Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 74

September 2023

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

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SUMMARY OF CONTENTS

Update 74

Update 74, September 2023

Update 74 amends the *Criminal Trial Courts Bench Book* to incorporate recent case law and legislative developments. Two new chapters, **Judge-alone trials** and **Sexual act** have been added to the Book and a number of chapters have been significantly revised.

Outline of trial procedure

- The chapter at **[1-000]**ff has been revised and includes new commentary at **[1-005]** on pronunciation and forms of address to be used for counsel, parties, children, witnesses, interpreters, solicitors and others relevant to the case.

New chapter: Judge-alone trials

- A new chapter at **[1-050]**ff provides commentary on the relevant statutory provisions and case law applying to judge-alone trials.

Child witness/accused

- **[1-118] Unsworn evidence — conditions of competence** to add reference to *SC v R* [2023] NSWCCA 111 where the conviction was set aside for failure of the court to comply strictly with s 13(5)(c) of the *Evidence Act* 1995.

Jury

- The chapter at **[1-440]**ff has been revised and includes updated suggested (oral) directions at the commencement of the trial following empanelment (at **[1-490]**) and reference to the following cases:
  - *Sun v R* [2023] NSWCCA 147 and *Addo v R* [2022] NSWCCA 141 at **[1-505]** regarding discretionary discharge of individual jurors
  - *Cook (a pseudonym) v R* [2022] NSWCCA 282 at **[1-535]** regarding written directions, and
  - *Fantakis v R* [2023] NSWCCA 3 at **[1-540]** regarding verdict juries.

Oaths and affirmations

- **[1-620] Oath and affirmation for sheriff's officer upon sequestration of jury** to add an example of an oath and affirmation for sheriff's officer upon sequestration of jury.

Complicity

- **[2-710] Suggested direction — accessory before the fact** to add reference to *Jaghbir v R* [2023] NSWCCA 175 confirming, where the accused is charged as an accessory before the fact, the principal offender's identity is not an element of the offence.

Consciousness of guilt, lies and flight

- **[2-955] Lies** to add reference to *AB v R* [2023] NSWCCA 165 regarding when it may be necessary for the judge to give jury directions about consciousness of guilt reasoning (even when the Crown expressly declaims its use) due to the Crown's conduct of the trial.

Onus and standard of proof

- **[3-605] The Liberato direction — when a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness or the accused's account in a recorded police interview** to add reference to *Park v R* [2023] NSWCCA 71 regarding three different aspects of the *Liberato* and *De Silva* direction and the need for clear jury directions on all the aspects.

Silence — Evidence of

- **[4-130] Notes** to add reference to *Rahman v R* [2021] NSWCCA 209 regarding the suggested direction at **[4-110]** and the need for a judicial direction on adverse inferences to be given at the time evidence is adduced of an accused having exercised the right to silence during police questioning.

Complaint evidence

- **[5-060] Notes** to add reference to *Park v R* [2023] NSWCCA 71 regarding the suggested direction at **[5-055]** and the application of s 294(2)(c) of the *Criminal Procedure Act* 1986 pertaining to absence or delay in complaint.

Maintain unlawful sexual relationship with a child

- The chapter at **[5-700]**ff has been extensively revised and includes updated suggested direction — maintain unlawful sexual relationship (at **[5-720]**) and reference to the following cases regarding the application of the direction:
  - *MK v R* [2023] NSWCCA 180 at **[5-720]**
  - *DPP (NSW) v Presnell* [2022] NSWCCA 146 at **[5-730]**.

Sexual touching

- **[5-1110]**ff to update language in suggested directions regarding the offence of sexual touching.

New chapter: Sexual act

- A new chapter at **[5-1200]**ff provides commentary on the separate offences of "sexual act" in ss 61KE and 61KF of the *Crimes Act* 1900 for adults, and ss 66DC, 66DD, 66DE and 66DF for children.

Self defence

- **[6-455] Essential components of self-defence direction** to amend commentary regarding the essential components of a self-defence direction in cases other than murder.

Summing-up format

- **[7-040] Notes** to amend commentary regarding the suggested direction at **[7-030]** and the provision in s 161 of the *Criminal Procedure Act* 1986 that the judge need not summarise the evidence if of the opinion that, in all of the circumstances of the trial, a summary is not necessary.

Prospect of disagreement

- The chapter at **[8-050]**ff regarding disagreement of jury over verdict has been extensively revised and updated.

Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 74

September 2023

FILING INSTRUCTIONS OVERLEAF

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Level 5, 60 Carrington Street, Sydney NSW 2000

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FILING INSTRUCTIONS

Update 74

Note: Before filing this Update please ensure that Update 73 has been filed.

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Outline of trial procedure

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

[1-000] Introduction

Last reviewed: September 2023

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

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

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

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

[1-005] Pre-trial procedures

Last reviewed: September 2023

Trial court's jurisdiction

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

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

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

The indictment

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

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

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

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

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

Arraignment

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

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

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

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

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

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

There will be no arraignment where:

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

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

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

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

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

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

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

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

Pronunciation and forms of address

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

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

Judge-alone trials

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

Pre-trial rulings

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

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

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

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

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

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

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

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

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

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

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

Sexual assault communications privilege

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

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

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

[1-010] The trial process

Last reviewed: September 2023

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

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

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

Empanelling the jury

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adjournment after empanelling

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

Judge's opening

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

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

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

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

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

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

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

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

[1-015] The course of the evidence

Last reviewed: September 2023

Opening addresses

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

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

Witnesses in the Crown case

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

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

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

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

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

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

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

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

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

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

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

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

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

Directions and warnings

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

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

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

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

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

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

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

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

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

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

Warnings and exculpatory evidence

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

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

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

A direction is usually required in relation to:

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

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

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

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

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

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

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

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

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

Views

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

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

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

Transcript

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

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

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

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

Close of Crown case

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

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

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

Defence case

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

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

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

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

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

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

Case in reply

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

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

Discharge of the jury

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

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

[1-020] Addresses

Last reviewed: September 2023

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

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

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

Crown address

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

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

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

[1-025] Summing up

Last reviewed: September 2023

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

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

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

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

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

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

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

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

[1-030] Jury deliberations

Last reviewed: September 2023

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

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

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

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

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

Return of the jury

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

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

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

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

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

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

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

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

[The next page is 1]

Judge-alone trials

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

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

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

Last reviewed: September 2023

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

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

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

Interests of justice — s 132(4)

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

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

Factors relevant to the interests of justice

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

Application for order

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

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

Efficiency and length of trial

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

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

Case complexity and comprehensibility

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

Reasons for verdict

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

Community standards

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

Media publicity and prejudice

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

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

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

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

Community standards — s 132(5)

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

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

Intention

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

Credibility

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

Substantial impairment

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

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

Last reviewed: September 2023

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

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

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

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

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

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

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

Last reviewed: September 2023

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

Obligation to give reasons — s 133(2)

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

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

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

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

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

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

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

Warnings — s 133(3)

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

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

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

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

(b) the defendant is legally represented and

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

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

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

[1-065] Procedural fairness

Last reviewed: September 2023

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

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

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

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

[1-070] Apprehension of bias

Last reviewed: September 2023

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

accede to an application that they are subject to a reasonable apprehension of bias and so recuse themself too readily from hearing a matter: *Livesey v NSW Bar Assn* (1983) 151 CLR 288 at 294; *Johnson v Johnson* (2000) 201 CLR 488 at [45]; *McIver v R* [2020] NSWCCA 343 at [72] per Davies J; cf *Antoun v The Queen* at [35].

[1-075] Commonwealth offences

Last reviewed: September 2023

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

[1-080] Additional resources

Last reviewed: September 2023

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

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

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

[The next page is 19]

Child witness/accused

[1-100] Definition of "child"

Last reviewed: September 2023

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

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

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

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

[1-105] Competence generally

Last reviewed: September 2023

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

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

[1-110] Competence of children and other witnesses

Last reviewed: September 2023

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

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

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

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

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

[1-115] Sworn evidence

Last reviewed: September 2023

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

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

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

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

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

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

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

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

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

[1-118] Unsworn evidence — conditions of competence

Last reviewed: September 2023

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

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

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

[1-120] Jury directions — unsworn evidence

Last reviewed: September 2023

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

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

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

[1-122] Use of specialised knowledge

Last reviewed: September 2023

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

[1-125] Evidence in narrative form

Last reviewed: September 2023

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

[1-135] Warnings about children's evidence

Last reviewed: September 2023

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

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

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

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

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

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

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

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

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

Section 165(6) provides:

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

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

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

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

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

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

Last reviewed: September 2023

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

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

[1-150] Other procedural provisions applicable to children

Last reviewed: September 2023

As to the:

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

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

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

Last reviewed: September 2023

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

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

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

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

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

Last reviewed: September 2023

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

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

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

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

[The next page is 33]

Jury

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

[1-440] Number of jurors

Last reviewed: September 2023

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

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

[1-445] Anonymity of jurors

Last reviewed: September 2023

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

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

Last reviewed: September 2023

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

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

[1-455] Excusing jurors

Last reviewed: September 2023

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

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

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

[1-460] Right to challenge

Last reviewed: September 2023

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

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

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

[1-465] Pleas

Last reviewed: September 2023

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

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

[1-470] Opening to the jury

Last reviewed: September 2023

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

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

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

[1-475] Jury booklet and DVD

Last reviewed: September 2023

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

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

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

Last reviewed: September 2023

Nature of a criminal trial

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

Role of judge and jury

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

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

Jury foreperson

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

Onus and standard of proof

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

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

No discussions outside jury room

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

Duties of a juror to report irregularities

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

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

Criminal conduct by a juror during and after the trial

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

   For this offence, "making any inquiry" includes:

   - asking a question of any person

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

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

Media reports

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

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

Last reviewed: September 2023

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

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

Other sources of information for jurors

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

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

The charge(s)

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

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

[Where there are multiple charges, add

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

[Where appropriate, add

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

[If there are any alternative charges, add

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

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

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

Roles and functions

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

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

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

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

Legal argument

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

Introduction of lawyers

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

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

Selection of foreperson

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

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

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

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

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

Queries about evidence or procedure

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

Note taking

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

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

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

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

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

Media publicity during the trial

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

The nature of a criminal trial

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

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

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

Onus and standard of proof

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

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

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

Prohibition against making enquiries outside the courtroom

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

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

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

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

Discussing the case with others

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

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

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

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

Bringing irregularities to the judge's attention

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

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

Reporting other misconduct and irregularities — s 75C Jury Act

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

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

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

Breaks/personal issues/daily attendance

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

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

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

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

Outline of the trial

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

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

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

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

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

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

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

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

[1-492] Jury questions for witnesses

Last reviewed: September 2023

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

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

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

[1-494] Expert evidence

Last reviewed: September 2023

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

[1-495] Offences and irregularities involving jurors

Last reviewed: September 2023

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

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

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

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

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

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

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

[1-500] Communications between jurors and the judge

Last reviewed: September 2023

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

[1-505] Discharging individual jurors

Last reviewed: September 2023

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

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

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

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

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

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

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

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

Last reviewed: September 2023

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

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

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

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

[1-515] Suggested direction following discharge of juror

Last reviewed: September 2023

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

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

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

[1-520] Discharge of the whole jury

Last reviewed: September 2023

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

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

[1-525] Provision of transcripts

Last reviewed: September 2023

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

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

Last reviewed: September 2023

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

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

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

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

[1-535] Written directions

Last reviewed: September 2023

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

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

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

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

[1-540] Verdict juries

Last reviewed: September 2023

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

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

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

[1-545] Directed verdict juries

Last reviewed: September 2023

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

[The next page is 123]

Oaths and affirmations

[1-600] General oaths and affirmations

Last reviewed: September 2023

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

Oath/affirmation by a witness

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

Oath/affirmation by an interpreter

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

Oath/affirmation by a children's champion

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

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

Last reviewed: September 2023

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

[1-610] Oaths and affirmations for jurors

Last reviewed: September 2023

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

Oath for jurors

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

Affirmation for jurors

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

Oath/affirmation for jurors sworn en masse

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

[1-615] Oaths and affirmations — view

Last reviewed: September 2023

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

Oath/affirmation: sheriff's officer

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

Oath/affirmation: shower

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

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

Last reviewed: September 2023

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

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

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

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

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

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

[The next page is 129]

Complicity

[2-700] Introduction

Last reviewed: September 2023

A person may be criminally liable in various ways for a crime physically committed by another person. For the sake of simplicity, that other person is referred to in the suggested directions as "the principal offender", and the person charged with complicity in that crime is referred to as "the accused". See suggested directions on **Conspiracy** at **[5-5300]**; **Manslaughter** at **[5-6200]**ff and **Murder** at **[5-6300]**ff.

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

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

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

Accessorial liability

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

Last reviewed: September 2023

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

The identity of the principal offender is not an element of the offence; nor does it need to be proved the accessory knew the personal identity of the principal offender: *Jaghbir v R* [2023] NSWCCA 175 at [195]–[196]; *King v The Queen* (1986) 161 CLR 423 at 434.

The Crown accepts that the accused was not present when the crime of [*specify offence*] was committed by [*the principal offender*]. But it alleges that the accused is still guilty of that crime because of what they did before the crime was committed by [*the principal*

offender]. This allegation is known in law as being an accessory before the fact to the offence that was later committed by a person I will describe as a principal offender. The Crown must prove beyond reasonable doubt both that [*the principal offender*] committed an offence of a particular type and that the accused was an accessory to that crime before it was committed.

A person is guilty of being an accessory before the fact where at some time before the crime is actually carried out, the person intentionally encourages or assists [*the principal offender*] to commit that crime. Therefore, there must be some act committed by the accessory that was intended to bring about the crime later committed by [*the principal offender*]. The act of an accessory can consist of conduct of encouraging, including advising, urging or persuading the principal offender to commit the crime, or it can be assisting in the preparations for the commission of the crime. It can be both encouraging and assisting [*the principal offender*].

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

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

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

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

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

1. that [*the principal offender*] committed the offence of [*specify offence*], and
2. [*set out the alternative(s) which apply*] that:
   (a) the accused intentionally encouraged [*the principal offender*] to commit that offence, and/or
   (b) the accused intentionally set out to assist [*the principal offender*] in the preparations to commit that offence, and
3. that the crime which [*the principal offender*] committed was one that the accused intended would be committed.

   [*If applicable* or was within the scope (see below) of what they foresaw that [*the principal offender*] would do], and
4. that the accused knew at the time of [*the encouragement and/or assistance*] all the essential facts, both of a physical and mental nature, which made what was to be done by [*the principal offender*] a crime,

   [*and* ***if applicable*** *(see below)*:
5. that the accused, before the crime was committed by [*the principal offender*] neither had a genuine change of mind nor expressly instructed [*the principal offender*] not to commit the offence.**]**

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

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

[Where applicable, add involvement of third party

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

[Where the offence committed differs from that contemplated

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

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

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

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

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

(a) the accused did in fact withdraw his or her encouragement and/or assistance, and

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

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

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

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

Last reviewed: September 2023

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

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

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

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

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

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

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

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

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

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

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

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

Last reviewed: September 2023

As to accessory after the fact, see s 347 *Crimes Act* 1900 which makes provision for how the accessory may be tried. Sections 348–350 contain provisions relating to punishment, depending upon the nature of the principal offence. The offence of being an accessory after the fact can be committed by rendering assistance either to the principal offender or to a person who aids and abets the principal. The prosecution must establish the accused had knowledge of the precise crime committed by a principal offender: *Gall v R* [2015] NSWCCA 69 at [164] (confirming a submission at [155]), [249]–[251], [257]).

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

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

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

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

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

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

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

[Where applicable — explanation of belief and knowledge

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

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

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

Joint criminal enterprise and common purpose

[2-740] Joint criminal liability

Last reviewed: September 2023

In the usual case it will be necessary for the judge to instruct the jury in relation to the elements of the offence and, where appropriate, the principles governing accessorial or joint enterprise liability: *Huynh v The Queen* [2013] HCA 6 at [31]. Joint criminal liability between two or more persons for a single crime may be established by the Crown in different ways:

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

(b) where the crime committed fell within the scope of the joint criminal enterprise agreed upon as a possible incident in carrying out the offence the subject of the joint criminal enterprise: see *McAuliffe v The Queen* (1995) 183 CLR 108 at 114–115 affirmed in *Miller v The Queen* (2016) 259 CLR 380 at [29]; *Clayton v The Queen* [2006] HCA 58 at [17]

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

Joint criminal liability arises from the making of the agreement (tacit or express) and the offender's participation in its execution: *Huynh v The Queen* at [37]. A person participates in a joint enterprise by being present when the agreed crime is committed: *Huynh v The Queen* at [38]; *Youkhana v R* [2015] NSWCCA 41 at [13]. Although presence at the actual commission of the crime is sufficient, it is not necessary if the offender participated in some other way in furtherance of the enterprise: *Dickson v R* (2017) 94 NSWLR 476 at [47]–[48]; *Sever v R* [2010] NSWCCA 135 at [146]; *Osland v The Queen* (1998) 197 CLR 316 at [27]. If participation by the accused is not in issue a specific direction explaining the concept may not be required: *Huynh v The Queen* at [32]–[33].

In *IL v The Queen* (2017) 262 CLR 268 there was disagreement as to what the High Court had held in *Osland v The Queen* (1998) 197 CLR 316 (see Special Bulletin 33 which explains *IL's* case). Bell and Nettle JJ at [65] opined that in a joint criminal enterprise the only acts committed by one participant that are attributed to another participant are those acts that comprise the actus reus of the commission of a crime. Kiefel CJ, Keane and Edelman JJ did not agree: "… joint criminal liability involves the attribution of acts. The attribution of acts means that one person will be personally responsible for the acts of another". Gaegler J at [106] agreed with Kiefel CJ, Keane and Edelman JJ. See also Gordon J at [152]. The direction below follows the prevailing view in *IL's* case.

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

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

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

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

Last reviewed: September 2023

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

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

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

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

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

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

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

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

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

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

Only one of them broke into the house (being the person who broke the glass panel and put a hand inside to open the door). Only one of them entered the house and stole something (that is the one who removed the valuables from the house) and the

third person did neither of those things. But the law provides that, if a jury were satisfied that by their actions (rather than merely by their words) all three had reached an understanding or arrangement which amounted to an agreement between them to commit the crime of break, enter and steal from a house, each of the three is criminally responsible for the acts of the others. On this example all three could be found guilty of breaking, entering and stealing from the house regardless of what each actually did.

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

Last reviewed: September 2023

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

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

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

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

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

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

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

But it may be that in carrying out the joint criminal enterprise, one of the participants commits an additional offence that was not the crime that they had agreed to commit but

was one that at least one or some of the other participants foresaw might be committed. In such a case, not only would each of those participants be guilty of the offence that they agreed to commit, but those participants who foresaw the possibility of the commission of the additional offence would also be guilty of the additional offence.

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

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

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

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

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

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

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

Because things do not always turn out precisely as planned, the law makes each participant in the joint enterprise criminally responsible, not only for the acts done as part of that enterprise, but also for any additional acts that the participant foresees as possibly being committed in carrying out the joint criminal enterprise. If any one of the participants does an act which they all foresaw may possibly be done in the course of committing the agreed crime, then all of them are criminally responsible for that act. Thus, to take the example which I have already given you, if the person guarding the door pushed a bystander out of the way to prevent that person from interfering with their escape after the armed robbery was complete, all three would be guilty of that assault as well as of the armed robbery, if the possibility that the person on guard may have to do something like that was, obviously enough, originally foreseen by them in carrying out the robbery.

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

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

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

Let us now consider a further situation, one where not everyone engaged in the joint criminal enterprise foresaw the possibility that the shotgun would be fired injuring someone in the bank. Let us assume, for example, that there had been a discussion amongst the three participants to the joint enterprise beforehand as to whether the gun should be loaded, and there had been a clear agreement reached between them that it would be unloaded. If, notwithstanding this agreement and unbeknown to the others, the man with the shotgun had loaded it, then the others would not be criminally

responsible for any injury caused by the discharge of the weapon during the robbery. This is because the discharge of the weapon was not part of the agreement and could not have been foreseen by the others as a possible incident or consequence occurring in the course of carrying out the robbery.

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

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

Last reviewed: September 2023

As to the liability of a participant in a joint enterprise for murder based upon the commission of an offence punishable by imprisonment for life or 25 years (constructive murder), see *R v Sharah* (1992) 30 NSWLR 292 at 297–298. The directions for constructive murder must address both the liability of the accused for the offence punishable by imprisonment for life or 25 years (the foundational offence) and the liability of the accused for murder based upon his or her liability for the foundational offence: see *R v Thurston* [2004] NSWCCA 98 at [3]–[9] and *Batcheldor v R* [2014] NSWCCA 252 at [80]–[82] where the judge failed to direct the jury as to the appellant's liability for the foundational offence of specially aggravated kidnapping. The judge must direct the jury that it is for them to:

(a) identify the act causing death; and

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

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

In *IL v The Queen* (2017) 262 CLR 268, some of the Justices passed comment about *R v Sharah*. Gordon J opined at [166] that constructive murder under s 18(1)(a)

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

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

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

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

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

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

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

[2-780] Notes

Last reviewed: September 2023

1. The application of the doctrine of extended joint criminal enterprise (or extended common purpose) to constructive murder was considered in the South Australian context in *Mitchell v The King* [2023] HCA 5. It was held that combining the doctrine with the statutory provision of constructive murder (s 12A of the *Criminal*

Law Consolidation Act 1935 (SA)) was impermissible as it amounted to creating a new doctrine of "constructive, constructive murder", where no such doctrine has ever existed. Section 12A is drafted in somewhat similar terms to s 18 of the *Crimes Act* 1900 (NSW).

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

Last reviewed: September 2023

As to withdrawal from a joint criminal enterprise, see *R v Tietie* (1988) 34 A Crim R 438 at 445–447 applying *White v Ridley* (1978) 140 CLR 342 at 348–351. It is a question of fact to be decided by the jury whether a co-accused has withdrawn from a criminal enterprise: *Tierney v R* [2016] NSWCCA 144 at [19]. The jury must be satisfied beyond reasonable doubt that the accused did not intend to withdraw or did not take reasonable steps to prevent the co-accused from committing the crime: *Tierney v R* at [19]. There is no obligation to direct jury specifically in the terms of *R v Sully* (2012) 112 SASR 157: *Tierney v R* at [19].

A person who is part of a joint criminal enterprise to commit a particular crime may withdraw from that enterprise. If they do withdraw, they cease to be criminally responsible for that crime if the other members of the enterprise go on to commit the offence after the withdrawal.

