
- the judgment of the court finding the person unfit
- any psychiatric reports tendered during the fitness proceedings
- any additional reports tendered as evidence to the court pertaining to the person's fitness to stand trial,
- the police facts, agreed facts or the Crown Case Statement (if available),
- any victim impacts statements (if relevant).

[4-330] Extension orders

Sections 121 and 122 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 empower the Supreme Court to make an order extending a person's status as a forensic patient where there is a high degree of probability that—

(a) the forensic patient poses an unacceptable risk of causing serious harm to others if the patient ceases to be a forensic patient, and

(b) the risk cannot be adequately managed by other less restrictive means.

See *AG (NSW) v Bragg (Preliminary)* [2021] NSWSC 439 at [25]–[28] and *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* [2022] NSWSC 537 at [21]–[25] for interpretation of the terms "high degree of probability", "serious harm" and "unacceptable risk". See also, guidance on assessing whether the risk can be managed by other less restrictive means: *AG (NSW) v Bragg (Preliminary)* at [29] and *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* at [26]–[31].

The matters to consider when determining whether to make the order are set out in s 127(2) and include the safety of the community, and reports from registered psychologists, psychiatrists, or registered medical practitioners. If, following the preliminary hearing, the court is satisfied the matters alleged in the documentation supporting the application would, if proved, justify the making of an extension order, the court must make orders appointing two qualified psychiatrists, or two registered

psychologists, or two registered medical practitioners, or any combination of two persons aforementioned, to conduct separate examinations of the forensic patient and to give reports to the court, and direct the forensic patient to attend those examinations: s 126(5). Whether the making of an extension order would be "justified" depends, in part, upon s 122, which governs when an extension order can be made: *AG (NSW) v Bragg (Preliminary)* at [23].

Sections 130 and 131 allow the Supreme Court to make interim extension orders. The court's task is not to assess the matters alleged in the documentation or to attempt to predict what would be the result on the final hearing of the matter: *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* at [18]. The words "would … justify the making" of an interim order in ss 126(5) and 130(b) impose a lower standard than that which applies to the making of the final order itself. There is only a requirement to be satisfied the making of a final order would be justified, in the sense of being reasonably open, in the light of the matters alleged in the supporting documentation, assuming them to be proved: *AG (NSW) v Bragg (Preliminary)* at [31]; *AG (NSW) v Wright (by his tutor Johnson) (Preliminary)* at [32].

[4-331] Suggested direction — the nature of special hearing

The appropriate directions to be given to a jury determining a special hearing were considered in *Subramaniam v The Queen* [2004] HCA 51 in respect of the identical predecessor provision, s 21(4) *Mental Health (Forensic Provisions) Act* 1990.

The High Court held that directions given in that case were inadequate and the court drafted an appropriate direction to assist trial judges — it was acknowledged that precisely what was to be said to the jury would need adaption to the particular facts but gave the following guide as to what should be said:

> The court [*or Mental Health Review Tribunal where s 80 applies*] has found that the accused is unfit to be tried on the present charge(s) in the normal way because [*he/she*] does not have the mental [*and/or cognitive*] capacity to understand the basic requirements of a fair and just trial. Consequently, the law requires the accused be tried under a special procedure.
>
> The accused's unfitness for a normal trial may or may not be apparent to you as the trial proceeds. That is because unfitness for trial, may arise for any one or more of several reasons. [*He/she*] may not understand the nature of the charge against [*him/her*], or be able to decide whether [*he/she*] has a defence to it. [*He/she*] may not be able to make a rational decision about whether [*he/she*] is guilty or not guilty, or how to plead to the charge. [*He/she*] may not be able to understand generally the nature of the criminal proceedings and what their course and outcome may mean to [*him/her*]. The unfitness may be an unfitness to give [*his/her*] lawyers instructions about what [*his/her*] defence is or how the prosecution evidence is wrong, or should be questioned, or it may be an inability to apply [*himself/herself*] to the proceedings in an informed or constructive way. Whether or not any one of these matters is apparent to you, you must accept that the accused is unfit to be tried in a normal way because the law insists an accused have the mental capacity to do all of these things.
>
> How then is this special hearing to be conducted and in what ways does it differ from a normal criminal trial? Well, it could be different in one or more of the ways to which I

have referred, that is, in the way in which [*the accused*] is able or unable to participate or contribute to [*his/her*] defence. In every criminal trial an accused may or may not choose to give evidence. That remains so in a special hearing such as this, but an unfit person may not be capable of making a reasoned decision about that, or indeed other matters concerning the hearing. At a special hearing the accused is taken to have pleaded not guilty to the charges against [*him/her*], unlike in a normal trial when they may enter a plea of either guilty or not guilty. The law is intended to ensure a special hearing does not prejudice the accused any more than [*his/her*] unfitness already may do. [*He/she*] may raise, or have raised on [*his/her*] behalf whatever defences a fit person could raise in a normal trial. [*He/she*] may, or may not, give evidence. [*He/she*] must, however have legal representation and may not, as some mentally [*and/or cognitively*] fit accused persons do, choose to represent [*himself/herself*].

What are the purposes of a special hearing? The first is to see that justice is done, as best it can be in the circumstances, to the accused and the prosecution. [*He/she*] is put on trial so that the case against [*him/her*] can be determined. The prosecution representing the community has an interest also in seeing that justice be done. A special hearing gives the accused an opportunity of being found not guilty, in which case the charge ceases to hang over [*his/her*] head, and if [*he/she*] requires further treatment it may be given to [*him/her*] outside the criminal justice system.