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

[Where applicable, add

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

[Where applicable, add

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

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

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

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

[The next page is 319]

Consciousness of guilt, lies and flight

[2-950] Introduction

Last reviewed: September 2023

The Crown can rely upon the accused's post-offence conduct as evidence of a consciousness of guilt. This will usually be in the form of a lie (either in or out of court) or flight (absconding to avoid arrest or trial). But it can include other forms of conduct: *McKey v R* [2012] NSWCCA 1; see *Pollard v R* (2011) 31 VR 416, where the evidence of the accused hiding his mobile phone was admitted on this basis. Such evidence will generally be part of a Crown's circumstantial case or evidence supporting direct evidence such as an admission.

[2-953] Alternative charges and included offences

Last reviewed: September 2023

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

The issue is determined in light of the specific facts of the case — there are no "… rigid prescriptive rules as to when and in what precise terms an *Edwards*-type direction should be given …": *Zoneff v The Queen* (2000) 200 CLR 234 at [15]. In *The Queen v Baden-Clay*, the issue arose as to whether post-offence conduct could be used to specifically prove the accused's murderous intent. The court held that there is no hard and fast rule that evidence of post-offence concealment and lies is always intractably neutral as between murder and manslaughter and that the issue will turn on the nature of the evidence in question and its relevance to the real issue in dispute: at [74]. In some cases, an accused's post-offence conduct may go to such lengths in concealing or distancing themselves from the death as to provide the jury with a basis to conclude the accused had committed an extremely serious crime and warrant a conclusion beyond reasonable doubt as to the accused's responsibility for the death and the concurrent existence of the intent necessary for murder: at [74]. In *Lane v R* [2013] NSWCCA 317 at [111] (cited with approval in *The Queen v Baden-Clay* at [75]), the court held that the jury were entitled to take the post-offence conduct of the accused into account as evidencing consciousness of guilt of murder.

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

the jury may need to be warned about misusing post-offence conduct as evidence of a consciousness of guilt: *SW v R* [2013] NSWCCA 103 at [62]–[65]. In *SW v R*, some post-offence conduct was used to prove the mental state for murder while other conduct was not: at [62]–[63].

[2-955] Lies

Last reviewed: September 2023

Care is necessary when the issue of lies arises: *R v Ray* (2003) 57 NSWLR 616 at [98]; *Healey v R* [2008] NSWCCA 229 at [43]. It is important to distinguish between lies being used to attack the credit of the accused and lies being used as evidence of guilt, and the Crown should make it clear what use it is seeking to make of an allegation that the accused lied: *R v GJH* [2001] NSWCCA 128. Where the issue is one of credit, the jury should not usually be directed as to consciousness of guilt: see *Zoneff v The Queen* (2000) 200 CLR 234 at [14]–[17]. It is not always necessary for a judge to give a direction on lies: *Dhanhoa v The Queen* (2003) 217 CLR 1 at [34]; *Ahmed v R* [2012] NSWCCA 260 at [44]–[45]; *KJS v R* [2013] NSWCCA 132 at [56]–[57]. It may be necessary for the judge to warn the jury against using lies as evidence of guilt because of the conduct of the Crown in cross-examination or addresses: *McKey v R* [2012] NSWCCA 1 at [26]–[35]. In *AB v R* [2023] NSWCCA 165 the jury were not directed regarding consciousness of guilt reasoning as the Crown denied reliance upon it in its case. However, the Crown employed such reasoning to rebut *doli incapax* in its closing address and the absence of directions caused the trial to miscarry. Generally, the Crown will not have to prove the evidence beyond reasonable doubt unless the lie is being relied upon as an implied admission: *Edwards v The Queen* (1993) 178 CLR 193 at 201, 210–211; *R v Adam* [1999] NSWCCA 189 at [55].

As to the use of lies to prove a consciousness of guilt: see generally: *Edwards v The Queen* at 210 and *R v Lane* [2011] NSWCCA 157 where the lies could be used for that purpose and *R v ST* (1997) 92 A Crim R 390 where they could not.

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

[2-960] Flight

Last reviewed: September 2023

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

As to the admission of evidence of flight: see generally *R v Adam* [2004] NSWCCA 52 (where the evidence was wrongly admitted) but compare *Quinlan v R* [2006] NSWCCA 284 and *Steer v R* [2008] NSWCCA 295 (where the evidence was correctly admitted).

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

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

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

Last reviewed: September 2023

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

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

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

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

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

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

Second, you must find that the reason [*the accused*] told this lie is because they feared that telling the truth might reveal their guilt in respect of the charge they now face. In other words, they feared that telling the truth would implicate them in the commission of the offence for which they are now on trial.

[*Where manslaughter is an alternative charge in appropriate cases, the above paragraph can be substituted with:*

Second, you must find that the reason [*the accused*] told this lie is because they feared that the truth would implicate them in relation to the commission of the offence for which they are now on trial because it would indicate they [*modify next part of direction*

*as required (see **[2-953]**): had an intention to kill or inflict grievous bodily harm/was not acting under provocation/did not reasonably believe the actions were necessary in self-defence, etc*].]

The Crown says you would be satisfied of that because [*set out Crown case on this issue*].

You must remember, however, that people do not always act rationally, and that conduct of this sort, that is, telling a lie, may sometimes be explained in other ways. A person may have a reason for lying quite apart from trying to conceal their guilt. For example, a lie may be told out of panic; to escape an unjust accusation; to protect some other person; or to avoid a consequence unrelated to the offence. [*It is dangerous to give too many examples for the reasons stated in R v Jeffrey (1991) 60 A Crim R 384.*]

If you think that the lie may have been told for some reason other than to avoid being implicated in the commission of the offence for which [*the accused*] is now on trial, then it cannot be used as evidence of [*the accused's*] guilt. If that is the case, you should put it to one side and focus your deliberations upon the other evidence in the case.

Let me summarise what I have just said. Before you can use what [*the accused*] said as something which points towards their guilt, you must be satisfied that they lied deliberately. You must find that the lie related to some significant circumstance or event connected with the alleged offence. You must find that the reason [*the accused*] told this lie was because they feared that the truth would implicate them in relation to the commission of the offence for which they are now on trial.

The defence case in relation to this issue is [*set out the defence response in detail appropriate to the circumstances of the case*].

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

Last reviewed: September 2023

If the prosecution has not suggested that the accused told lies because they knew the truth would implicate them in the commission of the offence, there may nevertheless be risk of misunderstanding on the part of the jury about the significance of possible lies. The suggested direction below takes account of *Zoneff v The Queen* (2000) 200 CLR 234 at [23].

You have heard it suggested that [*the accused*] lied.

[*Refer to the evidence said to constitute lie(s).*]

Whether [*the accused*] did in fact lie is a matter for you to decide. To decide that a lie was (or lies were) told, you must be satisfied that [*the accused*] said something that was untrue and that at the time of making the statement, they knew that it was untrue. Saying something that is untrue by mistake, or out of confusion or forgetfulness, is not a lie.

If you decide that a lie was (or lies were) told, you cannot use that fact in support of a conclusion that [*the accused*] is guilty. A lie cannot prove [*the accused's*] guilt and nor can a lie be used in conjunction with the other evidence that the Crown relies upon to prove [*the accused's*] guilt.

The only use you can make of the fact that [*the accused*] told a lie (or lies) is in your assessment of their credibility. If you are satisfied that they did lie, then that may be considered by you as having a bearing upon whether you believe the other things that they have said.

[The next page is 331]

Onus and standard of proof

It is essential that the jury be directed appropriately and clearly on the onus and standard of proof. The following are various passages which may be of assistance wholly or in part.

[3-600] Suggested direction — where the defence has no onus

Last reviewed: September 2023

Onus of proof

As this is a criminal trial the burden or obligation of proof of the guilt of the accused is placed squarely on the Crown. That burden rests upon the Crown in respect of every element or essential fact that makes up the offence charged. That burden never shifts to the accused. There is no obligation on the accused to prove any fact or issue that is in dispute. It is not for the accused to prove their innocence but for the Crown to prove their guilt.

A critical part of the criminal justice system is the presumption of innocence. What it means is that a person charged with a criminal offence is presumed to be innocent unless and until the Crown persuades a jury that the person is guilty beyond reasonable doubt.

[***Note**: For situations where there is an onus of proof on the accused see specific instances, such as supplying drugs at [5-6700], substantial impairment at [6-570], mental illness at [6-230].*]

[If the defence has called evidence (or relies on an account in a police interview) and a *Liberato* direction is not considered necessary:

The fact the accused has given/called evidence before you [*or relies on an account given in an interview by police*] does not alter the burden of proof. The accused does not have to prove that their version is true. The Crown has to satisfy you that the account given by the accused [*and defence witnesses*] should not be accepted as a version of events that could reasonably be true.]

[***Note**: In some instances this direction will not be appropriate because the accused may be guilty even if there is no dispute over the facts, for example where guilt is based upon an objective evaluation such as whether the accused's driving was dangerous in an offence under s 52A Crimes Act.*]

Standard of proof

Proving the accused's guilt beyond reasonable doubt is the standard of proof the Crown must achieve before you can convict them and the words mean exactly what they say — proof beyond reasonable doubt. When you finish considering the evidence in the trial and the submissions made by the parties you must ask yourself whether the Crown has established the accused's guilt beyond reasonable doubt.

[*Where the Crown must negative a defence/issue to the criminal standard, a long accepted direction which can be given (after making clear that the Crown must prove all ingredients of the charge beyond reasonable doubt) is as follows*:

"Has the Crown eliminated any reasonable possibility that the accused acted in self-defence/was extremely provoked/acted under duress, etc?"]

The burden of proof on the Crown does not mean the Crown must prove beyond reasonable doubt every single fact that is in dispute but the Crown must prove the elements of the charge and must prove those elements beyond reasonable doubt.

In a criminal trial there is only one ultimate issue that a jury has to decide. Has the Crown proved the guilt of the accused beyond reasonable doubt? If the answer is "yes", the appropriate verdict is "guilty". If the answer is "no", the verdict must be "not guilty".

[Where the accused has given or called evidence or evidence has been adduced of a conflicting defence version of events (typically in answers in a record of interview (see Note at [3-605]):

The accused relies on an account of events in [*the evidence they gave, or called, or in their interview by the police*] That account is to the following effect … [*summarise the account relied upon*].

It is important you understand that the accused must be found not guilty if their guilt has not been proved beyond reasonable doubt and that they are entitled to the benefit of any reasonable doubt you may have at the end of your deliberations.

It follows from this (***Liberato* direction**):

First, if you believe the accused's evidence [*the account relied on by the accused in their interview with the police*], obviously you must acquit.

Second, if you find difficulty in accepting the accused's evidence [*the account relied on by the accused in their interview with the police*], but think it might be true, then you must acquit.

Third, if you do not believe the accused's evidence [*if you do not believe the account relied on by the accused in their interview with the police*], then you should put it to one side. Nevertheless, the question will remain: has the Crown, upon the basis of evidence that you do accept, proved the accused's guilt beyond reasonable doubt?

[3-603] Notes

Last reviewed: September 2023

1. There is longstanding authority for the proposition that, except in certain limited circumstances, no attempt should be made to explain or embellish the meaning of the phrase "beyond reasonable doubt": *Green v The Queen* (1971) 126 CLR 28 at 32–33; *La Fontaine v R* (1976) 136 CLR 62 at 71; *R v Reeves* (1992) 29 NSWLR 109 at 117; *Raso v R* [2008] NSWCCA 120 at [20]. If, in an address, counsel suggests that fantastic or unreal possibilities should be regarded by the jury as affording a reason for doubt, the judge can properly instruct the jury that fantastic or unreal possibilities ought not to be regarded by them as a source of reasonable doubt: *Green v The Queen* at 33; or as put in *Keil v The Queen* (1979) 53 ALJR 525, "fanciful doubts are not reasonable doubts". It is generally undesirable to direct a jury in terms which contrast proof beyond reasonable doubt with proof

beyond any doubt: *The Queen v Dookheea* (2017) 262 CLR 402 at [28]. However, an effective means of conveying the meaning of the phrase "beyond reasonable doubt" to a jury may be by contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities: *The Queen v Dookheea* at [41].

2. The question of whether there is a reasonable doubt is a subjective one to be determined by each individual juror: *Green v The Queen* at 32–33; *R v Southammavong* [2003] NSWCCA 312 at [28]. There was no error in *R v Southammavong* by the trial judge saying, in response to a jury request for clarification, that "the words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them": at [23]. Newman J said in *R v GWB* [2000] NSWCCA 410 at [44] that "judges should not depart from the time honoured formula that the words 'beyond reasonable doubt' are words in the ordinary English usage and mean exactly what they say".

3. If a judge gives the jury written directions it is essential that the directions make clear where the legal onus is on the Crown to eliminate any reasonable possibility: *Hadchiti v R* (2016) 93 NSWLR 671 at [106], [112] (see Special Bulletin 32). A trial judge should take particular care before introducing the concept of reasonable possibility in the course of explaining the onus and standard of proof to the jury. The written directions in *Hadchiti v R* were held to be contrary to law because of the repeated use of the expression "reasonable possibility" throughout and the failure to make clear the onus of proof was on the Crown: *Hadchiti v R* at [44], [112] and see *Moore v R* [2016] NSWCCA 185 at [114].

4. Proof of a matter beyond reasonable doubt involves rejection of all reasonable hypotheses or any reasonable possibility inconsistent with the Crown case: *Moore v R* at [43] per Basten JA; RA Hulme J generally agreed at [94] and see RA Hulme J at [125]. It is not erroneous to direct that if there is a reasonable possibility of some exculpatory factor existing then the jury should find in favour of the accused: *Moore v R* at [99], [125]. The jury should be directed in terms that it is a matter for the Crown to "eliminate any reasonable possibility" of there being such exculpatory matter: *Moore v R* at [99], [125] and several cases cited at [99]–[124]. Framing the issue of self-defence in terms a reasonable possibility does not distort the onus and standard of proof and is consistent with the oft cited case of *R v Katarzynski* [2002] NSWSC 613 at [22]: *Moore v R* at [122]–[124] and see Basten JA in *Moore v R* at [43]. The concept of a reasonable possibility in a question trail is definitive and does not give rise to an answer other than "yes" or "no" — there is no "middle ground" answer of "not sure": *Moore v R* at [36]; [129].

[3-605] The *Liberato* direction — when a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness or the accused's account in a recorded police interview

Last reviewed: September 2023

1. In *Liberato v The Queen* (1985) 159 CLR 507 at 515, Brennan J in his dissenting judgment (Deane J agreeing) spoke of a case in which there is evidence relied upon by the defence conflicting with that relied upon by the Crown. In such a case, a jury might consider "who is to be believed". His Honour said it was essential to ensure

the jury were aware that deciding such a question in favour of the prosecution does not conclude the issue as to whether guilt has been proved beyond reasonable doubt. The jury should be directed that:

(a) a preference for the prosecution evidence is not enough — they must not convict unless satisfied beyond reasonable doubt of the truth of that evidence;

(b) even if the evidence relied upon by the accused is not positively believed, they must not convict if that evidence gives rise to a reasonable doubt about guilt.

2. In *De Silva v The Queen* (2019) 268 CLR 57, the High Court noted that there were differing views as to whether a *Liberato* direction was appropriate in a case where the conflicting defence version of events was not given on oath by the accused, but was before the jury, typically in the accused's answers in a record of interview and said such a direction should be given:

(a) if there is a perceived risk of the jury thinking they have to believe the accused's evidence or account before they can acquit, or of the jury thinking it was enough to convict if they prefer the complainant's evidence over the accused's evidence or account (*De Silva v The Queen* at [11], [13]); or

(b) in a case where the accused gives or calls evidence and/or there is an out of court representation (for example in an ERISP) that is relied upon (*De Silva v The Queen* at [11]).

3. The *Liberato* direction in the suggested direction at **[3-600]** is modelled on what was proposed by the High Court in *De Silva v The Queen* at [12]. A *Liberato* direction should be given in any case where the trial judge perceives there is a real risk the jury may be left with the impression the evidence the accused relies on will only give rise to a reasonable doubt if they believe it is truthful, or that a preference for the complainant's evidence is sufficient to establish guilt: at [9]; see also *Haile v R* (2022) 109 NSWLR 288 at [1] per Bell CJ (Ierace J agreeing) and [73] per Bellew J (Bell CJ , Ierace J agreeing).

4. The *Liberato* direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused's account (second aspect): *Park v R* [2023] NSWCCA 71 at [102]–[103]. In *Park v R*, the second aspect of the direction was defective as it was not framed in terms of a jury, though not positively believing the accused's account, thinking the account might be true. Nor did the direction make it clear there was a command to acquit in such circumstances: at [103]–[104].

5. It is never appropriate to frame the issue for the jury's determination as one which involves making a choice between conflicting Crown and defence evidence. The issue is always whether the Crown has proved its case beyond reasonable doubt: *Haile v R* at [72]. See [76]–[78] as an example of how the failure to give a *Liberato* direction can result in error.

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

Last reviewed: September 2023

The following direction applies where there is one witness essential to the Crown case.

> The Crown seeks to prove the guilt of the accused with a case based largely or exclusively on the evidence of [*essential Crown witness*].
>
> Accordingly, unless you are satisfied beyond reasonable doubt [*essential Crown witness*] is both an honest and accurate witness in the account they have given, you cannot find the accused guilty. Before you can convict the accused, you should examine the evidence of [*essential Crown witness*] very carefully to satisfy yourselves you can safely act upon that evidence to the high standard required in a criminal trial.
>
> I am not telling you to be cautious because of any personal view I have of the [*essential Crown witness*]. I told you at the outset of this summing-up that I would not express my personal opinions on the evidence. But in any criminal trial, where the Crown case relies solely or substantially upon the evidence of a single witness, a jury must always approach that evidence with particular caution because of the onus and standard of proof placed upon the Crown.
>
> I am not suggesting that you are not entitled to convict the accused upon the evidence of [*essential Crown witness*]. Clearly you are entitled to do so but only after you have carefully examined the evidence and satisfied yourself that it is reliable beyond reasonable doubt.
>
> In considering [*essential Crown witness'*] evidence and whether it does satisfy you of the accused's guilt, you should of course look to see if it is supported by other evidence.

[3-615] Notes

Last reviewed: September 2023

General direction

1. The above direction is derived from *R v Murray* (1987) 11 NSWLR 12 where Lee J said at 19(E):

   > In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable.

   R v Murray was decided when s 405C(2) (rep) *Crimes Act* 1900, which stated a judge was not required to give a warning in prescribed sexual offence trials that it would be unsafe to convict on the complainant's uncorroborated evidence, was in force. In 2007, this was replaced by s 294AA *Criminal Procedure Act* 1986 which prohibits such a warning being given at all in such cases.

2. The High Court has held that a *Murray* direction should be given in appropriate cases where there is a perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinise the evidence of a complainant with care before arriving at a conclusion of guilt: *Robinson v The Queen* (1999) 197 CLR 162

at [25]–[26]. The direction "emphasises what should be clear from the application of the onus and standard of proof: if the Crown case relies upon a single witness then the jury must be satisfied that the witness is reliable beyond reasonable doubt": *Smale v R* [2007] NSWCCA 328 at [71] per Howie J.

3. This does not mean that in cases where there is one principal witness in the Crown case a *Murray* direction is automatically required — if that witness' evidence is corroborated by other evidence in the trial, such as documentary evidence, forensic evidence or other physical evidence (for example, DNA results implicating the accused) there is no basis for a direction: *Gould v R* [2021] NSWCCA 92 at [134], [136]; cf *Ewen v R* [2015] NSWCCA 117 at [104].

4. There is no particular form of words prescribed for giving a *Murray* direction; nor is there any obligation to use the verb "scrutinize": *Kaifoto v R* [2006] NSWCCA 186 at [72]; *Williams v R* [2021] NSWCCA 25 at [144].

Direction in prescribed sexual offence matters

5. The application of *Murray* to prescribed sexual offences (defined in s 290 *Criminal Procedure Act*) has been significantly modified by s 294AA *Criminal Procedure Act*. This was considered in *Ewen v R* [2015] NSWCCA 117 (see point 7 below). Cases decided before the enactment of s 294AA, where the appellant was charged with a prescribed sexual offence, are no longer good law.

6. Section 294AA *Criminal Procedure Act*, which commenced on 1 January 2007, provides:

   (a) A judge in any proceedings to which this Division applies must not direct a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.

   (b) Without limiting subsection (1), that subsection prohibits a direction to a jury of the danger of convicting on the uncorroborated evidence of any complainant.

   (c) Sections 164 and 165 of the *Evidence Act* 1995 are subject to this section.

7. *Ewen v R* [2015] NSWCCA 117 makes clear that s 294AA takes precedence over *R v Murray*, signalling the legislature's intention to prohibit warnings that call into question (by reason *only* of absence of corroboration) the reliability not only of complainants as a class, but also of a complainant in any particular case: *Ewen v R* at [136]–[140]. A *Murray* direction, based *only* on the absence of corroboration, is tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant. If the direction suggests that merely because a complainant's evidence is uncorroborated, it would be, on that account, dangerous to convict, it transgresses s 294AA(2): *Ewen v R* at [140]–[141]. Such a conclusion cannot be avoided by switching from one linguistic formula ("dangerous to convict") to another ("scrutinise the evidence with great care").

8. This does not mean that directions appropriate to the circumstances of the individual case cannot be given as envisaged in *Longman v The Queen* (1989) 168 CLR 79: *Ewen v R* at [143]. A direction would not contravene s 294AA if it concerned specific evidence in the case, including weaknesses or deficiencies

as described in *Longman v The Queen*; *Robinson v The Queen* (1999) 197 CLR 162 and *Tully v The Queen* (2006) 230 CLR 234 — particularly weaknesses or deficiencies that are apparent to the judge but may not be so apparent to the jury. Neither would a direction concerning delay in bringing the case (although note s 165B *Evidence Act* 1995 regarding delay). Nor would a direction which addressed a scenario where the evidence indicated that others were present and were or may have been in a position to observe what took place, and were not called to give evidence: *Ewen v R* at [143]–[144]. The latter direction would, however, have to be consistent with *Mahmood v Western Australia* (2008) 232 CLR 397 at [27]. See further **Witnesses — not called** at **[4-370]**, **[4-375]**.

9. In *Williams v R* [2021] NSWCCA 25, the Court held that the trial judge (in a judge-alone trial) correctly gave a *Murray* direction without breaching s 294AA because no mention was made of the complainant's evidence being uncorroborated, only that the tribunal of fact had to be satisfied beyond reasonable doubt that the complainant was an honest and reliable witness whose evidence was "accurate in vital respects": [143]. See also *AB v R* [2022] NSWCCA 104, where the Court concluded there was no error in the trial judge's direction to consider other evidence, including evidence of complaint, that may "support" the complainant's evidence and that, in that context, her Honour's reference to *Ewen* rather than *Murray* was correct: at [62]–[63].

[3-625] Motive to lie and the onus of proof

Last reviewed: September 2023

Crown witnesses

1. A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) *Evidence Act* 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: *South v R* [2007] NSWCCA 117 at [42]; *MAJW v R* [2009] NSWCCA 255 at [31]. The jury's task does not include speculating whether there is some other reason why the Crown witness would lie: *Brown v R* [2008] NSWCCA 306 at [50]. Nor does it include acceptance of the Crown witness's evidence unless some positive answer to that question is given by the accused: *South v R* at [42].

2. If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: *Doe v R* [2008] NSWCCA 203 at [58]; *Jovanovic v R* (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: *Jovanovic v R* at 523.

3. Where the defence does not directly raise the issue, it is impermissible for the prosecutor to submit (for the purpose of promoting the acceptance of a Crown witness as a witness of truth) that the accused did not advance a motive to lie.

The jury should not be given the impression that the accused bears some onus of proving the existence of a motive for the fabrication of the allegations against them: *Doe v R* at [59]–[60].

The accused

4. It is impermissible to cross-examine an accused to show that they do not know of any reason why the complainant (or indeed a central Crown witness) has a motive to lie: *Palmer v The Queen* (1998) 193 CLR 1 at [8]; *Doe v R* at [59]. The question focuses the jury's attention on irrelevant material and invites them to accept the evidence unless some positive answer is given by the accused: *Palmer v The Queen* at [8]. An open-ended question to the accused, "why would the complainant lie?", "simply should never be asked" by a prosecutor in a trial: *Doe v R* at [54]; *South v R* [2007] NSWCCA 117 at [44]; *Causevic v R* [2008] NSWCCA 238 at [38]. If in closing addresses the prosecutor makes a comment or asks a rhetorical question to that effect when the issue has not been raised, the judge should give full, firm and clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie: *Palmer v The Queen* at [7]–[8]; *Doe v R* at [59]–[60]; *Cusack v R* [2009] NSWCCA 155 at [105].
5. The evidence of an accused person is subject to the tests which are generally applicable to witnesses in a criminal trial: *Robinson v The Queen* (1991) 180 CLR 531 at 536. However, the trial judge should refrain from directing the jury that the accused's interest in the outcome of the proceedings is a factor relevant to assessing his or her credibility as a witness: *Robinson v The Queen* at 535–536; *MAJW v R* [2009] NSWCCA 255 at [37]–[38]. *Robinson v The Queen* did not create a new rule. It applied a more general principle that directions should not deflect the jury from its fundamental task of deciding whether the prosecution had proved its case beyond reasonable doubt: *Hargraves v The Queen* (2011) 245 CLR 257 at [46]. Nevertheless trial judges must not instruct juries in terms of the accused's interest in the outcome of the proceedings whether as a direction of law or as a judicial comment on the facts: *Hargraves v The Queen* at [46]. A direction of that kind seriously impairs the fairness of the trial and undermines the presumption of innocence: *Robinson v The Queen* at 535.

See further **Cross-examination of defendant as to credibility** at **[1-343]** and **Consciousness of Guilt, Lies and Flight** at **[2-950]**ff.

[3-630] Suggested direction — where the defence has an onus

Last reviewed: September 2023

In the type of case now before you, however, there is an exception to the general propositions of law which I have just put, namely — that the Crown must prove its case, and prove it beyond reasonable doubt. The law makes provision in respect of one matter which arises for your decision in this trial, in which the accused must prove their case. I will explain shortly what that matter is.

Now however, I wish to emphasise that the law is that where the proof of any matter is on an accused person, that is to say, by way of exception to the general rule which I have explained, then the accused is not required to prove that matter beyond reasonable doubt — the standard of proof imposed upon the Crown.

The accused needs only to establish what the accused relies upon, in this regard, to a lower standard of proof than beyond reasonable doubt. The accused is required to prove the accused's case, in this regard, only on the balance of probabilities. That is to say the accused needs only to show that it is more likely than not that what the accused asserts is so.

[The next page is 531]

Silence — Evidence of

[4-100] Common law and s 89 Evidence Act 1995

Last reviewed: September 2023

The expression "right to silence" is a useful shorthand description for a number of different rules that apply in the criminal law but may obscure the particular rule or principle that is being applied: *RPS v The Queen* (2000) 199 CLR 620 at 630 at [22]; *Jones v R* [2005] NSWCCA 443. The scope and forms of the common law right are set out in *Sanchez v R* [2009] NSWCCA 171 at [47]–[52]. Section 89 *Evidence Act* 1995 is narrower in its scope than the common law concerning the right of silence: *Sanchez v R* at [71]. Section 89 *Evidence Act* 1995 provides:

> (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused—
>
> (a) to answer one or more questions, or
>
> (b) to respond to a representation,
>
> put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.
>
> (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
>
> (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

The *Evidence Amendment (Evidence of Silence) Act* 2013 inserted s 89A. Section 89A permits unfavourable inferences to be drawn against a defendant who relies at trial upon a fact that was not mentioned at the time of questioning for the offence charged and where the defendant could reasonably have been expected to mention the fact in the circumstances existing at the time. Such inferences can only be drawn where special caution is given to the defendant who has been provided with legal assistance in respect of the caution. The provision only applies to offences carrying a maximum penalty of life imprisonment or a term of imprisonment of five years or more. It does not apply to a defendant under the age of 18 years.

See Special Bulletin 31 — August 2013 for a discussion of s 89A.

[4-110] Suggested direction — right to silence where the accused has exercised the right before trial

Last reviewed: September 2023

[*The accused*], as you are aware, chose not to answer questions put to them by the police at the time of their arrest. All people in this country have a right to silence — that is, to choose not to answer questions put to them by the police. That is what the police officer told [*the accused*] when they were asked if they wanted to answer their

questions. There are some exceptions to this right, for example, when a police officer asks the registered owner of a car who was driving it at the time of some traffic incident. But those exceptions do not apply here.

In this case, it would be quite wrong if [*the accused*], having listened to what the police said, and having decided to exercise their right to silence, later found that a jury was using that fact against them. You must not do that of course. It is important, therefore, that you bear in mind that [*the accused's*] silence cannot be used against them in any way at all. The fact that they took note of the caution given by the police and chose to remain silent cannot be used against them. Under our law, an accused person has a right to silence. [*see: s 89 Evidence Act 1995 and Petty v The Queen (1991) 173 CLR 95 at 97*.]

[4-130] Notes

Last reviewed: September 2023

1. A right to silence direction should be given at the time evidence is given that an accused has exercised the right and the judge should give the direction to the jury that they are not to draw an adverse inference: *Sanchez v R* [2009] NSWCCA 171 at [58]; *Rahman v R* [2021] NSWCCA 290 at [81]–[87]. There is no rule to the effect that the warning *must* be repeated in the summing-up but it may well be a desirable and prudent course: *Sanchez v R* at [58].

2. The Crown should not lead evidence or make comments to the effect that, when charged, the defendant made no reply: *Petty v The Queen* (1991) 173 CLR 95 at 99. Justice Callinan (Gleeson CJ agreeing) said in *Graham v The Queen* (1998) 195 CLR 606 at [45] that evidence of an accused's refusal to answer one or more questions in the course of official questioning might properly be excluded in the exercise of discretion under s 137 *Evidence Act* 1995: *R v Graham* (unrep, 02/09/97, NSWCCA) at 9–10.

3. Where questions asked by the Crown prosecutor elicit the fact that the defendant did not identify matters supporting their innocence when questioned by the police, directions must be given which make it clear that no inference adverse to the defendant may be drawn from that fact: *R v Anderson* [2002] NSWCCA 141 at [30]; *R v Coe* [2002] NSWCCA 385 at [42]–[46]; *R v Merlino* [2004] NSWCCA 104 at [66]–[80].

4. It is clear from the use of the phrase "one or more questions" in s 89(1)(a) that a selective refusal to answer some questions and not others falls within the ambit of the rule in s 89: see *Rahman v R* at [81]. Accordingly, s 89 does not permit an inference of consciousness of guilt to be drawn from selective answering of questions by the defendant: *Evidence*, ALRC Report 38 (Final Report), 1987 at [165]. See also Attorney-General's Department, *Commonwealth Evidence Law*, AGPS Press, Canberra, 1995 at [89.3]: "… selective refusal to answer questions is a refusal to answer 'one or more questions', and therefore falls within the rule in s 89(1)".

   The common law authorities on selective silence in the face of police questioning (such as *Woon v The Queen* (1964) 109 CLR 529) are no longer relevant.

5. If the defendant seeks to impugn the police investigation, evidence that the police properly cautioned the defendant (and they exercised their right to silence) is only relevant if the criticisms are actually raised by the defendant: *Graham v The Queen* at [40].
6. Statements by the police and the Crown Prosecutor in court regarding the defendant's right to silence do not carry the authority or weight of the court and will not replace the need for judicial directions on the issue: *Rahman v R* at [87].

For directions regarding the election of an accused not giving evidence or offering an explanation: see **Election of accused not to offer explanation** at **[2-1000]**.

[The next page is 631]

Witnesses — not called

[4-370] Introduction

Defence witness

No comment should be made as to the failure of the defence to call a witness who might have been able to assist the defence: *Dyers v The Queen* (2002) 210 CLR 285. If any comment is to be given it is that the jury should not speculate about what a witness not called might have said: *Dyers* at [15].

Crown witnesses

In *Mahmood v Western Australia* (2008) 232 CLR 397 at [27] the High Court held that in a criminal trial:

> … where a witness, who might have been expected to be called and to give evidence on a matter, is not called by the prosecution, the question is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, they should entertain a reasonable doubt about the guilt of the accused.

See also *Louizos v R, R v Louizos* (2009) 194 A Crim R 223 at [57].

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

You have heard that [*name of witness*] has not been called by the Crown to give evidence. You can take the fact that there was no evidence from that witness into account when you decide whether the Crown has proved the guilt of the accused.

I am not inviting you to guess what [*name of witness*] would have said if [*he/she*] had been called. You must not do that at all. But in a criminal trial, where the Crown must prove that the accused is guilty beyond reasonable doubt, a jury is entitled to take into account that there was no evidence from a particular person in deciding whether or not there is a reasonable doubt about the accused's guilt … [*refer to the submissions of the defence and Crown on the issue*].

[4-377] Suggested direction — complainant not called on retrial

The appropriate direction to be given where a complainant did not give evidence in person in accordance with s 306B *Criminal Procedure Ac*t 1986 was considered in *PGM (No 2) v R* [2012] NSWCCA 261 at [91]–[92]. A direction in these terms may also be given where the complainant is a child and their evidence was originally given during a pre-recorded evidence hearing in accordance with the procedure in *Criminal Procedure Act* 1986, Sch 2, Pt 29, Divs 1–4. Note in particular, cl 91 which sets out what a judge must advise a jury in relation to such evidence. See [1-376] for the suggested direction where evidence is given by way of a recording.

Where a witness intermediary is used, see the suggested direction at **[1-370]**.

It must be obvious to you that [*the complainant*] did not personally give evidence before you. Instead a [*video and/or audio recording*] of [*his/her*] evidence from an earlier trial was played to you. This includes the cross-examination of [*him/her*] by [*the accused's*] counsel at that time. The procedure adopted in this trial of playing that recording is usual practice. It is to spare [*the complainant*] from having to attend court to give that evidence again.

You cannot use the fact that [*his/her*] evidence was played to you from a [*video or audio recording*] against the accused. As I said a moment ago, it is usual practice for evidence to be given this way and you should not give the evidence any greater or lesser weight simply because of that. You should also assess the evidence in the same way as you assess the evidence of any other witness.

[*If appropriate*]

You cannot speculate about what [*the complainant*] may have said had [*he/she*] given evidence in person. You simply act upon the evidence before you and assess it to determine whether you are prepared to act upon it.

[The next page is 693]

Complaint evidence

[5-000] Introduction

Last reviewed: September 2023

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

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

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

[5-010] Evidence of complaint where witness available to give evidence — s 66(2)

Last reviewed: September 2023

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

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

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

As the evidence is admitted as hearsay, a warning may be required under s 165(1)(a) of the Act: see generally *R v TJF* [2001] NSWCCA 127 where there was delay and the complaint was prompted; *Criminal Practice and Procedure NSW* at [3-s 165.1]ff; *Uniform Evidence Law* (16th edn, 2021) at [EA.165.90]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 165-9ff.

[5-020] Suggested direction — where complaint evidence admitted under s 66(2)

Last reviewed: September 2023

The following direction suits a case in which the fact of an assault is disputed. It may be modified for a case where the act is not disputed but there is an issue as to consent. If use of the evidence has been limited under s 136 *Evidence Act* 1995, the direction should omit reference to the evidence having twofold use and omit the reference to s 60 *Evidence Act* use.

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

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

If it is contended there is a difference between the complainant's evidence and a prior complaint, a direction under s 293A *Criminal Procedure Act* 1986 as suggested at **[5-050]** may be incorporated where indicated. A judge may give a direction under s 293A or s 294 at any time during the trial and may give the same direction more than once: ss 293A(2A); 294(2A). See further at **[5-060]** below.

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

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

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

Section 60 use

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

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

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

[*Where, for a prescribed sexual offence, a s 293A direction is appropriate*, insert the direction suggested at **[5-050].]**

Credibility use

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

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

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

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

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

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

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

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

Conclusion

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

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

[5-030] Evidence of complaint where witness not available under s 65(2)

Last reviewed: September 2023

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

The mere fact a complainant refuses to answer questions will not always satisfy the requirement of "all reasonable steps" in the definition of "unavailability of persons" in Pt 2, cl 4(g) of the Dictionary to the Act for the purpose of s 65(1). What constitutes "all reasonable steps" will depend upon the circumstances of the case but some relevant considerations include: the nature of the case; the importance of the evidence; the higher standard of proof in a criminal trial; and the importance of the liberty of the individual: *RC v R* [2022] NSWCCA 281 at [114]–[115]. The serious consequences of the successful invocation of s 65 emphasises the need for compliance with the conditions of admissibility prescribed by the section: at [116]; *Sio v The Queen* (2016) 259 CLR 47 at [60]–[61].

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

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

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

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

Because of the variety of the situations in which such evidence can be given, no suggested form of direction is appropriate. However, a suitable direction can be adapted from the first part of the suggested direction in **[5-020]**.

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

[5-040] Evidence of complaint as a prior consistent statement under s 108(3)

Last reviewed: September 2023

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

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

[5-045] Direction where difference in complainant's account — prescribed sexual offences only

Last reviewed: September 2023

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

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

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

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

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

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

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

[5-050] Suggested direction

Last reviewed: September 2023

The defence case is that [*name of witness*] was not telling the truth, that there were gaps in the account [*the witness*] gave, and that there were differences and inconsistencies between the witness's accounts.

[*Summarise relevant evidence*]

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

[5-055] Suggested direction — delay in, or absence of, complaint

Last reviewed: September 2023

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

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

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

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

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

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

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

This is a matter which you should consider.]

[5-060] Notes

Last reviewed: September 2023

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the words "warn" or "warning" with "direct" or "direction": Sch 2[9]–[12]. These amendments apply to proceedings the hearing of which commence on and from 1 June 2022.

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

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

> Without being prescriptive, there must be something in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the "good reasons" why there was no timely complaint for the purposes of par (b), but, if not believed, may form the evidence justifying the warning under par (c).

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

Section 294(2)(c) does not require the giving of a direction that delay in complaint is *not* relevant to a complainant's credibility. Whether delay is relevant to that issue is open for a jury to consider, subject to any specific direction that may be given under s 294(2)(c): *Park v R* [2023] NSWCCA 71 at [118].

[5-070] Delay in complaint and forensic disadvantage to the accused

Last reviewed: September 2023

Where s 165B *Evidence Act* 1995 applies, a direction regarding any forensic disadvantage to the accused is to be given if:

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

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

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

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

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

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

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

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

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

1. The duty on the judge to give a direction in accordance with subsection (2) arises only on application by a party and what is said to be the particular significant forensic disadvantage must form part of the application: *Groundstroem v R* at [56].
2. Subsection (5) prohibits the judge from directing the jury "about any forensic disadvantage the defendant may have suffered because of delay" otherwise than in accordance with the section: *Jarrett v R* at [53].
3. There is a duty to inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence, only when the judge is satisfied that the defendant has "suffered a significant forensic disadvantage because of the consequences of delay": *Jarrett* at [53].
4. Subsection (3) provides a rider to the obligation to inform where the judge is satisfied there are "good reasons" for not taking that step: *Jarrett* at [53].
5. Subsection (4) prohibits the judge from suggesting that it would be dangerous or unsafe to convict the defendant "solely because of" the delay or the disadvantage. Otherwise, no particular form of words need be used: *Jarrett* at [53].
6. Whether there has been a significant forensic disadvantage depends on the nature of the complaint and the extent of the delay in the circumstances of the case. The extent of delay is not the test. It is the consequence of delay which is decisive: *Groundstroem* at [61]. The proper focus of s 165B is on the disadvantage to the accused: *Jarrett* at [60].
7. The concept of delay is relative and judgmental. Although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the exception in s 165B(3): *Jarrett* at [61]–[62].
8. If the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction: *Jarrett* at [63].

The focus of s 165B is on the disadvantage to the accused and, unlike *Longman v The Queen*, there is no generalised assumption concerning the reliability of the

complainant's evidence as a consequence of the delay: *Jarrett v R* at [54], [60]. Section 165B(4) specifically prohibits the giving of a "dangerous to convict" *Longman* direction which was considered by the Parliament to be an encroachment on the fact-finding task of the jury: *W v R* at [125]. A failure by a party to apply for a forensic disadvantage direction does not prevent a judge giving such a direction in order to avoid a perceptible risk of a miscarriage of justice: *TO v R* at [181] and [183]. This is supported by the preservation of the common law under s 9(1) *Evidence Act* and by the text of s 165B(5) which include "… but this section does not affect any other power of the judge to give any warning to, or to inform, the jury": *TO v R* at [181]–[182].

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

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

[5-080] Suggested direction — delay in complaint and forensic disadvantage to the accused

Last reviewed: September 2023

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

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

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

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

- *the delay in instituting the prosecution*
- *the possibility of distortion in human recollection*
- *the nature of the allegations*

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

These difficulties put the accused at a significant disadvantage in responding to the prosecution case, either in testing the prosecution evidence, or in bringing forward evidence themself to establish a reasonable doubt about their guilt, or both.

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

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

Another aspect of the accused's disadvantage is that had [*the accused*] learned of the allegations at a much earlier time [*the accused*] may have been able to find witnesses or items of evidence that might have either contradicted the complainant or supported their case, or both. [*The accused*] may have been able to recall with some precision what [*the accused*] was doing and where [*the accused*] was at particular times on particular dates and to have been able to bring forward evidence to support [*the accused*].

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

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

[The next page is 731]

Sexual assault offences

Sexual touching

Sexual act

[The next page is 791]

Maintain unlawful sexual relationship with a child

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

[5-700] Introduction

Last reviewed: September 2023

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

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

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

Last reviewed: September 2023

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

However, if the indictment only contains a substantive s 66EA count, parties must be asked, preferably before arraignment, whether, and what, alternative verdicts will be relied on because the directions at the end of the trial must address the elements of those offences comprising the unlawful sexual acts the subject of the charge.

It is also good practice to identify with the parties precisely what is in issue in the trial, as the content of the summing-up may vary significantly.

Whether or not separate tendency directions may be required in an individual case should also be discussed with the parties as such a direction may be necessary when addressing alternative verdicts.

[5-720] Suggested direction — maintain unlawful sexual relationship with child

Last reviewed: September 2023

The following direction is suggested largely on the basis of the text of s 66EA and the five-judge bench decision of *MK v R* [2023] NSWCCA 180. The suggested direction should be modified as considered appropriate.

The accused is charged with maintaining an unlawful sexual relationship with the complainant between the dates identified on the indictment.

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

1. that the accused, being an adult
2. maintained an unlawful sexual relationship with the complainant
3. who was a child.

If you are not satisfied the Crown has proved each of these elements beyond reasonable doubt then you must find the accused not guilty.

The law says an adult is a person of or above the age of 18 years and that a child is a person who is under the age of 16 years. In this case, there is no dispute that the accused was an adult and the complainant was a child under 16 during the period specified on the indictment. [*This will require adaptation if the complainant's age is in dispute*].

A relationship is a way of describing the nature of the connection between two or more people such as parent and child, teacher and student or coach and player. [*Where applicable*: In the present case there is no dispute the relationship that existed between the complainant and the accused was one of eg, father and daughter.]

An unlawful sexual relationship is a relationship that involves two or more unlawful sexual acts over any period. An "unlawful sexual act" means an act that constitutes an offence of a sexual nature.

The critical issue is whether the relationship of [*for example, father and daughter which the Crown submits existed*], included an unlawful sexual relationship. To answer that question, you must be satisfied beyond reasonable doubt that the accused committed two or more unlawful sexual acts with or towards the complainant during the period identified in the indictment.

The Crown case is that the unlawful sexual acts in this case are [*summarise the evidence the Crown relies on to prove the alleged unlawful sexual acts and summarise the elements of each of those offences*]. **See s 66EA(2)**.

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

You do not need to be satisfied that the Crown has proved that every unlawful sexual act alleged against the accused occurred. All you need to be satisfied of beyond reasonable doubt is that the accused committed two or more of the unlawful sexual acts with

or towards the complainant. Further, you do not all need to agree about which two unlawful sexual acts constitute the unlawful sexual relationship. This means **[***give examples from Crown case such as*: some of you might be satisfied beyond reasonable doubt that the acts described in 1 and 3 took place, while some of you might be satisfied beyond reasonable doubt that the events described in 4 and 5 took place**]**. In other words, provided you are all satisfied that at least two unlawful sexual acts took place, even if you do not agree on which two (or more) acts have been proved beyond reasonable doubt, that is sufficient to prove the element of unlawful sexual relationship. If you have to consider whether the Crown has established one of the alternative counts on the indictment then the situation is different and I will talk to you about the approach you must take then. **See s 66EA(5).**

[*Where applicable if certain of the unlawful sexual acts were committed outside of NSW*]: In this case, the Crown case is that some of the unlawful sexual acts did not occur in New South Wales but in [*identify the different location/s of unlawful sexual acts*]. Before you can find the accused guilty, you must be satisfied beyond reasonable doubt that *at least* one unlawful sexual act occurred in New South Wales. You cannot find the accused guilty if all the unlawful sexual acts you are satisfied occurred took place outside New South Wales. **See s 66EA(3)**]

[*Summarise the defence case on the unlawful sexual acts*. *For example, none of these acts happened at all. There was no unlawful sexual relationship at all. At no time did the accused sexually assault the complainant in any way*].