You also need to keep in mind that you will have to reach your verdict based on the limited evidence available. There are various ways evidence at a hearing of this nature may be limited. For example, the accused may be unable to give evidence, or unable to give adequate instructions to [*his/her*] lawyers about which witnesses might be called to assist [*his/her*] case, or, as to matters on which cross-examination could be based.

The next matter I must explain to you concerns the verdicts you may give in this case. Those verdicts are “not guilty”, “special verdict of act proven but not criminally responsible” or “the accused committed the offence/s based on the limited evidence available”.

If you find the accused not guilty then that is the end of the matter and [*he/she*] will be free to go. If, however, you find that on the limited evidence available [*he/she*] did commit the offence(/s), it is my duty to decide whether, had [*he/she*] been fit to be tried in a normal way, and been convicted, [*he/she*] would have been sentenced to a term of imprisonment, and if so the appropriate term. If I take the view a term of imprisonment would not have been appropriate, I may impose another penalty just as I might in the case of a person fit to be tried, such as a fine, a community correction order or a community release order.

If I nominate a term of imprisonment the accused is referred to the Mental Health Review Tribunal, to decide whether *[he/she]* is still suffering from a mental health [*and/or cognitive*] impairment and whether [*he/she*] should be detained in [*a mental health facility*] for treatment. If the accused should become fit to be tried before the period equivalent to any term of imprisonment I might nominate expires, the accused may be tried in the normal way for the offence. But this would be a matter for the prosecuting authorities to decide.

Finally, if you return a special verdict of act proven but not criminally responsible, it will be my duty to decide whether the accused will be held in custody or released,

either with or without conditions. I will only release [*him/her*] if I am satisfied it will not seriously endanger [his/her] safety or the safety of any member of the public. If the accused is not released unconditionally, [*he/she*] will be referred to the Mental Health Review Tribunal which may make an order about [*his/her*] detention, care, treatment or release. Again, the Tribunal will not release the accused unless satisfied [*his/her*] safety and the safety of the public will not be seriously endangered.

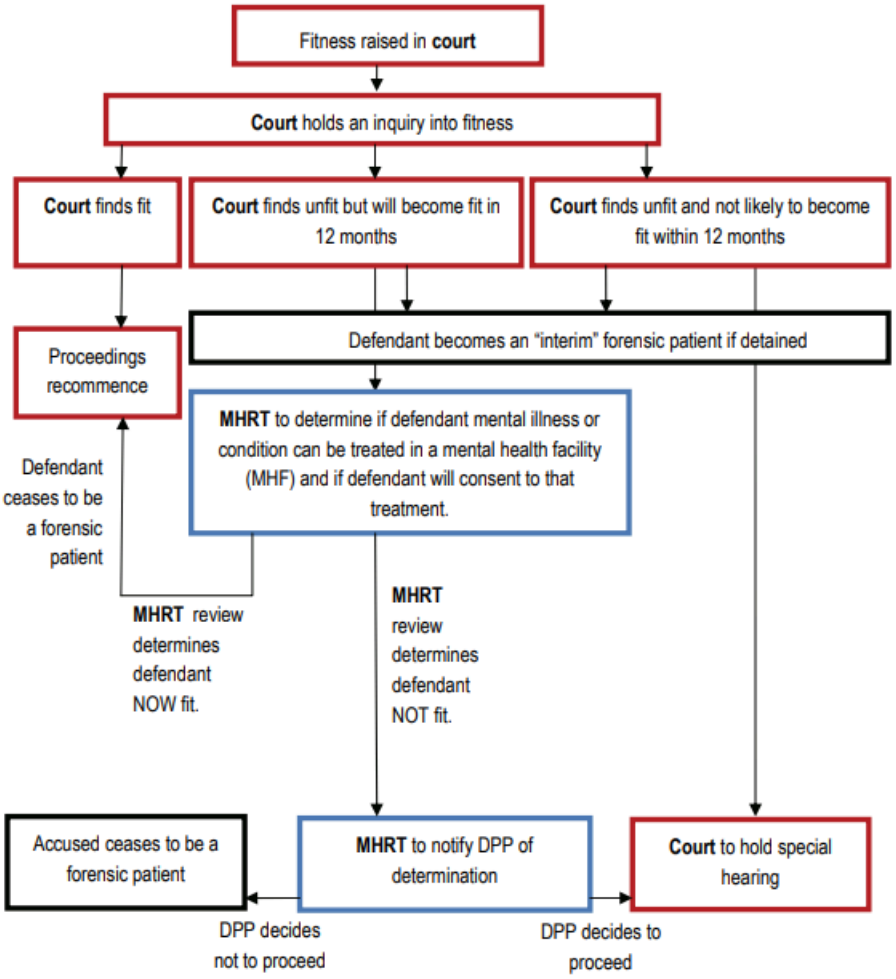
I should emphasise that although I am telling you about the legal and practical consequences of any verdict you may reach in order for you to understand the nature of the special proceeding in which we are engaged, your duty is confined to deciding whether, on the limited evidence available, the prosecution has proved beyond reasonable doubt that the accused committed the offence(s) charged. The consequences of the verdict and what happens to the accused afterwards are matters for the Mental Health Review Tribunal, the prosecuting authorities and the court, not for you.

[4-333] Additional references

See also:

- M Ierace, "Introducing the new Mental Health and Cognitive Impairment Forensic Provisions Act 2020" (2021) 33(2) *JOB* 15.
- Second Reading Speech, Mental Health and Cognitive Impairment Forensic Provisions Bill 2020, NSW, Legislative Council, *Debates*, 16 June 2020, p 51.

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



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