Alternative verdicts – s 66EA(13)

See note 11 below which addresses issues for consideration when determining the appropriate direction with respect to alternative verdicts

If the Crown has failed to prove one of the essential elements of the offence, then you must find the accused not guilty and will be required to return verdicts in respect of the alternative charges. I will now explain what the Crown must prove before you can return a verdict of guilty in relation to those charges.

[5-730] Notes

Last reviewed: September 2023

1. An offence against s 66EA is a "prescribed sexual offence": see s 3, *Criminal Procedure Act* 1986. Accordingly, those provisions of the *Criminal Procedure Act* and the *Crimes Act* concerning how complainants may give evidence apply: see further **Evidence given by alternative means** at **[1-360]**ff, and **Closed court, suppression and non-publication orders** at **[1-349]**.
2. An "unlawful sexual relationship" is defined as a relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over any period: s 66EA(2). See *DPP (NSW) v Presnell* (2022) 108 NSWLR 407 for a discussion of the phrase "with or towards" in the context of sexual act offences under *Crimes Act*, s 66DC(a). As the suggested direction indicates, the summing-up must also address the elements of the offences which comprise the alleged unlawful sexual acts: *JJP v R* [2021] SASCA 53 at [157].

3. An "unlawful sexual act" is comprehensively defined in s 66EA(15) as an act that constitutes, or would constitute, one of the many offences listed and includes former sexual offences which are identified in Column 1 of Sch 1A of the Act.
4. Section 66EA requires proof of the existence of a relationship "in which" two or more unlawful sexual acts were committed: *MK v R* [2023] NSWCCA 180 at [6], [99]–[100]; *R v Mann* (2020) 135 SASR 457 at [21]. The offence may involve an established relationship such as parent and child, teacher and student or coach and player which is corrupted by the commission of two or more unlawful sexual acts within that relationship. In some cases, the "relationship" might be something that arises from the facts and circumstances of the commission of the unlawful sexual acts themselves so that the provision excludes from the scope of the offence a person who commits unlawful sexual acts with a child with whom they have no relationship: *MK v R* at [18], [95].
5. The word "maintains" in s 66EA(1) does not add anything to the actus reus of the offence beyond satisfaction of s 66EA(2): *MK v R* at [18], [79], [95]. Previous authorities requiring the existence of a sexual relationship over and above the unlawful sexual act (see *RW v R* [2023] NSWCCA 2 at [166]–[169], [173]–[174]; [180], *R v RB* [2022] NSWCCA 142 at [62]) are plainly wrong: *MK v R* at [6].
6. An adult is defined as someone 18 years or older and a child is a person under 16 years old: s 66EA(15).
7. Consent is not a defence: s 80AE. Notwithstanding the operation of s 80AE, in certain circumstances it may be prudent to direct a jury that a child cannot consent to an unlawful sexual act. In *R v Nelson* [2016] NSWCCA 130 at [23], Basten JA explained why consent was not an element of an offence against s 66C of the *Crimes Act* : see also *R v McClymont* (unrep, 17/12/92, NSWCCA); *R v Woods* [2009] NSWCCA 55 at [53]. Although those are sentencing cases, the way the issue has been articulated is uncontroversial as they explain the legislative policy underpinning offences of this type.
8. The jury must be satisfied beyond reasonable doubt that there was an unlawful sexual relationship but are *not* required to be satisfied of the particulars of any unlawful sexual act that they would have to be satisfied of if the act, or acts, were charged as separate offences: s 66EA(5). Particulars in this sense refers to particulars as to time and place: *JJP v R* at [145], [154]. However, it is still necessary to prove the general nature or character of those acts by reference to the elements of the relevant sexual offences; merely establishing the relevant acts were of a sexual or indecent nature is not sufficient: *JJP v R* at [154]
9. The jury is not required to agree about which two unlawful sexual acts constitute the unlawful sexual relationship: s 66EA(5)(c).
10. A separate tendency direction may be necessary when giving a jury an alternative verdict direction: see **Tendency, coincidence and background evidence** at **[4-200]**ff.
11. The direction to be given with respect to alternative verdicts depends on the issues in the particular trial. The importance of identifying the issues with the parties before the trial commences has been dealt with above at **[5-710]**.
12. Generalised offences such as this create the potential for unfairness to an accused. It is therefore necessary to ensure the summing up includes whatever directions

are necessary to ensure the accused's trial is fair: *KRM v The Queen* (2001) 206 CLR 221 at [97]–[101] (dealing with a similar Victorian provision); see also *ARS v R* [2011] NSWCCA 266 at [35]–[37] per Bathurst CJ (James and Johnson JJ agreeing) with respect to the previous form of s 66EA.

[The next page is 811]

Sexual touching

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

Important note: The directions in ss 292–292E *Criminal Procedure Act* 1986 apply to proceedings for these offences which commence from 1 June 2022, regardless of when the offence was committed: Sch 2, Pt 42. See further **[5-200] Directions — misconceptions about consent in sexual assault trials**. The procedure for filing a Crown or Defence Readiness Hearing Case Management Form requires the parties to identify, amongst other matters, which directions under ss 292A–292E may be required at trial. It would be prudent to commence a discussion early in the trial concerning which of these directions, if any, might be required in a particular trial.

[5-1100] Introduction

Last reviewed: September 2023

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

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

For offences committed before 1 December 2018 see **[5-600] Indecent assault**.

"Sexual touching" is defined in s 61HB(1) as a person touching another person in circumstances a reasonable person would consider to be sexual:

(a) with any part of the body or with anything else, or

(b) through anything, including anything worn by the person doing the touching or by the person being touched.

The following matters in s 61HB(2) must be considered when deciding whether a reasonable person would consider touching to be sexual:

(a) whether the area of the body touched or doing the touching is the person's genital area or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person's breasts, whether or not the breasts are sexually developed, or

(b) whether the person doing the touching does so for the purpose of obtaining sexual arousal or sexual gratification, or

(c) whether any other aspect of the touching (including the circumstances in which it is done) makes it sexual.

Offences against ss 61KC, 61KD, 66DA and 66DB are "prescribed sexual offences": s 3 *Criminal Procedure Act* 1986. Particular provisions of the *Criminal Procedure Act* and the *Crimes Act* apply to proceedings for such offences: see **Evidence given by alternative means** at **[1-360]**ff, and **Closed court, suppression and non-publication orders** at **[1-349]**.

See also: *Criminal Practice and Procedure NSW* at [8-s 61KC], [8-s 61KD], [8-s 66DA] and [8-s 66DB].

[5-1110] Suggested direction — basic offence (s 61KC) — until 31 May 2022

Last reviewed: September 2023

The suggested direction is based on the offence in s 61KC(a). For incitement offences see the commentary at **[5-1170] Notes — Incitement offences**.

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

For the suggested direction for offences involving a child, see **[5-1150] Suggested direction — sexually touching a child under 10 (s 66DA)**.

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

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

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

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

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

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

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

2. **The touching was sexual**

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

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

   - the part of the body touched, **[***or if appropriate*: "or doing the touching"]. Was it the genital or anal area or the breasts **[***and add where relevant*: whether or not the breasts are sexually developed, and regardless of the person's gender or sex**]**?

- whether the person doing the touching did so for the purpose of obtaining sexual arousal or sexual gratification.
- was there any other aspect of the touching (including the circumstances in which it was done) which made it sexual?

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

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

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

The third element concerns the complainant's state of mind. The Crown must prove that the sexual touching was done without their consent.

Consent means that a person freely and voluntarily agrees to something. So, the Crown is required to prove the complainant did not freely and voluntarily agree to the sexual touching.

You are concerned with whether the complainant did not consent to the touching at the time the touching occurred. What the complainant's state of mind was before or after the touching might provide a guide, but the question is whether the Crown has proved that they were not consenting at the time the touching occurred.

[*Where appropriate***:** The complainant said in evidence that they did not consent to being sexually touched. If you accept that evidence, then you could be satisfied the Crown has proved this element.**]**

In deciding whether you accept that the complainant was not consenting you may also take into account any of the following:

(a) Consent obtained after persuasion is still consent, provided that ultimately it is given freely and voluntarily.

(b) Consent, or lack of consent, may be indicated by what the complainant said or did. In other words, the complainant's words or actions, or both, may indicate whether or not there was consent.

(c) A person who does not offer actual physical resistance to sexual touching is not, by reason only of that fact, to be regarded as consenting to that touching. There is no legal requirement for a person to physically resist before a jury can find that the person did not consent.

[*If applicable, add one or more of the following* **[s 61HE(5)–(6)]:**

The law provides that a person does not consent to sexual touching:

- if they do not have the capacity to consent, including because of their age or cognitive incapacity, or
- if they did not have the opportunity to consent because they were unconscious or asleep, or

- if they consent because of threats of force or terror (whether the threats are against, or the terror is instilled in, them or another person), or
- if they consent because they were unlawfully detained, or
- if the person consented under a mistaken belief:
  - as to the other person's identity, or
  - that the other person is married to the person, or
  - that the sexual activity is for health or hygienic purposes, or
  - about the nature of the activity that has been induced by fraudulent means.**]**

[*If applicable, add one or more of the following* **[s 61HE(8)]:**

It may be established that the complainant did not consent to the sexual touching if:

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

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

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

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

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

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

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

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

The law says the Crown will have proved the accused knew the complainant did not consent to sexual touching if: **[***refer only to those of the following matters that arise from the evidence* **— see further [5-1120] Notes below**]

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

(b) the accused was reckless as to whether the complainant consented because the accused realised there was a possibility the complainant did not consent; or

(c) the accused was reckless as to whether the complainant consented because the accused did not even think about whether the complainant consented but went ahead not caring, or considering it was irrelevant whether they consented; or

(d) the accused may have actually believed the complainant consented, but the accused had no reasonable grounds for that belief; or

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

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

[5-1115] Suggested direction — basic offence (s 61KC) — from 1 June 2022

Last reviewed: September 2023

Notes:

1. Sections 61HF–61HK *Crimes Act* 1900 which relate to consent and proof of consent apply to offences committed from 1 June 2022. See **[5-900] Sexual intercourse without consent — from 1 June 2022** and **[5-920] Notes related to consent** for the commentary related to these provisions. See also the notes preceding the suggested direction at **[5-1110]** above.
2. The suggested direction is framed in terms of what the Crown is required to prove. It is a matter of discretion as to how often it is appropriate to remind the jury that the accused is not obliged to prove anything.

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

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

1. the accused intentionally touched the complainant;
2. the touching was sexual;
3. without the complainant's consent to being touched in that way; and
4. the accused knew the complainant did not consent.

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

1. The accused intentionally touched the complainant

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

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

2. The touching was sexual

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

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

- the part of the body touched, [*or if appropriate*: "or doing the touching"]. Was it the genital or anal area or the breasts **[***and add where relevant*: whether or not the breasts are sexually developed, and regardless of the person's gender or sex**]**?
- whether the person doing the touching did so for the purpose of obtaining sexual arousal or sexual gratification.
- was there any other aspect of the touching (including the circumstances in which it was done) which made it sexual?

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

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

3. Without the complainant's consent

This element concerns the complainant's state of mind. The Crown must prove beyond reasonable doubt that the complainant did not consent to the sexual touching.

Everyone has a right to choose whether or not to participate in sexual touching. A person cannot presume that another person is consenting. Consensual sexual touching involves ongoing and mutual communication and decision-making and free and voluntary agreement between the persons participating in the sexual touching. **[s 61HF]**

[***If required (s 292A Criminal Procedure Act 1986 — circumstances in which non-consensual activity occurs)***: *However, you should bear in mind that non-consensual sexual activity can occur in many different circumstances and between different kinds of people including people who know one another, or are married to one another, or who are in an established relationship with one another*.] [*See* ***[5-200]***]

A person consents to sexual touching if, at the time of the touching, they freely and voluntarily agree to the touching: [**s 61HI(1)**]. Consent can be given verbally or it

can be expressed by actions. However, a person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity: [**s 61HI(4)**].

[*If applicable — circumstances in which there is no consent — s 61HJ*:

The law provides that circumstances in which a person does not consent to sexual touching include if you are satisfied beyond reasonable doubt that the person [*refer only to those that apply*]:

(a) does not say or do anything to communicate consent,

(b) does not have the capacity to consent to the sexual touching,

(c) is so affected by alcohol or another drug as to be incapable of consenting to the sexual touching,

(d) is unconscious or asleep,

(e) participates in the sexual touching because of force, fear of force or fear of serious harm of any kind to them, another person, an animal or property (regardless of when the force or the conduct giving rise to the fear occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(f) participates in the sexual touching because of coercion, blackmail or intimidation (regardless of when the coercion, blackmail or intimidation occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(g) participates in the sexual touching because they or another person is unlawfully detained,

(h) participates in the sexual touching because they are overborne by the abuse of a relationship of authority, trust or dependence,

(i) participates in the sexual touching because they are mistaken about the nature of the touching,

(j) participates in the sexual touching because they are mistaken about the purpose of the touching (including about whether the touching is for health, hygienic or cosmetic purposes),

(k) participates in the sexual touching with another person because they are mistaken about the identity of the other person or because they are mistaken that they are married to the other person, or

(l) participates in the sexual touching because of a fraudulent inducement. [*If appropriate*: A misrepresentation about a person's income, wealth or feelings [*refer only to that or those which apply*] is not a "fraudulent inducement".

Summarise the evidence and relevant arguments of the parties.]

[If applicable — persuasion: Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.**]**

[If applicable — withdrawal of consent: A person may withdraw consent to sexual touching at any time: [**s 61HI(2)**]. If the touching occurs, or continues, after consent has been withdrawn then it occurs without consent: [**s 61HI(3)**]. If the Crown has proved

beyond reasonable doubt that the complainant withdrew consent and that the touching occurred or continued after that point in time, then you would find the occurrence or continuation of the sexual touching was without the complainant's consent. *Summarise the evidence and relevant arguments of the parties*.]

[If applicable — consent to a different act of sexual touching [**s 61HI(5)**]: A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. There is evidence the complainant may have consented to [*describe relevant sexual activity*]. If you decide they may have consented to that activity, it does not follow that for that reason only they may have consented to the sexual touching alleged by the Crown. [*Summarise the evidence and relevant arguments of the parties*.**]**

[If applicable — consent to sexual activity with accused on a different occasion (s 61HI(6)(a)): A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with that person on another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with the accused. If you decide the complainant may have consented to that activity, it does not follow that for that reason only they consented to the sexual activity alleged by the Crown.

Summarise the evidence and relevant arguments of the parties.**]**

[*If applicable — consent to sexual activity with another person on same or another occasion* (s 61HI(6)(b)):

A person who consents to a sexual activity with a person is not, by reason only of that fact, taken to consent to a sexual activity with another person on that or another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with [*name of person*]. If you decide they may have consented to that activity, it does not follow that for that reason only they consented to the sexual touching with the accused alleged by the Crown. Summarise the evidence and relevant arguments of the parties.**]**

4. The accused knew the complainant did not consent

This element concerns the accused's state of mind. The Crown must prove beyond reasonable doubt that the accused knew the complainant did not consent to the sexual touching alleged.

The Crown has no direct evidence about what the accused's state of mind was at that time. The Crown asks you to infer or conclude that the accused knew the complainant was not consenting on the basis of the facts and circumstances which it has sought to prove occurred.

[*Give direction as to Inferences [see **[3-150]**] or remind jury if already given.*]

For the purpose of deciding whether the Crown has proved this element, you must consider all the circumstances of the case, including what, if anything, the accused said or did: [**s 61HK(5)(a)**]. **[***Add, if appropriate — self-induced intoxication*: However, intoxication of the accused that was self-induced must be ignored. If you consider they were intoxicated by voluntarily drinking alcohol [*or taking drugs*], you must decide if the Crown has proved this element by considering what their state of mind would have been if they had not been intoxicated: [**s 61HK(5)(b)**]].

The Crown will have proved the accused knew the complainant did not consent if it proves that [*refer only to those of the following that arise from the evidence*]:

1. the accused actually knew the complainant did not consent to the sexual touching; or
2. the accused was reckless as to whether the complainant consented to the sexual touching;
3. any belief the accused had, or may have had, that the complainant consented to the sexual touching was not reasonable in the circumstances.

It is important to bear in mind that it is for the Crown to prove this. As you are well aware, there is no obligation upon the accused to prove anything.

[*Actual knowledge — s 61HK(1)(a)*: *Summarise the evidence and relevant arguments of the parties*.]

[Recklessness — s 61HK(1)(b)]

To establish that the accused was reckless as to whether the complainant consented to the sexual touching, the Crown must prove, beyond reasonable doubt, either:

(a) that the accused failed to consider whether or not the complainant was consenting at all, and just went ahead with the sexual touching, even though the risk they were not consenting would have been obvious to someone with the accused's mental capacity had they turned their mind to it, or

(b) the accused realised the possibility that the complainant was not consenting but went ahead with the sexual touching regardless of whether they were consenting or not.

[*Summarise the evidence and relevant arguments of the parties*.]

[Belief in consent that was not reasonable in the circumstances — s 61HK(1)(c):

If, on the basis of the evidence led in the trial, you decide there is a possibility the accused had, or may have had, a belief that the complainant consented, the Crown must prove beyond reasonable doubt that the belief was not reasonable in the circumstances. The Crown case is that you would find that any such belief was not reasonable in the circumstances because [*state Crown's contention*].

[*If appropriate* — **s 61HK(2):** A belief that the complainant consented to the sexual touching is not reasonable if the Crown satisfies you beyond reasonable doubt the accused did not, within a reasonable time before, or at the time of, the sexual touching, say or do anything to find out if the complainant consented.

Whether it was reasonable in the circumstances for the accused to believe the complainant was consenting to the sexual touching is judged according to community standards. You ask yourself what would an ordinary person in the accused's position have believed at the relevant time having regard to all the circumstances of the case [*If appropriate: other than the accused's self-induced intoxication*]?

[*Summarise the evidence and relevant arguments of the parties.*]

[If applicable — cognitive or mental health impairment as a substantial cause of the accused not saying or doing anything (s 61HK(3)–(4)):

If the Crown has proved beyond reasonable doubt that the accused did not say or do anything to ascertain whether the complainant consented to the sexual touching,

then that would establish that the belief of the accused that the complainant was not consenting was not reasonable. However, this would not be the case if the accused was suffering from a [*cognitive/mental health*] impairment at the time of the sexual touching and that the impairment was a substantial cause of them not saying or doing anything to ascertain whether the complainant consented to that sexual touching.

[*Adopt so much of the definitions of mental health impairment and cognitive impairment from ss 4C and 23A(8) and (9) Crimes Act as appropriate — see further* ***[4-304]***.]

This is a matter where the accused must prove on the balance of probabilities both that:

1. they were suffering from a [*cognitive/mental health*] impairment at the time of the sexual touching; AND
2. their [*cognitive/mental health*] impairment was a substantial cause of them not saying or doing anything to ascertain whether the complainant consented to the sexual touching.

[*Summarise the evidence and relevant arguments of the parties*.]

If the accused has not proved both these matters on the balance of probabilities, then the Crown will have established beyond reasonable doubt that their failure to say or do anything to ascertain whether the complainant consented to the sexual touching was such that their belief the complainant was not consenting was not reasonable in the circumstances.

If the accused has proved both these matters on the balance of probabilities, then you cannot use the fact they did not do or say anything to ascertain whether the complainant consented to the sexual touching in considering whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable. You must put that fact to one side and consider whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable because of other facts and circumstances.

[*For aggravated forms of the offence add from* ***[5-1130]*** *as appropriate*.]

[5-1120] Notes

Last reviewed: September 2023

1. It is important to tailor the directions to the circumstances and issues in the particular trial. Where the only issue is whether the alleged act occurred, or whether the accused was the offender and there is no issue about the complainant not consenting, it may be confusing to direct the jury about aspects of the definition of consent in s 61HE(6) (for offences up to 31 May 2022) and s 61HJ(1)(i) and (j) (for offences from 1 June 2022) that do not apply. See *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4] and [42].
2. The Crown must prove the alleged complainant did not consent. What amounts to knowledge of consent and how consent may be negated is addressed in detail in s 61HE (for offences up to 31 May 2022) and ss 61HJ and 61HK (for offences from 1 June 2022).

3. Consent is not an element of a sexual touching offence if the alleged victim is a child: s 61HE(1) (for offences up to 31 May 2022) and s 61HG(1) (for offences from 1 June 2022) lists the offences to which the definition of consent applies.

4. The exception for genuine or proper medical or hygienic purposes in s 61HB(3) may be excluded when the relevant acts giving rise to the offence occurred during a medical examination: *Decision Restricted* [2020] NSWCCA 138 at [51]–[65]. There is no requirement that the sole purpose of touching in such a context be for sexual gratification. The exception is only engaged when the relevant act is carried out for proper medical purposes: at [51]; see also [99].

5. Evidence that, at the relevant time, the accused was intoxicated cannot be taken into account if it was self-induced: s 61HE(4)(b) (for offences up to 31 May 2022) and s 61HK(5)(b) (for offences from 1 June 2022).

6. Where a trial involves an offence of sexual touching and an offence of indecent assault (*Crimes Act*, s 61M, now repealed) separate consent directions are required: *Holt v R* [2019] NSWCCA 50 at [64].

[5-1130] Suggested direction — aggravated offence (s 61KD)

Last reviewed: September 2023

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

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

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

In company — s 61KD(2)(a)

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

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

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

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

and

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

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

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

or

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

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

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

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

Under authority — s 61KD(2)(b)

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

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

Complainant has serious physical disability or cognitive impairment — s 61KD(2)(c), (d)

It is an aggravating circumstance if the offence was committed while the complainant had a [*serious physical disability* OR *cognitive impairment*].

The law recognises a variety of forms of "cognitive impairment", including where a person has a [*nominate the form of cognitive impairment according to the list in s 61HD and in accordance with the evidence relied on in the particular case*].

OR

The law does not define what a "serious physical disability" is. That is a matter for you to decide. However, it is an ordinary English phrase, and you should give it its ordinary English meaning. It obviously focuses on disability of the body, as opposed to the mind and requires you to evaluate whether there was a disability that was a serious one.

To prove this element, the Crown relies upon the evidence of [*summarise relevant evidence*].

That evidence [*has/has not*] been disputed. [*Summarise defence case as necessary*.]

Conclusion

If you are satisfied the Crown has proved all five elements of the aggravated offence of sexual touching in the indictment beyond reasonable doubt you would find the accused guilty. When asked for the verdict [*for this count*], your foreperson would simply announce, "guilty".

If you are satisfied the Crown has only proved the first four elements of the basic offence of sexual touching, but has not proved the element of aggravation, then you would acquit the accused of the aggravated offence and return a verdict of guilty for the basic offence. When asked for the verdict [*for this count*], your foreperson would announce, "not guilty of aggravated sexual touching but guilty of sexual touching".

If you are not satisfied the Crown has proved any one of the four elements of the basic offence of sexual touching, then you would acquit the accused completely. When asked for the verdict [*for this count*], your foreperson would simply announce, "not guilty".

[5-1140] Notes — aggravated sexual touching — under s 61KD

Last reviewed: September 2023

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

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

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

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

4. As to whether the alleged victim is under the authority of the accused (s 61KD(2)(b)), s 61H(2) provides that "a person is under the authority of another person if [they are] in the care, or under the supervision or authority, of the other person". In *KSC v R* [2012] NSWCCA 179 at [125], McClellan CJ at CL (Davies and Fullerton JJ agreeing) concluded that the components in the definition of care and supervision made plain the nature of the relationship to which section was directed and that each of the words "care", "supervision" and "authority" were ordinary English words a jury would have no difficulty understanding. See also *R v Howes* [2000] VSCA 159 at [4]; *R v MacFie* [2000] VSCA 173 at [18], [21]. It is not confined to relationships based on a legal right or power: *Howes* at [50]; *MacFie* at [20]–[21].
5. "Serious physical disability" (s 61KD(3)(d)) is not defined but is capable of encompassing a vast array of different conditions: *JH v R* [2021] NSWCCA 324 at [38]. In *JH v R*, it was held that this term did not require explication as the words mean what they say and are capable of being applied by a jury: at [24]–[25].
6. "Cognitive impairment" is defined in s 61HD and provides that a person has such an impairment if they have:

   (a) an intellectual disability, or

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

   (c) a neurological disorder, or

   (d) dementia, or

   (e) a severe mental illness, or

   (f) a brain injury,

   that results in the person requiring supervision or social habilitation in connection with daily life activities.

[5-1150] Suggested direction — sexually touching a child under 10 (s 66DA)

Last reviewed: September 2023

This direction can be adapted for an offence involving a child against s 66DB. For incitement offences see the commentary at **[5-1170] Notes — Incitement offences**.

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

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

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

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

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

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

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

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

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

3. **The touching was sexual**

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

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

   - the part of the body touched, **[***or if appropriate*: "or doing the touching"**]**. Was it the genital or anal area or the breasts **[***and add where relevant*: whether or not the breasts are sexually developed, and regardless of the person's gender or sex**]**?
   - whether the person doing the touching did so for sexual arousal or sexual gratification.
   - was there any other aspect of the touching (including the circumstances in which it was done) which made it sexual?

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

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

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

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

[5-1160] Notes — sexual touching of a child

Last reviewed: September 2023

1. Section 80AF *Crimes Act* 1900, which addresses the situation where there is some uncertainty about the timing of a particular offence or offences against a child, may require consideration. The section may only be invoked at the commencement of a trial; it cannot be invoked to address uncertainties that arise during the trial: *Stephens v The Queen* (2022) 273 CLR 635 at [45]–[46].

2. The suggested direction at **[5-1150]** could be adapted for an offence of sexually touching a young person between 16 and 18 years old under special care in s 73A. "Special care" is broadly defined in s 73A(3).

[5-1170] Notes — incitement offences

Last reviewed: September 2023

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

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

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

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

4. The incitement must be to commit the specific offence at hand: *Walsh v Sainsbury* (1925) 36 CLR 464 at 476; *Clyne v Bowman* (1987) 11 NSWLR 341 at 347–348. It is not necessary to prove the person incited acted upon the incitement or whether the incitement had any effect. However, it is necessary to prove that the course of conduct urged would, if it had been acted upon as the inciter intended it to be,

amount to the commission of the offence: *R v Dimozantis* (unrep, 7/10/1991, Vic CCA); *R v Assistant Recorder of Kingston-Upon-Hull; Ex parte Morgan* [1969] 2 QB 58 at 62.

[The next page is 879/1]

Sexual act

***Crimes Act* 1900 (NSW), ss 61KE, 61KF, 66DC, 66DD, 66DE and 66DF**

Important note: The directions in ss 292–292E *Criminal Procedure Act* 1986 apply to proceedings for the above offences which commence on or after 1 June 2022, regardless of when the offence was committed: Sch 2, Pt 42. See further **[5-200] Directions — misconceptions about consent in sexual assault trials**. The procedure for filing a Crown or Defence Readiness Hearing Case Management Form requires the parties to identify, amongst other matters, which directions under ss 292A–292E may be required at trial. It would be prudent to commence a discussion early in the trial concerning which of these directions, if any, might be required in a particular trial.

[5-1200] Introduction

Last reviewed: September 2023

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (the amending Act) implemented recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse and the Child Sexual Offences Review team to reform the law with respect to sexual offences. These included repealing the basic and aggravated offences of act of indecency (former ss 61N and 61O *Crimes Act* 1900, respectively) and replacing them with separate offences of sexual act in ss 61KE and 61KF for adults, and in ss 66DC, 66DD, 66DE and 66DF for children.

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

"Sexual act" is defined in s 61HC as an act (other than sexual touching) carried out in circumstances a reasonable person would consider to be sexual.

The following matters in s 61HC must be considered when deciding whether a reasonable person would consider an act to be sexual:

(a) whether the area of the body involved in the act is the person's genital area or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person's breasts, whether or not the breasts are sexually developed, or

(b) whether the person carrying out the act does so for the purpose of obtaining sexual arousal or sexual gratification, or

(c) whether any other aspect of the act (including the circumstances in which it is carried out) makes it sexual.

Offences against ss 61KE, 61KF, 66DC, 66DD, 66DE and 66DF are "prescribed sexual offences": s 3 *Criminal Procedure Act* 1986. Particular provisions of the *Criminal Procedure Act* and the *Crimes Act* apply to proceedings for such offences: see **Evidence given by alternative means** at **[1-360]**ff, and **Closed court, suppression and non-publication orders** at **[1-349]**.

See also: *Criminal Practice and Procedure NSW* at [8-s 61KE], [8-s 61KF], [8-s 66DC], [8-s 66DD], [8-s 66DE] and [8-s 66DF].

For offences committed before 1 December 2018, ss 61N and 61O provide the basic and aggravated offences, respectively. Section 61N(1) makes it an offence to commit an

act of indecency "with or towards" a person (or incite a person to an act of indecency) where the person is under the age of 16 years. Section 61N(2) applies where the person is aged above 16 years.

The common law definition of "indecency" applies, meaning contrary to currently accepted standards of decency: *R v Manson* (unrep, 17/2/93, NSWCCA,); *R v Harkin* (1989) 38 A Crim R 296. Where an act does not have an unequivocal sexual connotation, it may still constitute an indecent act if it is proved it was carried out for sexual gratification: *R v Court* [1989] 1 AC 28; *R v Harkin*. The purpose of the act, such as for artistic or political reasons, is a relevant but not decisive condition for determining if the act was indecent: *R v Manson*.

[5-1210] Suggested direction — basic offence (s 61KE) — until 31 May 2022

Last reviewed: September 2023

The suggested direction is based on the offence in s 61KE(a). For incitement offences see the commentary at **[5-1290] Notes — Incitement offences**.

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

For the suggested direction for offences involving a child, see **[5-1260] Suggested direction — sexual act involving a child under 10 (s 66DC)**.

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

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

1. the accused intentionally carried out an act with, or towards, the complainant;
2. the act was sexual;
3. without the complainant's consent to the sexual act;
4. the accused knew the complainant did not consent.

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

1. **The accused intentionally carried out an act with, or towards, the complainant**

   The act itself must be voluntary and intentional, not an accident or carried out by mistake.

   In determining whether the act was intentionally carried out with, or towards, the complainant, you are to consider the act and all of its surrounding circumstances. [*refer to specific Crown allegation regarding the act*]. This may include: .

   - the nature of the act;
   - the proximity between the accused and the complainant when the act was carried out (the complainant does not have to be in the immediate physical presence of the accused);

- the visibility of the act and whether the accused wanted their actions to be seen or was deliberately hiding them;
- what interaction, if any, occurred between the complainant and the accused at the time the act was being carried out, including inviting or encouraging the complainant to watch or participate.

[*Add the following where the offence is particularised as 'with'*]:

The act must involve some participation by the complainant (although the Crown case is that the participation was involuntary).

[*Add the following where the offence is particularised as 'towards'*]:

In performing the act, there must be some engagement with the complainant, from which it can be inferred the act is directed at the complainant.

[*For either particularisation*]: It is not enough if the complainant was simply present (physically or electronically), but nothing more, when the act was carried out.

2. **The act was sexual**

Sexual act means an act (other than touching another person) carried out in circumstances where a reasonable person would consider the act to be sexual.

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

- the part of the body involved in the act. Was it the genital or anal area or [*only in the case of a female person, or a transgender/intersex person identifying as female:* the breasts] [*and add where relevant:* whether or not the breasts are sexually developed]?
- whether the person doing the carrying out the act did so for the purpose of obtaining sexual arousal or sexual gratification;
- whether there was any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?

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

[*Where appropriate*: An act carried out for genuine medical or hygienic purposes is not a sexual act. As that is what the accused says was the reason for carrying out the act, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

3. **Without the complainant's consent**

This element concerns the complainant's state of mind. The Crown must prove that the sexual act was carried out without the complainant's consent.

Consent means that a person freely and voluntarily agrees to something. So, the Crown is required to prove the complainant did not freely and voluntarily agree to the sexual act being carried out.

You are concerned with whether the complainant did not consent to the act at the time the act occurred. What the complainant's state of mind was before or after the act might provide a guide, but the question is whether the Crown has proved that the complainant was not consenting at the time the act occurred.

[*Where appropriate:* The complainant said in evidence that they did not consent to the sexual act being carried out. If you accept that evidence, then you could be satisfied the Crown has proved this element.**]**

In deciding whether you accept that the complainant was not consenting you may also take into account any of the following:

(a) Consent obtained after persuasion is still consent, provided that ultimately it is given freely and voluntarily.

(b) Consent, or lack of consent, may be indicated by what the complainant said or did. In other words, the complainant's words or actions, or both, may indicate whether or not there was consent.

(c) A person who does not offer actual physical resistance to a sexual act being carried out is not, by reason only of that fact, to be regarded as consenting to that act. There is no legal requirement for a person to physically resist before a jury can find that the person did not consent.

[*If applicable, add one or more of the following* **[s 61HE(5)–(6)]:**

The law provides that a person does not consent to a sexual act being carried out:

- if they do not have the capacity to consent, including because of their age or cognitive incapacity, or
- if they did not have the opportunity to consent because they were unconscious or asleep, or
- if they consent because of threats of force or terror (whether the threats are against, or the terror is instilled in, them or another person), or
- if they consent because they were unlawfully detained, or
- if the person consented under a mistaken belief:
  - as to the other person's identity, or
  - that the other person is married to the person, or
  - that the sexual activity is for health or hygienic purposes, or
  - about the nature of the activity that has been induced by fraudulent means.**]**

[*If applicable, add one or more of the following* **[s 61HE(8)]:**

It may be established that the complainant did not consent to the sexual act if:

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

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

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

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

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

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

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

The law says the Crown will have proved the accused knew the complainant did not consent to the sexual act if: **[***refer only to those of the following matters that arise from the evidence* **— see further [5-1230] Notes below**]

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

(b) the accused was reckless as to whether the complainant consented because the accused realised there was a possibility the complainant did not consent; or

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

(d) the accused may have actually believed the complainant consented, but the accused had no reasonable grounds for that belief; or

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

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

[5-1220] Suggested direction — basic offence (s 61KE) — from 1 June 2022

Last reviewed: September 2023

Notes:

1. Sections 61HF–61HK *Crimes Act* 1900 which relate to consent and proof of consent apply to offences committed from 1 June 2022. See **[5-900] Sexual intercourse without consent — from 1 June 2022** and **[5-920] Notes related to consent** for the commentary related to these provisions. See also the notes at **[5-1230]** below.
2. The suggested direction is framed in terms of what the Crown is required to prove. It is a matter of discretion as to how often it is appropriate to remind the jury that the accused is not obliged to prove anything.

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

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

1. the accused intentionally carried out an act with, or towards, the complainant;
2. the act was sexual;
3. without the complainant's consent to the sexual act;
4. the accused knew the complainant did not consent.

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

1. The accused intentionally carried out an act with, or towards, the complainant

The act itself must be voluntary and intentional, not an accident or carried out by mistake.

In determining whether the act was intentionally carried out with or towards the complainant, you are to consider the act and all of its surrounding circumstances. [*refer to specific Crown allegation regarding the act*].

This may include:

- The nature of the act;
- The proximity between the accused and the complainant when the act was carried out (the complainant does not have to be in the immediate physical presence of the accused);

- The visibility of the act and whether the accused wanted their actions to be seen or was deliberately hiding them;
- What interaction, if any, occurred between the complainant and the accused at the time the act was being carried out, including inviting or encouraging the complainant to watch or participate.

[*Add the following where the offence is particularised as 'with'*]:

The act must involve some participation by the complainant (although the Crown case is that the participation was involuntary).

[*Add the following where the offence is particularised as 'towards'*]: In performing the act, there must be some engagement with the complainant, from which it can be inferred the act is directed at the complainant.

[*For either particularisation*]:

It is not enough if the complainant was simply present (physically or electronically), but nothing more, when the act was carried out.

2. The act was sexual

Sexual act means an act (other than touching another person) carried out in circumstances where a reasonable person would consider the act to be sexual.

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

- the part of the body involved in the act. Was it the genital or anal area or **[***only in the case of a female person, or a transgender/intersex person identifying as female:* the breasts] [*and add where relevant:* whether or not the breasts are sexually developed**]**?
- whether the person carrying out the act did so for the purpose of obtaining sexual arousal or sexual gratification.
- whether there was any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?

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

[*Where appropriate*: An act carried out for genuine medical or hygienic purposes is not a sexual act. As that is what the accused says was the reason for carrying out the act, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

3. Without the complainant's consent

This element concerns the complainant's state of mind. The Crown must prove beyond reasonable doubt that the complainant did not consent to the sexual act.

Everyone has a right to choose whether or not to participate in a sexual act. A person cannot presume that another person is consenting. A consensual sexual act involves ongoing and mutual communication and decision-making and free and voluntary agreement between the persons participating in the sexual act. **[s 61HF]**

[***If required (s 292A Criminal Procedure Act 1986 — circumstances in which non-consensual activity occurs)***: *However, you should bear in mind that non-consensual sexual activity can occur in many different circumstances and between different kinds of people including people who know one another, or are married to one another, or who are in an established relationship with one another*.] [*See [5-200]*]

A person consents to a sexual act being carried out if, at the time of the act, the person freely and voluntarily agrees to the act: [**s 61HI(1)**]. Consent can be given verbally or it can be expressed by actions. However, a person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity: [**s 61HI(4)**].

[*If applicable — circumstances in which there is no consent — s 61HJ*:

The law provides that circumstances in which a person does not consent to a sexual act include if you are satisfied beyond reasonable doubt that the person [*refer only to those that apply*]:

(a) does not say or do anything to communicate consent,

(b) does not have the capacity to consent to the sexual act,

(c) is so affected by alcohol or another drug as to be incapable of consenting to the sexual act,

(d) is unconscious or asleep,

(e) participates in the sexual act because of force, fear of force or fear of serious harm of any kind to them, another person, an animal or property (regardless of when the force or the conduct giving rise to the fear occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(f) participates in the sexual act because of coercion, blackmail or intimidation (regardless of when the coercion, blackmail or intimidation occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(g) participates in the sexual act because they or another person is unlawfully detained,

(h) participates in the sexual act because they are overborne by the abuse of a relationship of authority, trust or dependence,

(i) participates in the sexual act because they are mistaken about the nature of the act,

(j) participates in the sexual act because they are mistaken about the purpose of the act (including about whether the act is for health, hygienic or cosmetic purposes),

(k) participates in the sexual act with another person because they are mistaken about the identity of the other person or because they are mistaken that they are married to the other person, or

(l) participates in the sexual act because of a fraudulent inducement. [*If appropriate*: A misrepresentation about a person's income, wealth or feelings [*refer only to that or those which apply*] is not a "fraudulent inducement".

Summarise the evidence and relevant arguments of the parties.]

[If applicable — persuasion: Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.**]**

[If applicable — withdrawal of consent: A person may withdraw consent to a sexual act at any time: [**s 61HI(2)**]. If the act occurs, or continues, after consent has been

withdrawn then it occurs without consent: [**s 61HI(3)**]. If the Crown has proved beyond reasonable doubt that the complainant withdrew consent and that the act occurred or continued after that point in time, then you would find the occurrence or continuation of the sexual act was without the complainant's consent. *Summarise the evidence and relevant arguments of the parties*.]

[If applicable — consent to a different act [**s 61HI(5)**]: A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. There is evidence the complainant may have consented to [*describe relevant sexual activity*]. If you decide the person may have consented to that activity, it does not follow that for that reason only the person may have consented to the sexual act alleged by the Crown. [*Summarise the evidence and relevant arguments of the parties*.**]**

[If applicable — consent to sexual activity with accused on a different occasion (s 61HI(6)(a)): A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with that person on another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with the accused. If you decide the complainant may have consented to that activity, it does not follow that for that reason only the complainant consented to the sexual activity alleged by the Crown.

Summarise the evidence and relevant arguments of the parties.**]**

[*If applicable — consent to sexual activity with another person on same or another occasion* (s 61HI(6)(b)):

A person who consents to a sexual activity with a person is not, by reason only of that fact, taken to consent to a sexual activity with another person on that or another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with [*name of person*]. If you decide that the complainant may have consented to that activity, it does not follow that for that reason only that the complainant consented to the sexual act with the accused alleged by the Crown.

Summarise the evidence and relevant arguments of the parties.**]**

4. The accused knew the complainant did not consent

This element concerns the accused's state of mind. The Crown must prove beyond reasonable doubt that the accused knew the complainant did not consent to the sexual act alleged.

The Crown has no direct evidence about what the accused's state of mind was at that time. The Crown asks you to infer or conclude that the accused knew the complainant was not consenting on the basis of the facts and circumstances which it has sought to prove occurred.

[*Give direction as to Inferences [see [3-150]] or remind jury if already given.*]

For the purpose of deciding whether the Crown has proved this element, you must consider all the circumstances of the case, including what, if anything, the accused said or did: [**s 61HK(5)(a)**]. **[***Add, if appropriate — self-induced intoxication*: However, intoxication of the accused that was self-induced must be ignored. If you consider the accused was intoxicated by voluntarily drinking alcohol [*or taking drugs*], you must decide if the Crown has proved this element by considering what the accused's state of mind would have been if the accused had not been intoxicated: [**s 61HK(5)(b)**]].

The Crown will have proved the accused knew the complainant did not consent if it proves that [*refer only to those of the following that arise from the evidence*]:

1. the accused actually knew the complainant did not consent to the sexual act; or
2. the accused was reckless as to whether the complainant consented to the sexual act;
3. any belief the accused had, or may have had, that the complainant consented to the sexual act was not reasonable in the circumstances.

It is important to bear in mind that it is for the Crown to prove this. As you are well aware, there is no obligation upon the accused to prove anything.

[*Actual knowledge — s 61HK(1)(a)*: *Summarise the evidence and relevant arguments of the parties*.]

[Recklessness — s 61HK(1)(b)]

To establish that the accused was reckless as to whether the complainant consented to the sexual act, the Crown must prove, beyond reasonable doubt, either:

(a) that the accused failed to consider whether or not the complainant was consenting at all, and just went ahead with the sexual act, even though the risk the complainant was not consenting would have been obvious to someone with the accused's mental capacity had they turned their mind to it, or

(b) the accused realised the possibility that the complainant was not consenting but went ahead with the sexual act regardless of whether the complainant was consenting or not.

[*Summarise the evidence and relevant arguments of the parties*.]

[Belief in consent that was not reasonable in the circumstances — s 61HK(1)(c):

If, on the basis of the evidence led in the trial, you decide there is a possibility the accused had, or may have had, a belief that the complainant consented, the Crown must prove beyond reasonable doubt that the belief was not reasonable in the circumstances. The Crown case is that you would find that any such belief was not reasonable in the circumstances because [*state Crown's contention*].

[*If appropriate* — **s 61HK(2):** A belief that the complainant consented to the sexual act is not reasonable if the Crown satisfies you beyond reasonable doubt the accused did not, within a reasonable time before, or at the time of, the sexual act, say or do anything to find out if the complainant consented.

Whether it was reasonable in the circumstances for the accused to believe the complainant was consenting to the sexual act is judged according to community standards. You ask yourself what would an ordinary person in the accused's position have believed at the relevant time having regard to all the circumstances of the case [*If appropriate: other than the accused's self-induced intoxication*]?

[*Summarise the evidence and relevant arguments of the parties.*]

[If applicable — cognitive or mental health impairment as a substantial cause of the accused not saying or doing anything (s 61HK(3)–(4)):

If the Crown has proved beyond reasonable doubt that the accused did not say or do anything to ascertain whether the complainant consented to the sexual act, then that would establish that the belief of the accused that the complainant was not consenting

was not reasonable. However, this would not be the case if the accused was suffering from a [*cognitive/mental health*] impairment at the time of the sexual act and that the impairment was a substantial cause of the accused not saying or doing anything to ascertain whether the complainant consented to that sexual act.

[*Adopt so much of the definitions of mental health impairment and cognitive impairment from ss 4C and 23A(8) and (9) Crimes Act as appropriate — see further [4-304]*.]

This is a matter where the accused must prove on the balance of probabilities both that:

1. The accused was suffering from a [*cognitive/mental health*] impairment at the time of the sexual act; AND
2. The accused's [*cognitive/mental health*] impairment was a substantial cause of the accused not saying or doing anything to ascertain whether the complainant consented to the sexual act.

[*Summarise the evidence and relevant arguments of the parties*.]

If the accused has not proved both these matters on the balance of probabilities, then the Crown will have established beyond reasonable doubt that the accused's failure to say or do anything to ascertain whether the complainant consented to the sexual act was such that the accused's belief the complainant was not consenting was not reasonable in the circumstances.

If the accused has proved both these matters on the balance of probabilities, then you cannot use the fact the accused did not do or say anything to ascertain whether the complainant consented to the sexual act in considering whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable. You must put that fact to one side and consider whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable because of other facts and circumstances.

[*For aggravated forms of the offence add from [5-1240] as appropriate*.]

[5-1230] Notes

Last reviewed: September 2023

1. The meaning of "with" or "towards" has been considered in the following cases:
   (a) Sexual or indecent acts "with" another require two participants, while acts "towards" another are committed towards a non-participant: *R v Chonka* [2000] NSWCCA 466 at [46].
   (b) Where an accused performs a sexual or indecent act in front of a person and invites that person to participate, this will be considered a sexual act towards that person: *R v Gillard* [1999] NSWCCA 21 at [63].
   (c) An accused's sexual or indecent act does not have to be committed in the immediate physical presence of another person for it to be considered "towards" that other person. It is sufficient if the conduct was within the view of that person and the accused intended to be seen: *R v Barrass* [2005] NSWCCA 131 at [28]–[30].

(d) If the accused engages in a sexual or indecent act but does not believe the other person is able to see the act, this act will not be "towards" that person. The accused must know they are being watched by that person and derive some sort of stimulus from that person's observation: *R v Francis* (1989) 88 Cr App R 127 at 129.

(e) "Towards" requires an intention by the accused to engage at some level with another person, from which it can be inferred the accused's sexual or indecent act is directed towards the person. A person's mere presence is not enough: *DPP (NSW) v Presnell* [2022] NSWCCA 146 (by majority) at [29], [91]–[92]. A complainant does not have to be aware of the accused's conduct for the offence to be established (for example, if the complainant is asleep they are taken to not be consenting: s HJ(1)(d)): *DPP (NSW) v Presnell* at [59]. If the accused is sufficiently proximate to the person so that it can be inferred the accused intends to gain sexual pleasure from exposure to the person's body, this may be sufficient even if the accused does not intend the person becomes aware of the sexual or indecent act: *DPP (NSW) v Presnell* at [94].

2. *DPP (NSW) v Presnell* involved consideration of a sexual act involving a child (s 66DC), where consent is not an element of the offence. The principle of "intention to engage" was applied by Yehia J at [202] in *SC v R* [2023] NSWCCA 60 regarding an offence of aggravated act of indecency towards a person under 16 years contrary to now repealed s 61O(1).

3. It is important to tailor the directions to the circumstances and issues in the particular trial. Where the only issue is whether the alleged act occurred, or whether the accused was the offender and there is no issue about the complainant not consenting, it may be confusing to direct the jury about aspects of the definition of consent in s 61HE(6) (for offences up to 31 May 2022) and s 61HJ(1)(i) and (j) (for offences from 1 June 2022) that do not apply. See *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4] and [42].

4. The Crown must prove the alleged complainant did not consent. What amounts to knowledge of consent and how consent may be negated is addressed in detail in s 61HE (for offences up to 31 May 2022) and ss 61HJ and 61HK (for offences from 1 June 2022)..

5. Consent is not an element of a sexual act offence if the alleged victim is a child: s 61HE(1) (for offences up to 31 May 2022) and s 61HG(1) (for offences from 1 June 2022) lists the offences to which the definition of consent applies.

6. The exception for genuine or proper medical or hygienic purposes in s 61HC(3) may be excluded when the relevant acts giving rise to the offence occurred during a medical examination: *Decision Restricted* [2020] NSWCCA 138 at [51]–[65]. There is no requirement that the sole purpose of an act in such a context be for sexual gratification. The exception is only engaged when the relevant act is carried out for proper medical purposes: at [51]; see also [99].

7. Evidence that, at the relevant time, the accused was intoxicated cannot be taken into account if it was self-induced: s 61HE(4)(b) (for offences up to 31 May 2022) and s 61HK(5)(b) (for offences from 1 June 2022).

[5-1240] Suggested direction — aggravated offence (s 61KF)

Last reviewed: September 2023

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

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

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

In company — s 61KF(2)(a)

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

It is an aggravating circumstance if the offence was committed in the company of another person or persons. The Crown alleges the accused committed the offence when the accused was in the company of [*alleged co-offender*]. The Crown case is that when the accused carried out the sexual act, [*alleged co-offender*] was [*specify nature of presence*].

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

(a) the accused and [*alleged co-offender*] shared a common purpose that a sexual act would be carried out with or towards the complainant;

and

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

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

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

or

(b) to encourage or support the accused in carrying out the sexual act.

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

[*If appropriate, add*: It is not enough [*alleged co-offender*] shared a common purpose with the accused that a sexual act would be carried out with or towards the complainant, but was not physically present in the way in which I have defined that concept. For

example, it would not be enough if [*alleged co-offender*] was somewhere else acting as a look-out, or had provided encouragement to the accused at some time before the sexual act occurred.**]**

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

Under authority — s 61KF(2)(b)

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

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

Complainant has serious physical disability or cognitive impairment — s 61KF(2)(c), (d)

It is an aggravating circumstance if the offence was committed while the complainant had a [*serious physical disability* OR *cognitive impairment*].

The law recognises a variety of forms of "cognitive impairment", including where a person has a [*nominate the form of cognitive impairment according to the list in s 61HD and in accordance with the evidence relied on in the particular case*].

OR

The law does not define what a "serious physical disability" is. That is a matter for you to decide. However, it is an ordinary English phrase, and you should give it its ordinary English meaning. It obviously focuses on disability of the body, as opposed to the mind and requires you to evaluate whether there was a disability that was a serious one.

To prove this element, the Crown relies upon the evidence of [*summarise relevant evidence*].

That evidence [*has/has not*] been disputed. [*Summarise defence case as necessary*.]

Conclusion

If you are satisfied the Crown has proved all five elements of the aggravated offence of sexual act in the indictment beyond reasonable doubt you would find the accused guilty. When asked for the verdict [*for this count*], your foreperson would simply announce, "guilty".

If you are satisfied the Crown has only proved the first four elements of the basic offence of sexual act, but has not proved the element of aggravation, then you would acquit the accused of the aggravated offence and return a verdict of guilty for the basic offence. When asked for the verdict [*for this count*], your foreperson would announce, "not guilty of aggravated sexual act but guilty of sexual act".

If you are not satisfied the Crown has proved any one of the four elements of the basic offence of sexual act, then you would acquit the accused completely. When asked for the verdict [*for this count*], your foreperson would simply announce, "not guilty".

[5-1250] Notes — aggravated sexual act — under s 61KF

Last reviewed: September 2023

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

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

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

   Mere presence of another person is not sufficient: *R v Crozier* (unrep, 8/3/96, NSWCCA); *Kelly v The Queen* (1989) 23 FCR 463 at 466. The complainant's perspective (of being confronted with more than one person) is relevant but not determinative. "If two or more persons are present, and share the same purpose, they will be 'in company', even if the victim was unaware of the other person": *Button* at [120]. It is sufficient if the complainant is confronted by the "combined force of two or more persons", even if the other person(s) did not intend to physically participate if required: *R v Leoni* [1999] NSWCCA 14 at [20] (referring to the judgment of King CJ in *R v Broughman* (1986) 43 SASR 187 at 191); applied in *R v Villar* [2004] NSWCCA 302 at [68]. Proof of this aggravating circumstance does not depend upon the other person being convicted of the same offence: *Villar* at [69].
4. As to whether the alleged victim is under the authority of the accused (s 61KF(2)(b)), s 61H(2) provides that "a person is under the authority of another person if [they are] in the care, or under the supervision or authority, of the other person". In *KSC v R* [2012] NSWCCA 179 at [125], McClellan CJ at CL (Davies and Fullerton JJ agreeing) concluded that the components in the definition of care and supervision made plain the nature of the relationship to which section was directed and that each of the words "care", "supervision" and "authority" were ordinary English words a jury would have no difficulty understanding. See also *R v Howes* [2000] VSCA 159 at [4]; *R v MacFie* [2000] VSCA 173 at [18], [21]. It is not confined to relationships based on a legal right or power: *Howes* at [50]; *MacFie* at [20]–[21].
5. "Serious physical disability" (s 61KF(2)(c)) is not defined but is capable of encompassing a vast array of different conditions: *JH v R* [2021] NSWCCA 324 at [38]. In *JH v R*, it was held that this term did not require explication as the words mean what they say and are capable of being applied by a jury: [24]–[25].
6. "Cognitive impairment" is defined in s 61HD and provides that a person has such an impairment if they have:
   (a) an intellectual disability, or

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

(c) a neurological disorder, or

(d) dementia, or

(e) a severe mental illness, or

(f) a brain injury,

that results in the person requiring supervision or social habilitation in connection with daily life activities.

[5-1260] Suggested direction — sexual act involving a child under 10 (s 66DC)

Last reviewed: September 2023

This direction can be adapted for an offence involving a child against s 66DE. For incitement offences see the commentary at **[5-1290] Notes — Incitement offences**.

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

The accused is charged with carrying out a sexual act with or towards the complainant. The Crown case is that [*briefly outline the incident/s to which the charge relates*].

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

1. the complainant was a child under 10 years old;
2. the accused intentionally carried out an act with, or towards, the complainant; and
3. the act was sexual.

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

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

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

2. **The accused intentionally carried out a sexual act with or towards the complainant**

   The act itself must be voluntary and intentional, not an accident or carried out by mistake.

   In determining whether the act was intentionally carried out with or towards the complainant, you are to consider the act and all of its surrounding circumstances. [*refer to specific Crown allegation regarding the act*].

   This may include:

   - The nature of the act;
   - The proximity between the accused and the complainant when the act was carried out (the complainant does not have to be in the immediate physical presence of the accused);

- The visibility of the act and whether the accused wanted their actions to be seen or was deliberately hiding them;
- What interaction, if any, occurred between the complainant and the accused at the time the act was being carried out, including inviting or encouraging the complainant to watch or participate.

[*Add the following where the offence is particularised as 'with'*]:

The act must involve some participation by the complainant (although the Crown case is that the participation was involuntary).

[*Add the following where the offence is particularised as 'towards'*]:

In performing the act, there must be some engagement with the complainant, from which it can be inferred the act is directed at the complainant.

[*For either particularisation*]:

It is not enough if the complainant was simply present (physically or electronically), but nothing more, when the act was carried out.

3. **The act was sexual**

Sexual act means an act (other than touching another person) carried out in circumstances where a reasonable person would consider the act to be sexual.

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

- the part of the body involved in the act. Was it the genital or anal area or [*only in the case of a female person, or a transgender/intersex person identifying as female*: the breasts] **[***and add where relevant*: whether or not the breasts are sexually developed**]**?
- whether the person carrying out the act did so for sexual arousal or sexual gratification.
- was there any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?

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

[*Where appropriate*: An act carried out for genuine medical or hygienic purposes is not a sexual act. As that is what the accused says was the reason for carrying out the act, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.**]**

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

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

[5-1270] Notes — sexual act involving a child

Last reviewed: September 2023

1. Section 80AF *Crimes Act* 1900, which addresses the situation where there is some uncertainty about the timing of a particular offence or offences against a child, may require consideration. The section may only be invoked at the commencement of a trial; it cannot be invoked to address uncertainties that arise during the trial: *Stephens v The Queen* [2022] HCA 31 at [45]–[46].

[5-1280] Suggested direction — sexual act involving a child which is filmed (s 66DF)

Last reviewed: September 2023

The suggested direction is based on the offence in s 66DF. For incitement offences see **[5-1290] Notes — Incitement offences**.

The accused is charged with carrying out a sexual act with or towards the complainant, while knowing the act is being filmed for the purposes of producing child abuse material. The Crown case is that [*briefly outline the incident/s to which the charge/s relates*].

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

1. the complainant was a child under 16 years old at the time of the offence;
2. the accused intentionally carried out an act with, or towards, the complainant;
3. the act was sexual; and
4. the accused knew the act was being filmed to produce child abuse material.

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

1. **The complainant was a child under 16.**

   The law says a child is a person who is under the age of 16 years. In this case there is no dispute the complainant was a child of [age] at the time specified on the indictment. [This will require adaptation if the complainant's age is disputed].

2. **The accused intentionally carried out a sexual act with or towards the complainant**

   The act itself must be voluntary and intentional, not an accident or carried out by mistake.

   In determining whether the act was intentionally carried out with or towards the complainant, you are to consider the act and all of its surrounding circumstances. [*Refer to specific Crown allegation regarding the act*].

This may include:

- the nature of the act;
- the proximity between the accused and the complainant when the act was carried out (the complainant does not have to be in the immediate physical presence of the accused);
- the visibility of the act and whether the accused wanted their actions to be seen or was deliberately hiding them;
- what interaction, if any, occurred between the complainant and the accused at the time the act was being carried out, including inviting or encouraging the complainant to watch or participate.

[*Add the following where the offence is particularised as 'with'*]:

The act must involve some participation by the complainant (even though the Crown case is that the participation was involuntary).

[*Add the following where the offence is particularised as 'towards'*]:

In performing the act, there must be some engagement with the complainant, from which it can be inferred the act is directed at the complainant.

[*For either particularisation*]:

It is not enough if the complainant was simply present (physically or electronically), but nothing more, when the act was carried out.

3. **The act was sexual**

Sexual act means an act (other than touching another person) carried out in circumstances where a reasonable person would consider the act to be sexual.

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

- whether there was any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?
- the part of the body involved in the act. Was it the genital or anal area [*only in the case of a female person, or a transgender/intersex person identifying as female:* or the breasts] [*and add where relevant:* whether or not the breasts are sexually developed]?
- whether the person carrying out the act did so for the purpose of obtaining sexual arousal or sexual gratification;
- whether there was any other aspect of the act (including the circumstances in which it was carried out) which made it sexual?

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

[*Where appropriate:* An act carried out for genuine medical or hygienic purposes is not a sexual act. As that is what the accused says was the reason for carrying out the act, it is a matter for the Crown to prove beyond reasonable doubt that it was not done for such a purpose.]

4. **The accused knew the act was being filmed to produce child abuse material**

The Crown case is that the alleged sexual act [*briefly state the particulars*] was being filmed for the purposes of producing child abuse material and the accused knew this.

Child abuse material includes material that depicts a child's private parts, or a child engaged in sexual posing or sexual activity, [*or where relevant:* a child in the presence of another person engaged in sexual posing or a sexual activity].

Private parts means a person's genital or anal area (whether bare or covered by underwear) [*only in the case of a female person, or a transgender/intersex person identifying as female:* or the breasts] [*and add where relevant:* whether or not the breasts are sexually developed].

Child abuse material is what reasonable persons would, in all the circumstances, consider to be offensive. In determining whether reasonable persons would regard particular material as being, in all the circumstances, offensive, you should consider everything that you regard as relevant, but there are some particular matters you are required to take into account. They are:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults, and

(b) the literary, artistic or educational merit (if any) of the material, and

(c) the journalistic merit (if any) of the material, being the merit of the material as a record or report of a matter of public interest, and

(d) the general character of the material (including whether it is of a medical, legal or scientific character).

You must also be satisfied the accused knew, at the time of the sexual act, that it was being filmed for the purpose of producing child abuse material.

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

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

[5-1290] Notes — incitement offences

Last reviewed: September 2023

1. The offences of committing a sexual act include inciting an alleged victim to carry out a sexual act with or towards the alleged offender or a third person,

or inciting a third person to sexually touch the alleged victim (ss 61KE(b)–(d), 61KF(b)–(d), 66DC(b)–(d) and 66DE(b)–(d)) or doing any of the aforementioned while knowing the sexual act is being filmed for the purposes of the production of child abuse material (s 66DF(b)(d)).

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

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

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

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

[The next page is 881]

Self-defence

[6-450] Introduction

Last reviewed: September 2023

Part 11 *Crimes Act* 1900 contains a statutory form of self-defence. It was inserted by the *Crimes Amendment (Self-defence) Act* 2001. The amending Act applies to offences committed before or after its commencement, other than offences in which proceedings were instituted before commencement: s 423 *Crimes Act*; see also *R v Taylor* [2002] NSWSC 610.

The declared purposes of the amending Act were to "codify" the law with respect to self-defence and to repeal the *Home Invasion (Occupants Protection) Act* 1998 and the *Workplace (Occupants Protection) Act* 2001.

Section 418(1) provides that a person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence. Section 418(2) sets out the circumstances where self-defence is available. The questions to be asked by the jury under s 418(2) are succinctly set out in *R v Katarzynski* [2002] NSWSC 613 at [22]–[23] which was approved in *Abdallah v R* [2016] NSWCCA 34 at [61]. Section 419 provides that the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

[6-452] Raising/leaving self-defence

Last reviewed: September 2023

In order for self-defence to be raised or left to the jury there must be evidence capable of supporting a reasonable doubt in the mind of the tribunal of fact as to whether the prosecution has excluded self-defence: *Colosimo v DPP* [2006] NSWCA 293 at [19]. It is not essential that there be evidence from the accused as to the accused's beliefs and perceptions: *Colosimo v DPP* at [19]; but it must be raised fairly on the evidence: *Mencarious v R* [2008] NSWCCA 237 at [61], [78], [90]; *Douglas v R* [2005] NSWCCA 419 at [99]–[101]. A tactical decision not to raise self-defence does not of itself foreclose the obligation of the trial judge, in appropriate circumstances, to leave the issue to the jury: *Flanagan v R* [2013] NSWCCA 320 at [76].

[6-455] Essential components of self-defence direction

Last reviewed: September 2023

A direction for self-defence in cases other than murder must contain the following essential components:

1. The law recognises the right of a person to act in self-defence from an attack or threatened attack.
2. It is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that the accused's act was not done in self-defence.

3. The Crown may do this by proving beyond reasonable doubt either:
   (a) the accused did not believe at the time of the act that it was necessary to do what they did in order to defend themselves; *or*
   (b) the accused's act was not a reasonable response in the circumstances as they perceived them.
4. In determining the issue of whether the accused personally believed that their conduct was necessary for self-defence, the jury must consider the circumstances as the accused perceived them to be at the time.
5. If the jury is not satisfied beyond reasonable doubt that the accused did not personally believe that their conduct was necessary for self-defence, it must then decide whether the Crown has proved beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as perceived by them. If the Crown fails to do so it will have failed to eliminate self-defence.
6. If the Crown fails to prove either numbers 3(a) or (b), it will have failed to eliminate self-defence. If it proves one or the other, it will have succeeded.

A direction for self-defence in cases of murder must contain all the above numbers 1–5 essential components. The difference is that they are applied to the facts in a sequential way to accommodate the offence of manslaughter by excessive self-defence.

1. The jury is instructed as to numbers 1–2 above. It must first specifically consider self-defence on the charge of murder. The jury must be instructed in terms of number 3(a) above — that if the Crown has not proved beyond reasonable doubt that the accused did not believe that it was necessary to do what they did then the appropriate verdict is one of "not guilty of murder".
2. Number 3(b) above is then considered, that is, whether the accused's act was not a reasonable response in the circumstances as they perceived them.
3. If the jury finds that the Crown has failed to prove beyond reasonable doubt that the accused's act was not a reasonable response in the circumstances as they perceived them, the Crown will have completely failed to eliminate self-defence. In that situation the jury is instructed to also return a verdict of "not guilty of manslaughter".
4. However a verdict "not guilty of murder but guilty of manslaughter" can be returned if the Crown prove beyond reasonable doubt that the conduct of the accused was not a reasonable response in the circumstances as the accused perceived them because the particular use of force by the accused was excessive or otherwise unreasonable. Such a verdict can be returned providing the jury is satisfied beyond reasonable doubt of the other elements.

   See also the discussion of *Hadchiti v The Queen* (2016) 93 NSWLR 671 and *Moore v R* [2016] NSWCCA 185 at **[3-603] Notes**. Both cases were concerned with appropriate directions for self-defence in question trails.

[6-460] Suggested direction self defence — cases other than murder

Last reviewed: September 2023

I come now to what has been referred to during the course of the trial as "self-defence".

As you might expect, the law recognises the right of a person to act in self-defence from an attack or threatened attack [*even to the point of killing*].

This right arises where two circumstances exist. The first is that the person believes that their … [*specify act, for example, stabbing*] was necessary in order to defend themselves. The second is that what [*the accused*] did was a reasonable response in the circumstances as they perceived them.

Although "self-defence" is referred to as a defence, it is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that [*the accused's*] … [*specify act, for example, stabbing*] was not done by [*the accused*] in self-defence. It may do this by proving beyond reasonable doubt either:

1. that [*the accused*] did not believe at the time of the [*specify act, for example, stabbing*] that it was necessary to do what they did in order to defend themselves, *or*
2. the [*specify conduct, for example, stabbing*] by [*the accused*] was not a reasonable response in the circumstances as they perceived them.

For the Crown to eliminate self-defence as an issue, it must prove beyond reasonable doubt one or the other of these matters. It does not have to prove both of them. If you decide that the Crown has failed to prove both of them then the appropriate verdict is one of "not guilty".

As to whether [*the accused*] may have believed that their conduct was necessary for self-defence, you must consider the circumstances as [*the accused*] perceived them to be at the time of that conduct. You must take into consideration any extraordinary attribute of [*the accused*] which bears on their perception of those circumstances and which had a bearing on any such belief they may have formed. … [*deal with evidence as to intoxication, mental state etc of the accused*].

It is their perception which must be considered and not what someone else might have perceived. The matter should not be looked at with the benefit of hindsight, but in the realisation that calm reflection cannot always be expected in a situation such as [*the accused*] found themselves to be in. In hindsight, it might be thought that the accused was mistaken in believing that it was necessary to do what they did but that does not matter.

If the Crown establishes beyond reasonable doubt that [*the accused*] did not personally believe that their conduct was necessary for their defence, then the Crown will have succeeded in eliminating self-defence.

If the Crown has failed to prove beyond reasonable doubt the first aspect, then you should consider whether, the Crown has nevertheless proved beyond reasonable doubt that the conduct of [*the accused*] was not a reasonable response to the circumstances as perceived by [*the accused*].

The issue for you to consider is, having regard to the circumstances as they were perceived by [*the accused*], whether their response was unreasonable or excessive. Whether it was or was not a reasonable one in those circumstances is a matter for your judgment. It is not a matter of whether [*the accused*] thought their response was reasonable; it is a matter for you to consider whether it was or was not. In considering

this question you should consider all aspects of [*the accused's*] response including the nature, degree and means by which, force was used by them. The critical question is: has the Crown proved beyond reasonable doubt that it was not a reasonable response?

The Crown will only succeed in relation to this second part of self-defence if it satisfies you beyond reasonable doubt that the conduct of [*the accused*] was not a reasonable response in the circumstances as [*the accused*] perceived them to be at the time of the conduct in question.

… [*It may be necessary to give directions on such matters as arise on the evidence relating to, for example, the imminence of a threatened attack or the availability of other remedies to the accused, such as retreat. It should, however, be made emphatically clear to the jury that it is the accused's perception of the circumstances which must be considered.*]

To summarise, there are two parts to self-defence and in relation to both of them the Crown bears the burden of proof. It is not for the accused to prove that they were acting in self-defence. It is for the Crown to prove that they were not. This involves you considering two questions:

1. Has the Crown proved beyond reasonable doubt that the accused did not believe at the time of the [*specify act, for example, stabbing*] that it was necessary to do what they did in order to defend themselves?
2. Has the Crown proved beyond reasonable doubt that the [*specify conduct, for example, stabbing*] by [*the accused*] was not a reasonable response in the circumstances as they perceived them?

If the answer to one or both of those questions is "Yes", then the Crown will have succeeded in proving that the accused was not acting in self-defence.

If the answer to both of those questions is "No", then the Crown will have failed to eliminate self-defence and the accused must be found not guilty.

[6-465] Suggested direction self defence — murder cases

Last reviewed: September 2023

I come now to what has been referred to during the course of the trial as "self-defence".

As you might expect, the law recognises the right of a person to act in self-defence from an attack or threatened attack even to the point of killing.

This right arises where two circumstances exist. The first is that the person believes that their … [*specify act, for example, stabbing*] was necessary in order to defend themselves. The second is that what [*the accused*] did was a reasonable response in the circumstances as they perceived them.

Although "self-defence" is referred to as a defence, on a charge of murder it is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that [*the accused's*] … [*specify act, for example, stabbing*] was not done by [*the accused*] in

self-defence. It may do this by proving beyond reasonable doubt that [*the accused*] did not believe at the time of the [*specify act, for example, stabbing*] that it was necessary to do what they did in order to defend themselves.

If you decide that the Crown has failed to prove that the accused did not have such a belief, then the appropriate verdict is one of "not guilty of murder". If that is the case it will be necessary for you to consider manslaughter. I shall return to that.

As to whether [*the accused*] may have personally believed that their conduct was necessary for self-defence, you must consider the circumstances as [*the accused*] perceived them to be at the time of that conduct. You must take into consideration any extraordinary attribute of [*the accused*] which bears on their perception of those circumstances and which had a bearing on any such belief they may have formed … [*deal with evidence as to intoxication, mental state, etc, of the accused*].

It is their perception which must be considered and not what someone else might have perceived. The matter should not be looked at with the benefit of hindsight, but in the realisation that calm reflection cannot always be expected in a situation such as [*the accused*] found themselves to be in. In hindsight, it might be thought that the accused was mistaken in believing that it was necessary to do what they did but that does not matter.

If the Crown establishes beyond reasonable doubt that [*the accused*] did not personally believe that their conduct was necessary for their defence, then the Crown will have succeeded in eliminating self-defence. Provided all of the other essential elements have been proved, you should find the accused "guilty of murder".

On the other hand, if you are not satisfied that the Crown has proved beyond reasonable doubt the first aspect of self-defence you must find the accused "not guilty of murder". You will then have to consider the second aspect of self-defence; namely, whether the Crown has satisfied you beyond reasonable doubt that the conduct of [*the accused*] was not a reasonable response to the circumstances as perceived by [*the accused*].

The issue for you to consider is, having regard to the circumstances as they were perceived by [*the accused*], whether their response was unreasonable or excessive. Whether it was or was not a reasonable one in those circumstances is a matter for your judgment. It is not a matter of whether [*the accused*] thought their response was reasonable; it is a matter for you to consider whether it was or was not. In considering this question you should consider all aspects of [*the accused's*] response including the nature, degree and means by which force was used by them. The critical question is: has the Crown proved beyond reasonable doubt that it was not a reasonable response?

The Crown will only succeed if it satisfies you beyond reasonable doubt that the conduct of [*the accused*] was not a reasonable response in the circumstances as [*the accused*] perceived them to be at the time of the conduct in question. If you are satisfied of that, and provided you are satisfied beyond reasonable doubt of the other elements, your verdict should be "not guilty of murder but guilty of manslaughter".

… [*It may still be necessary to give directions on such matters as arise on the evidence relating to, for example, the imminence of a threatened attack or the availability of other remedies to the accused, such as retreat. It should, however, be made emphatically clear to the jury that it is the accused's perception of the circumstances which must be considered*.]

To summarise, there are two parts to self-defence and in relation to both of them the Crown bears the burden of proof. It is not for the accused to prove that they were acting in self-defence. It is for the Crown to prove that they were not. This involves two questions:

1. Has the Crown proved beyond reasonable doubt that the accused did not believe at the time of the [*specify act, for example, stabbing*] that it was necessary to do what they did in order to defend themselves?
2. Has the Crown proved beyond reasonable doubt that the [s*pecify conduct, for example, stabbing*] by [*the accused*] was not a reasonable response in the circumstances as they perceived them?

If the answer to the first question is "Yes", then, provided all of the other elements have been proved, your verdict should be "guilty of murder".

If the answer to the first question is "No", but the answer to the second question is "Yes", provided all of the other elements have been proved, your verdict should be "not guilty of murder but guilty of manslaughter".

If the answers to the first and second questions are both "No", then your verdicts should be "not guilty of murder" and "not guilty of manslaughter".

[6-470] Suggested directions where intoxication is raised

Last reviewed: September 2023

The jury must be directed that they must take into account the accused's self induced intoxication when considering whether the accused might have believed that it was necessary to act as they did in self-defence and when considering the circumstances as the accused perceived them: *R v Katarzynski* [2002] NSWSC 613 at [28]. However, the accused's self induced intoxication is not taken into account when assessing whether the accused's response to those circumstances was reasonable: *R v Katarzynski* at [28].

The following directions at **[6-480]** and **[6-490]** relating intoxication to self-defence may be appropriately adapted to the case. In a murder case, the adaptation should maintain the distinction in the relevance of the first limb as to whether the accused is guilty of murder and of the second limb as to whether the accused is guilty of manslaughter.

[6-480] Suggested written direction — intoxication

Last reviewed: September 2023

[*The accused's*] intoxicated state —

1. must be taken into account in determining whether [the accused] believed that their conduct was necessary to defend themselves;
2. must be taken into account in determining the circumstances as [*the accused*] perceived them to be;
3. must not be taken into account in determining whether their response to those circumstances was reasonable.

[6-490] Suggested oral direction — intoxication

Last reviewed: September 2023

You should fully understand that the law provides (in substance) that a person who genuinely thought that they were in danger, even if they were wrong about that perception because … [*specify, for example, their perception was affected by alcohol*], may still be regarded as having acted in lawful self-defence provided that the person's response was reasonable, based on the circumstances as they perceived them to be.

You need to look at the case through the eyes of [*the accused*] in its context, [*taking into account their intoxicated state*] and by reference to the actual situation in which they found themselves, and as they perceived it to be.

So you determine what [*the accused*] [*in their intoxicated state*] actually perceived was the danger they faced, and then determine whether what they did in response to that danger was reasonable. In determining whether what they did was reasonable, you stand back and consider the response from an objective viewpoint, disregarding any effects of alcohol upon them.

You are considering what would have been a reasonable response by a sober person in the circumstances as [*the accused*] drunkenly perceived them.

[The next page is 1311]

Summing-up format

[7-000] Suggested outline of summing-up

Last reviewed: September 2023

Prior to final addresses, it is prudent for the judge to raise with counsel, in the absence of the jury, the specific legal issues which in their submissions have arisen in the trial and which need to be the subject of specific reference in the summing-up. The task of drafting the summing-up is the responsibility of the trial judge. It cannot be delegated to the parties: *Hamilton (a pseudonym) v R* [2020] NSWCCA 80 at [83]–[84]; [97]. Of course, the trial judge is entitled to have the detailed assistance of the parties with regard to correctly explaining to the jury the law, the evidence, and the matters in dispute.

The following summing-up format is suggested purely as a guide and is not intended to be exhaustive:

1. Burden and standard of proof.
2. Where there is more than one count, each count is to be considered separately.
3. Where there is more than one defendant, each case is to be considered separately.
4. Legal elements of each count (a direction of law). It is not the function of a trial judge to expound to the jury the principles of law going beyond those which the jurors need to understand to resolve the issues that arise for decisions in the case: *The Queen v Chai* [2002] HCA 12. For example, in sexual assault cases it is unnecessary and unhelpful to direct the jury upon elements of consent not relevant to the issues in the case: *R v Mueller* (2005) 62 NSWLR 476 at [4] and [42]. Consideration needs to be given to any alternative verdicts: see **Alternative verdicts and alternative counts** at **[2-210]**.
5. It is generally not good practice to read legislation to a jury: *Pengilley v R* [2006] NSWCCA 163 at [41]; *R v Micalizzi* [2004] NSWCCA 406 at [36]. Where it is necessary to refer to a legal principle derived from statute, it is the effect of the provision, so far as it is relevant to the issue before the jury, that should be conveyed.
6. Any general matters of law which require direction — for assistance in this regard, reference might be conveniently made to the chapters in the Bench Book under the various headings in "Trial Instructions". This will operate as a check list, although it is not suggested that it would be exhaustive.
7. How the Crown seeks to make out its case — this will involve an outline of the nature of the Crown case, by reference to the various counts. Where necessary, the Crown case against separate accused(s) should be distinguished.
8. Defences — this will involve an outline of the defence or defences raised by the accused, distinguishing where necessary between individual accused.
9. Evidence — here reference should be made to the relevant evidence, relating it, where possible, to the legal issues which arise under the particular counts and the defences raised. It will be necessary, of course, to distinguish between direct and circumstantial evidence. A legal direction on circumstantial evidence will already have been given.

10. Summarise arguments of counsel again relating them, if possible, to particular counts and defences and legal issues.
11. Recap any matters where essential.
12. In the absence of the jury, seek submissions from counsel in relation to any factual or legal issues which they contend were not appropriately dealt with in the summing-up. In *DJF v R* [2011] NSWCCA 6, Giles JA, with whom RA Hulme J agreed, said that even outlining a matter on which further directions are sought should be done in the absence of the jury: at [16].
13. As to the use by the judge of written directions: see **The jury** at **[1-535]**. Written directions (including question trails) do not replace the need to give oral directions: *Trevascus v R* (2021) 104 NSWLR 571 at [65]. Where written directions are provided, the trial judge is required to give oral directions which, as a minimum, oblige the trial judge to read out and explain the written directions. This allows the judge and counsel to gauge the jury's reaction to the directions and detect whether the jurors are paying attention and appreciate the gravamen and purpose of the document: *Cook (a pseudonym) v R* [2022] NSWCCA 282 at [55]–[58].

[7-020] Suggested direction — summing-up (commencement)

Last reviewed: September 2023

The following is based upon the assumption that there is more than one accused.

Members of the jury, the accused stand before you upon an indictment which is in the following terms … [*read the indictment*].

Each accused has pleaded "not guilty" to that charge. It becomes your duty and your responsibility, therefore, to consider whether each accused is "guilty" or "not guilty" of the charge and to return your verdict(s) according to the evidence which you have heard.

I take this opportunity of reminding you that, at this stage, at all times you are free to ask any questions about these legal directions I am giving you if you have any difficulty with them. You can ask any questions that you wish, as often as you like, in relation to both the legal directions and any questions of fact.

I propose to commence this summing-up with a number of general directions which, to some extent, repeat those I gave you when the trial began. However, it is important I give them again, not only to remind you of what I said earlier but also to place those directions in the context of the trial which has now taken place.

What I said earlier was, in a sense, an explanation to you of the part you were expected to play in the trial, and a warning to you that it was necessary for you to participate in the determination of the factual issues from the outset.

I remind you that you are bound to accept those principles of law which I give to you and to apply them to the facts of the case as you find them to be. The facts of the case and the verdicts you give are for you, and you alone, because you alone are the judges of the facts.

I am the judge of the law, but you are quite correctly called the judges of the facts. I have nothing to do with those facts or your decisions in relation to them. I have nothing to do with what you accept as truthful, or what evidence you decide to reject as untruthful;

nor indeed what weight you might give to any one particular part of the evidence given or what inferences you draw from that evidence. Aside perhaps from pointing out that something appears not to be in dispute, I do not intend to express any opinion about any matters of fact. If you think I have expressed an opinion about something that is in dispute, or if you think I have tried to give you a hint about what I think, then you will be mistaken. I do not intend to do any such thing.

It is for you to assess the various witnesses and decide whether they are telling the truth. You have seen each of the witnesses as they have given their evidence. It is a matter for you entirely as to whether you accept that evidence.

Your ultimate decision as to what evidence you accept and what evidence you reject may be based on all manner of things, including what the witness has had to say; the manner in which they said it; and the general impression which they made upon you when giving evidence.

In relation to accepting the evidence of witnesses, you are not obliged to accept the whole of the evidence of any one witness. You may, if you think fit, accept part and reject part of the same witness' evidence. The fact you do not accept a portion of a witness' evidence does not mean you must necessarily reject the whole of their evidence. You could accept the remainder of their evidence if you think it is worthy of acceptance,

You have heard addresses from counsel for the Crown and counsel for the accused. You will consider the submissions they have made in their addresses and give those the submissions such weight as you think fit. In no sense are those submissions evidence in the case.

I shall, of course, endeavour (during the summing-up) to focus attention upon those parts of the evidence which seem to me to be the areas in respect of which counsel have devoted most of their attention. Of course, it is necessary for you in deliberating to consider all of the evidence and not only the evidence to which I or counsel have referred.

You are brought here from various walks of life and you represent a cross section of the community — a cross section of its wisdom and its sense of justice. You are expected to use your individual qualities of reasoning; your experience; and your understanding of people and human affairs.

In particular, and I cannot stress this too strongly, you are expected to use your common sense and your ability to judge your fellow citizens, so that you bring to the jury room (during the course of your deliberations) your own experience of human affairs, which must necessarily be as varied as there are twelve of you. It is that concentration of your own experience and your own individual abilities, wisdom and common sense which is, of course, the critical foundation of the whole jury system which has lasted in this State for almost two hundred years (and in many other democratic countries for far longer than that).

You have very important matters to decide in this case — important not only to the accused but also to the whole community. The privilege which you have of sitting in judgment upon your fellow citizens is one which carries with it corresponding duties and obligations. You must, as a jury, act impartially, dispassionately and fearlessly. You must not let sympathy or emotion sway your judgment.

Let me now say something to you about the onus of proof. This is a criminal trial and the burden of proving the guilt of the accused is on the Crown. That onus rests on the Crown in respect of every element of the charge. There is no onus of proof on the accused at all. It is not for the accused to prove their innocence but for the Crown to prove their guilt beyond reasonable doubt. This does not mean the Crown has to prove every single fact in the case beyond reasonable doubt but, at the risk of repetition, it does mean the Crown must prove every element of the charge/s beyond reasonable doubt.

It is, and always has been, a critical part of our system of justice that persons tried in this court are presumed to be innocent, unless and until they are proved guilty beyond reasonable doubt. This is known as the "presumption of innocence". The expression "beyond reasonable doubt" is an ancient one. It is not one that is explained by trial judges except to say that it is very different to the standard of proof in civil cases. In civil cases, matters need only be proved on the balance of probabilities, that is it is only necessary to prove something is more probable than not. The standard of proof in a criminal trial is higher. It is beyond reasonable doubt.

In a criminal trial there is only one ultimate issue. Has the Crown proved the guilt of the accused beyond reasonable doubt? If the answer is "Yes", the appropriate verdict is "Guilty". If the answer is "No", the verdict must be "Not guilty".

[Commonwealth offences — where unanimity is required:

Under our system of law, your verdict [on each count], whether it be "guilty" or "not guilty", must be unanimous. As this is a prosecution for a Commonwealth offence, majority verdicts are not recognised. That is not to say that each of you must agree upon the same reasons for your verdict. You may individually rely upon different parts of the evidence or place a different emphasis upon parts of the evidence. However, by whatever route you each arrive at your decision, that final decision of either "guilty" or "not guilty" [in relation to each charge] must be the decision of all of you, unanimously, before it can become your verdict.**]**

[State offences — where majority verdicts available:

Under our system of law, your verdict [on each count], whether it be "guilty" or "not guilty" must be unanimous. That is not to say that each of you must agree upon the same reasons for your verdict. You may individually rely upon different parts of the evidence or place a different emphasis upon parts of the evidence. However, by whatever route you each arrive at your decision, that final decision of either "guilty" or "not guilty" [in relation to each charge] must be the decision of all of you, unanimously, before it can become your verdict.

As you may know, the law permits me, in certain circumstances, to accept a verdict which is not unanimous. Those circumstances may not arise at all, so that when you retire I must ask you to reach a verdict upon which each one of you agree. Should, however, the circumstances arise when it is possible for me to accept a verdict which is not unanimous, I will give you a further direction.]

[The question whether there should be reference to majority verdicts has been considered. See Note 8 at [7-040] below.]

[7-030] Suggested direction — final directions

Last reviewed: September 2023

Except for two matters, I have now completed all I have to say to you before asking you to retire to consider your verdict(s).

First, if at any stage of your deliberations you would like me to repeat or further explain any of the directions of law I have given you, please do not hesitate to ask. It is fundamental that you should understand the principles which you are required to apply. If you have any doubt about those principles, then you are not only entitled to ask for further assistance, but you should ask for it. All you have to do is to write a note setting out the assistance you would like and give it to the court/sheriff's officer who will deliver it to me. Upon receiving such a request, I shall discuss the matter with counsel, and the court will then reassemble for the purpose of seeking to assist you.

I must stress that your deliberations are confidential so please do not include anything that would disclose the content of your discussions, including any voting patterns.

[**Where the jury do not have transcript**] Secondly, all of the evidence has been recorded. Although you will not have the advantage of having a transcript of that evidence for your perusal, if you wish, at any stage of your deliberations, to have any part of that evidence checked or read back to you, then that can be arranged. You need only let one of the court/sheriff's officers know and the court will reassemble for that purpose.

[**Where the jury have transcript**] Secondly, you have available to you the transcript of the evidence but if you experience any difficulty locating a particular passage that you are interested in, let me know by way of a note and I should be able to assist. I also remind you that whilst every effort is made to ensure the transcript is accurate, it is possible there may be errors. So if you have any doubt about whether something has been correctly transcribed, please let me know and I will endeavour to assist.

Return of verdict(s)

I shall now tell you what will happen when you return with your verdict(s). You will take your places in the jury box. Your foreperson will be asked to stand. My associate will then direct questions to [*him/her/them*]. They will be … [*refer here to so much of the procedure and the questions which the foreperson will be asked as is appropriate to the particular case*].

[*In trials involving multiple counts or accused, it may be worth suggesting that the foreperson have the verdicts written down to assist him/her/them.*]

Before I ask you to retire, I will ask counsel if there is anything they wish to raise.

[*Ask counsel in turn. It may be expected that if there is a matter that is uncontroversial, counsel may announce the subject matter and it may be dealt with in the presence of the jury. Otherwise the jury should be asked to leave while the matter is discussed.*]

[*If there is nothing raised, or after further directions have been given as a result of counsel's submissions, proceed as follows:*]

I now ask that you retire to consider your verdict(s). The exhibits will be sent to you shortly.

[*It is wise to have counsel check that all is in order and nothing extraneous is with the exhibits before they go to the jury room.*]

[7-040] Notes

Last reviewed: September 2023

1. **Section 161 *Criminal Procedure Act* 1986**

   The above suggested directions are given upon the basis that the judge intends to summarise the evidence during the course of the summing-up. However, s 161 *Criminal Procedure Act* provides that the judge need not summarise the evidence if of the opinion that, in all of the circumstances of the trial, a summary is not necessary. In the case of a short trial with narrow issues and other relevant factors, the trial judge may decide in the exercise of his or her discretion not to summarise the evidence: *R v DH* [2000] NSWCCA 360; *Alharbi v R* [2020] NSWCCA 130 at [73]–[77].

   Importantly, s 161 does not relieve the judge of the obligation to put the defence case accurately and fairly to the jury and instruct the jury about how the law applies to that case: *Wong v R* [2009] NSWCCA 101 at [141]; *AS v R* [2010] NSWCCA 218 at [21]; *Condon v R* (unrep, 9/10/95, NSWCCA). This does not require that it be done at length but it needs to be sufficient to highlight the evidence most relevant to the defence case: *Alharbi v R* at [75], [77], [82]. When putting the defence case to the jury, it must be made clear that the onus of proof remains on the prosecution: *Wong v R* at [141].

2. **Desirability of the judge raising the identification of the relevant legal issues with counsel at the conclusion of the evidence**

   (a) At the conclusion of the summing-up, it should be the invariable practice of the trial judge to enquire of counsel, in the absence of the jury whether he or she has overlooked any directions of law and appropriate warnings which should have been given to the jury as well as hearing submissions on the correctness or otherwise of directions of law which have in fact been given. If this practice is sedulously followed, it should go a long way to avoid the recurring cost, inconvenience and personal distress associated with a new trial: *R v Roberts* (2001) 53 NSWLR 138 at [67]. Notwithstanding counsel may take a position with respect to particular directions and request that no direction be given, as occurred in *DC v R* [2019] NSWCCA 234 where the trial judge was asked not to give a direction about lies, the obligation to ensure the accused receives a fair trial may require the judge to do so: *DC v R* at [148]ff. In such cases this should be raised with the parties first: at [149].

   (b) The responsibility of counsel to assist the trial judge in this regard was stressed in *R v Roberts* at [57], *R v Mostyn* [2004] NSWCCA 97 at [54]–[56] and *R v Gulliford* [2004] NSWCCA 338 at [182]–[184].

   (c) In *R v Micalizzi* [2004] NSWCCA 406 at [60], the view was expressed that, generally speaking, counsel appearing for either party is required to formulate the direction, warning or comment required by the trial judge, where counsel believes that what the trial judge has said to the jury is insufficient to ensure a fair trial for the accused or the Crown.

3. **Essential elements of a summing-up**

Generally, the summing-up should be as concise as possible so the jury is not "wearied beyond the capacity of concentration": *Alharbi v R* at [78]. In *R v Williams* (unrep, 10/10/90, NSWCCA), the court said that a summing-up:

> … should involve no more and no less than a clear and manageable explanation of the issues which are left to the jurors in the particular case before them. There is no need to venture beyond a clear statement of the relevant legal principles as they affect the particular case and against which they are to apply their decisions on the factual questions which arise.

See also *The Queen v Chai* [2002] HCA 12 at [18]. In *Haile v R* (2022) 109 NSWLR 288 at [117], Bellew J summarised a trial judge's obligations when summing-up to the jury as follows:

(i) although there is considerable leeway in the manner in which a summing-up can be structured, it remains essential for a trial judge to summarise, fairly and adequately, the competing cases of the Crown and the accused;

(ii) the requirement to summarise the cases fairly and adequately does not oblige the trial judge to remind the jury [of] every argument advanced by counsel;

(iii) it is the case which the accused makes that the jury must be given to understand, and it is not sufficient for a trial judge to simply say to the jury that they should give consideration to the arguments which have been put by counsel;

(iv) a trial judge must hold an even balance between the Crown case and the accused's case, and fairly direct the jury's consideration to the matters raised by the accused in his defence, the detail of which will depend on the circumstances of the particular case;

(v) generally speaking, a trial judge should not put matters to the jury in the summing-up which have not been put by the Crown, but which nevertheless advance the Crown case, because such an approach has the capacity to amount to a denial of natural justice because of the absence of opportunity for the accused to respond;

(vi) the task of restoring the credit of a Crown witness, or of destroying the credit of the accused, should always be left to the Crown Prosecutor. When such a task is undertaken by a trial judge, there is a risk of losing the appearance of impartiality which is expected.

4. **Alternative charges and arguments not put**

A judge has a special judicial obligation to leave manslaughter to the jury where it is an available verdict: *James v The Queen* (2014) 253 CLR 475 at [23]. A judge is obliged to instruct the jury on any defence or partial defence where there is material raising it regardless of the tactical decisions of counsel as part of ensuring a fair trial. However, it is wrong to equate this obligation with leaving alternative verdicts: *James v The Queen* at [33]. The test is what justice to the accused requires: *James v The Queen* at [34]; *The Queen v Keenan* (2009) 236 CLR 397 at 438. If neither party relies on an included offence then the judge may conclude that it is not a real issue in the trial: *James v The Queen* at [37].

See the discussion in **Alternative verdicts and alternative counts** at **[2-210]**.

If the judge advances an argument in support of the Crown case that was not put by the Crown this can occasion a significant forensic unfairness to the accused where his counsel is unable to address the jury on the new point: *R v Robinson* [2006] NSWCCA 192 at [137]–[149] where Johnson J set out the relevant principles.

5. **Requirements of fairness**

On the other hand if a judge refers to the evidence on a crucial issue, fairness requires that there be reference to the competing versions, and the competing considerations, including the inferences arising: *Cleland v The Queen* (1982) 151 CLR 1 per Gibbs CJ at 10; *Domican v The Queen* (1992) 173 CLR 555 at 560–561; *R v Zorad* (1990) 19 NSWLR 91 at 105; *El-Jalkh v R* [2009] NSWCCA 139 at [147]; *RR v R* [2011] NSWCCA 235 at [85]; *Buckley v R* [2012] NSWCCA 85 at [9]–[14]. It is therefore essential, if a summing-up is to be fair and balanced, that the defence case be put to the jury: *Abdel-Hady v R* [2011] NSWCCA 196 at [134]ff.

The defence case must be fairly and accurately put during the summing-up so that the jury can properly consider the issues raised. If that opportunity is not given, then there has been a miscarriage of justice: *Wong v R* [2009] NSWCCA 101 at [133]; *AS v R* [2010] NSWCCA 218 at [21]; *R v Malone* (unrep, 20/4/94, NSWCCA); *R v Meher* [2004] NSWCCA 355 at [76]. This extends to explaining any basis upon which the jury might properly return a verdict in the accused's favour: *Castle v The Queen* (2016) 259 CLR 449 at [59]. Reference to the defence case encompasses any challenge to the prosecution evidence and submissions: *Dixon v R* [2017] NSWCCA 299 at [14].

6. **Circumstances in which judge may express his or her view of the facts**

In *McKell v The Queen* (2019) 264 CLR 307 the plurality reiterated that a trial judge's discretion to comment on the facts should be exercised with circumspection and that comments conveying a trial judge's opinion of the proper determination of any disputed factual issue to be determined by the jury should not be made: at [3], [5], [47]–[50]; *The Queen v Abdirahman-Khalif* (2020) 271 CLR 265 at [77]; *Haile v R* at [118]. However, there are circumstances where judicial comment is necessary to maintain the balance of fairness between the parties by, for example, correcting errors in a closing address: at [53]–[54]. *Lai v R* [2019] NSWCCA 305 is an example of a case where the trial judge crossed the line of permissible comment by conveying his opinion of disputed facts which created a substantial risk the jury might actually be persuaded of the accused's guilt: [109]. *Haile v R* is another example. In that case, the trial judge drew repeated comparisons between the evidence given by a principal Crown witness and the accused, in effect suggesting to the jury that they had to choose between the two: see [42]–[48], [54], [99]–[103]. Repeatedly asking the question "Why would she lie?", in conjunction with expressing personal views about aspects of the defence case, compounded the unfairness of the summing-up which the Court of Criminal Appeal concluded lacked balance: at [120]–[127].

7. **Directions where counsel overlooks/breaches the rule in *Browne v Dunn***

A trial court must always endeavour to demonstrate flexibility in its response to a breach of the rule in *Browne v Dunn*, which is to be determined by the

particular circumstances of the case and the course of the proceedings: *Khamis v R* [2010] NSWCCA 179 at [42]; *MWJ v The Queen* [2005] HCA 74 at [18]. A non-exhaustive list of possible responses by a court to a breach of the rule appears in *Khamis v R* at [43]–[46] including that if the accused's evidence is allowed and there has been a breach of the rule the trial judge may fashion appropriate and careful directions to the jury: see also *RWB v R* [2010] NSWCCA 147 at [101], [116].

In general, it is dangerous for a trial judge to give a jury direction critical of the failure of counsel to put a proposition to a witness (in accordance with the rule in *Browne v Dunn* (1893) 6 R 67): *RWB v R* at [101]; *Llewellyn v R* [2011] NSWCCA 66 at [98]. If any direction is given, it is important for the jury also to be told that there may often be reasons, of which the jury are unaware, why such a thing was not done: *R v Banic* [2004] NSWCCA 322 at [23] and *R v Liristis* [2004] NSWCCA 287 at [59]–[89]. It is unfair to suggest to a jury that the only inference that they should draw is that the witness failed to include the contentious matter in his or her statement or instructions: *RWB v R* at [101], [116]. In some cases it is necessary to instruct the jury that oversights by counsel occur: *Llewellyn v R* at [98].

8. **Brief reference to majority verdicts in summing-up**

The suggested direction makes a brief reference to a majority verdict.

A brief reference to majority verdicts in the summing-up has been held not to undermine the direction that a unanimous verdict is required: *Ingham v R* [2011] NSWCCA 88 at [25]. However, if any reference is made in the summing-up it must not give the jury an indication of the time when a majority verdict will be accepted by the court: *Hunt v R* [2011] NSWCCA 152 at [27]. McClellan CJ at CL in *Ingham v R* at [25], said that a brief reference to a majority verdict in the summing-up has the "advantages referred to by the Victorian Court of Appeal" [in *R v Muto* [1996] 1 VR 336 at 339] which "are equally applicable to criminal trials in NSW". The advantages referred to in *Muto* include: being frank with the jury from the start; not pretending that majority verdicts are not possible; not confusing the jury with premature and largely irrelevant information about the effect of the majority verdict section; making clear that their verdict should be unanimous; and finally, to put the possibility of a majority verdict out of their minds. Macfarlan JA in *Doklu v R* [2010] NSWCCA 309 at [79] was inclined to the view that "it is better not to mention the possibility unless there is a reason to do so" but this approach was not taken or endorsed in *Ingham v R*: see brief reference to *Doklu v R* at [87]. Apart from Victoria, a brief reference to majority verdicts is made in England and Wales (*The Consolidated Criminal Practice Direction — Criminal Procedure Rules* at VI.26Q.1) and *Archbold* (2022) at 4-509, p 585. As to the position in other States and Territories, see discussion in *Ingham v R* [2011] at [69]–[81].

If after the summing-up the jury indicate that it cannot agree: see **Prospect of disagreement** at **[8-050]**ff.

[The next page is 1451]

Prospect of disagreement

[8-050] Introduction

Last reviewed: September 2023

It is a fundamental principle that the jury must be free to deliberate without any pressure being brought to bear upon them: *Black v The Queen* (1993) 179 CLR 44 at 50. In *Black v The Queen* at 51, the High Court formulated model directions which must be carefully followed. The directions set out below have adopted that formulation but with variations required for the purpose of trials to which the majority verdict provisions inserted in the *Jury Act* 1977 in 2006 apply.

The consequences of failing to follow the guidance followed in *Black v The Queen*, above, was highlighted in *Timbery v R* [2007] NSWCCA 355, where it was held that a miscarriage of justice was occasioned when the trial judge urged the jury to reach a verdict and indicated that it would be "just terrible" if the jury had to be discharged without verdict after a trial of four weeks. The words used were "emotive" and the trial judge failed to clearly indicate that each juror had a duty to give a verdict according to the evidence: at [122].

The trial judge in *Burrell v R* [2009] NSWCCA 163 received a note from a juror which stated that any continued deliberations would serve no purpose and that other jury members were pressuring him or her into agreeing with them. The judge gave directions in accordance with the model direction formulated in *Black v The Queen*: *Burrell v R* [2007] NSWCCA 65 at [301]–[302]. The Court of Criminal Appeal held that the directions were "appropriately formulated": *Burrell v R* [2009] NSWCCA 163 at [224].

The judge's direction in *Isika v R* [2015] NSWCCA 304 (extracted at [6]) given in response to a question from the jury "[w]hat happens if we cannot agree?" contravened *Black v The Queen*. The direction referred to the time and cost of trials and also "arguably implied that jury members would not be performing their duties if they did not agree on verdicts": *Isika v R* at [15].

[8-060] Suggested (*Black*) direction — Commonwealth offences — unanimity required

Last reviewed: September 2023

You have informed me that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has either sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have, and may convince you that your original opinion was wrong.

That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

[If appropriate add additional directions approved in *R v Tangye* (unrep, 10/4/1997, NSWCCA)

I remind you that your verdict — whether it be "guilty" or "not guilty" — must be a unanimous one.

All 12 of you must, in the end, agree upon that verdict. It may be that the particular paths which lead each of you to that unanimous decision are not quite the same, but, nevertheless, your verdict of "guilty" or "not guilty" must be the verdict of you all. In other words, provided that you all agree that a particular verdict should be given, it does not matter that you do not agree as to why that particular verdict should be given.**]**

As I have said, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be discharged.

So, in the light of what I have said, I ask you to retire again and see whether you can reach a verdict.

In cases in which majority verdicts cannot be returned, if there is still no likelihood of agreement, then, and only then, following *R v Tangye* (unrep, 10/4/1997, NSWCCA), and in accordance with s 56 *Jury Act* 1977, one or more jurors (usually the foreperson) must be examined on oath or affirmation to establish that fact before the jury can be discharged. This process is done in the presence of all jurors.

The juror (foreperson) must be informed that nothing should be said which would disclose the voting figures or the reasons for the absence of agreement.

After ascertaining the fact that agreement had not so far been reached, an inquiry may be made, if thought to be appropriate, as to whether there is any further assistance which could be given — by way of explaining the law to be applied or the factual issues to be decided — which might bring about an agreement. If the answer is still in the negative, the jury must then be discharged.

A suggested script for this process is as follows:

(1) Have you all agreed upon your verdict/s? Yes or no?

(2) (If no) Is there anything I can do that would assist you to reach a unanimous verdict/s, for example repeating or further explaining any direction of law, reminding you of any of the evidence (if the jury has not got a copy of the trial transcript)? Yes or no?

(3) (If no) In your opinion is it likely the jury would reach a unanimous verdict/s if given more time to deliberate? Yes or no?

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

Last reviewed: September 2023

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

You have informed me that you have not been able to reach a verdict so far.

[If the possibility of a majority verdict was not referred to in the course of the trial and summing-up, the following direction does not arise and is not necessary.

The circumstances in which I may take a verdict which is not unanimous have not yet arisen and may not arise at all. You should understand that your verdict of guilty or not guilty must be unanimous.**]**

Experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has either sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong.

That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

[If appropriate, add additional directions approved in *R v Tangye* (unrep, 10/4/1997, NSWCCA):

I remind you that your verdict — whether it be "guilty" or "not guilty" — must be a unanimous one.

All 12 of you must, in the end, agree upon that verdict. It may be that the particular paths which lead each of you to that unanimous decision are not quite the same, but, nevertheless, your verdict of "guilty" or "not guilty" must be the verdict of you all. In other words, provided that you all agree that a particular verdict should be given, it does not matter that you do not agree as to why that particular verdict should be given.**]**

As I have said, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict.

So, in the light of what I have said, I ask you to retire again and see whether you can reach a verdict.

[8-080] Notes

Last reviewed: September 2023

1. A trial judge should be careful not to undermine the effect of a direction in accordance with *Black v The Queen* (1993) 179 CLR 44 direction by making reference to a specific time when a majority verdict can be taken: *RJS v R* [2007] NSWCCA 241 at [22]; *Ingham v R* [2011] NSWCCA 88 at [84] (d)–(e). The above direction is in similar terms to that endorsed in *R v Muto* [1996] 1 VR 336 at 341–344, (affirmed in *R v Di Mauro* (2001) 3 VR 62 at [13]–[14]) and *Ingham v R* at [85] (b). No enquiry of the jury as to whether it is likely a majority verdict will be reached (for the purpose of discharge under s 56(2)) should be made by the judge until such time as a majority verdict is capable of being taken: *Hunt v R* [2011] NSWCCA 152 at [25], (see further **Notes** at **[8-100]**). The court said in *Hunt v R* at [33]:

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

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

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

Last reviewed: September 2023

The two preconditions of s 55F for the availability of majority verdicts are:

(a) that the jury has deliberated for a period of time that the court considers reasonable having regard to the nature and complexity of the proceedings (not less than eight hours), and

(b) that the court is satisfied, after examination on oath of one or more jurors, that the jury is unlikely to reach a unanimous verdict.

A majority verdict direction *cannot* be given until the court has "strictly observed" and "properly determined" these two "essential preconditions": *RJS v R* [2007] NSWCCA 241 at [19]; *AGW v R* [2008] NSWCCA 81; *Hanna v R* (2008) 73 NSWLR 390 at [72]; *KE v R* [2021] NSWCCA 119 at [101]. Failure to address the two pre-conditions will mean the trial is not conducted according to law: *AGW v R* at [27]; *Hanna v R* at [72]; *Hunt v R* [2011] NSWCCA 152 at [25].

The first pre-condition in s 55F(2)(a) is not fulfilled simply by acting upon the lapse of the minimum period of eight hours: *AGW v R* at [23]; *Hanna v R* at [71]; *Hunt v R* at [24]–[26]. Relevant considerations to guide whether eight hours is adequate include

the complexity of the disputed issues, the number of counts, the number of contentious witnesses, the volume of evidence, and if the jury was provided with the trial transcript, how much and when: *AGW v R* at [23].

After receipt of a note from the jury indicating a continued inability to agree upon a unanimous verdict (after having been given a *Black* direction), the procedural steps are:

1. In the absence of the jury, hear submissions, make a determination and provide reasons as to whether the jurors have deliberated for a period of time (not less than 8 hours) that is reasonable having regard to the nature and complexity of the trial (s 55F(2)(a)).
2. Have the jury return to the court room whereupon the judge will examine one or more jurors (usually just the foreperson) on oath/affirmation to confirm the jury are unable to reach a unanimous verdict and is unlikely to do so with further deliberation. (It is prudent to preface the question by indicating that no disclosure should be made of the jury's deliberation or of voting numbers.)
3. Declare that the court is satisfied of the fact the jury is unlikely to reach a unanimous verdict after further deliberation (s 55F(2)(b)).

Suggested perseverance direction and majority verdict direction *after* the preconditions of s 55F(2) *Jury Act* 1977 are satisfied and the time for taking a majority verdict has arrived

You have informed me that you have not been able to reach a verdict so far.

The circumstances have arisen in which I may take a majority verdict. I direct you that, should you continue to be unable to reach a unanimous verdict you may return a verdict of 11 [*or 10 where there are 11 jurors*] of you as the verdict of the jury in this case. However, it is preferable that your verdict be unanimous and you should continue to strive to reach a unanimous verdict.

I will repeat some of what I have previously told you.

Experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong.

That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

As I have said, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict.

You should continue your deliberations with a view to reaching a unanimous verdict. However, if that becomes impossible but you are able to reach a verdict by agreement of 11 of you [or 10 where there are 11 jurors] you may return such a majority verdict in this case, that is to say a verdict of 11 out of 12 of you [or 10 where there are 11 jurors]. These alternative ways are the only ways in which you may return a verdict according to law.

So, in the light of what I have said, I ask you to retire again and see whether you can reach a verdict in this trial.

[8-100] Notes

Last reviewed: September 2023

1. This direction does *not* obviate the need to first give the jury a perseverance direction or *Black v The Queen* (1993) 179 CLR 44 at 50 direction (as set out above in **[8-070]**) without reference to the fact or the circumstances in which the jury may return a majority verdict. In *Hanna v R* (2008) NSWLR 390, defence counsel asked for a *Black* direction without reference to the possibility of a majority verdict (see [44]) after the foreperson indicated the jury was having difficulty agreeing. The judge rejected the request and gave the jury the majority verdict direction above without making clear findings concerning the two "essential preconditions" under s 55F(2) *Jury Act* 1977: at [7], [45].
2. New South Wales legislation is silent as to how the minimum eight-hour period is to be calculated. In the absence of a statutory definition for "deliberation" two considerations may guide the application of the term: (i) whether the jury is sequestered in the same location and (ii) whether the jury is able to conduct discussions about the case at hand: *BR v R* (2014) 86 NSWLR 456 at [19]–[20]. Discrete and substantial breaks from the performance of the jury's task such as retirement overnight, taking lunch away from the jury room and sitting in court listening to further directions should not be included in the eight-hour calculation: *BR v R* at [21]–[22], [41], [44]. There were disparate views in *BR v R* as to whether travel time between the jury room and the courtroom should be included: [23]–[24]; cf [45], [36]. Nor could it be said with certainty whether deliberations ceased or continued, and for how long, while lunch breaks were taken within the jury room. Consequently, either the whole of the break or none of it should be included: [42], see also [23], [31]. Because it is not possible to inquire into what actually occurs in the privacy of the jury room, it would be prudent to avoid acting immediately after eight hours have elapsed if there is "any ambiguity about any component of the minimum period": *BR v R* at [24]; *AGW v R* [2008] NSWCCA 81 at [24]–[25]. The court should refrain from taking a majority verdict soon after the estimated expiry of eight hours where there is any ambiguity about a component part of that minimum span of time: *AGW v R* at [23]; *Hunt v R* at [24]; *BR v R* at [24], [47]. It is useful to keep a running record of deliberation times with

the court officer advising the judge's associate of commencement and conclusion times for each day's deliberations if the jury are not brought into court at those times; subtracting a generous allowance for periods during each day in which the jury might not have been deliberating.

3. The Victorian practice (endorsed in *R v VST* (2003) 6 VR 569) of recalling the jury once the minimum statutory period had elapsed to see if the jury had reached a unanimous verdict was questioned in *RJS v R* [2007] NSWCCA 241 at [24]. Spigelman CJ said at [26]:

> In many cases, the trial judge may well decide to await a further indication from the jury that it is unlikely that the jurors will reach a unanimous verdict. That is not to say that after the passage of a further lengthy period of time, a matter to be determined by the trial judge, some kind of inquiry to the jury would constitute legal error. This is a matter with respect to which the practice should develop in accordance with the experience of the implementation of the majority verdict system over time. It does not require any definitive guidance from this Court.

4. In *R v Muto* [1996] 1 VR 336 at 343, it was contemplated that a judge who considers that the time for taking a majority verdict has arrived will nevertheless tell the jury that it is still preferable that they should endeavour to reach a unanimous verdict but, if they cannot all agree, a majority verdict may be taken. This position was affirmed in *R v Di Mauro* (2001) 3 VR 62 at [6]–[7].

5. In *AB v R* [2023] NSWCCA 165 the trial judge did not obtain explicit evidence from the jury foreperson as to the second precondition in s 55F(2)(b). Beech-Jones CJ at CL said at [60] it would have been preferable if the foreperson had been asked a specific question directed to the likelihood or unlikelihood of the jury reaching a unanimous verdict if further deliberations took place, but in the circumstances of the particular case it was open to the judge to be satisfied that the requirement of s 55F(2)(b) was met. Submissions on whether a reasonable time has expired should be invited and the judge's reasons must make explicit the factors considered and how the decision it was reasonable to invite a majority verdict was reached. The reasons do not need to be complex or lengthy, but require clarity: *KE v R* at [98]; *RJS v R* at [25].

6. The terms of s 56 *Jury Act* 1977 with respect to the discharge of a jury in cases where a majority verdict is available (juries of 11 or 12 persons) should be noted:

> (1) Where a jury in criminal proceedings has retired, and the jury consists of 11 or 12 persons, the court in which the proceedings are being tried may discharge the jury if it finds, after examination on oath of one or more of the jurors, that it is unlikely that the jurors will reach a unanimous or a majority verdict under section 55F.
>
> (2) Where a jury in criminal proceedings has retired, and the jury consists of 11 or 12 persons, the court in which the proceedings are being tried may not discharge the jury under this section if it finds, after examination on oath of one or more of the jurors, that it is likely that the jurors will reach a majority verdict under section 55F.

The court cannot discharge a jury of 11 or 12 persons for disagreement unless it makes a finding referred to in s 56(2). No enquiry of the jury for the purpose of s 56(2) (that is, examination on oath of one or more of the jurors, that it is

likely that the jurors will reach a majority verdict under s 55F) should be made until the point had been reached at which a majority verdict is capable of being taken: *Hunt v R* [2011] NSWCCA 152 at [26]. See the observations in *O'Brien v R* [2019] NSWCCA 187 at [53]–[64], concerning the interplay between s 56 and s 55F(2), and the complications that may arise in cases where the jury has indicated an inability to reach a verdict before the eight hour period required by s 55F(2) has expired.

7. Section 68B *Jury Act* 1977 provides it is an offence for a juror to disclose deliberations including voting numbers except with the consent, or at the request, of the judge. Jury votes or voting patterns are irrelevant and should not be disclosed: *Smith v The Queen* (2015) 255 CLR 161 at [32], [53].

   It is highly desirable that judges inform juries, before retirement, that they should not disclose to the judge their votes or voting patterns in order to minimise such a disclosure occurring before verdict: *Smith v The Queen* at [32]; *R v Burrell* [2009] NSWCCA 163 at [217]. Disclosure of voting numbers is not necessary to enable the jury to perform its role in reaching a verdict or for the judge to form a view on whether to ask the jury to consider a majority verdict: *Smith v The Queen* at [48]–[49]. The judge must, however, disclose to counsel the precise terms of a question asked by a jury where it relates to a relevant issue before the court and both counsel should be given an opportunity to make submissions: *Smith v The Queen* at [58].

   In *Hawi v R* [2014] NSWCCA 83 at [457]–[460], it was held that the judge was not required to disclose the full contents of jury notes which revealed specifics about the jury's deliberations. The judge's summary to counsel of the notes was sufficient.

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