Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 75

December 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 75

Update 75, December 2023

Update 75 amends the *Criminal Trial Courts Bench Book* to incorporate recent case law and legislative developments. The following chapters have been revised or added:

Pre-recorded evidence in child sexual offence proceedings

- The chapter at **[5-400]**ff has been extensively revised to incorporate amendments made by the *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act* 2023 which commences 29 January 2024. The Act amends the *Criminal Procedure Act* 1986 by inserting new Div 1A, extending the Child Sexual Offence Evidence Pilot scheme (confined to Downing Centre, Sydney and Newcastle District Courts), with some amendments, to all District Courts ("relevant places") in NSW. The amending Act applies to proceedings commenced on and from 29 January 2024.

Abusive behaviour towards intimate partners

- A new chapter at **[5-2000]**ff provides suggested directions and commentary on the new offence of abusive behaviour towards intimate partners created by the *Crimes Legislation Amendment (Coercive Control) Act* 2022 (expected to commence between 1 February and 1 July 2024). The offence involves engaging in a course of conduct consisting of abusive behaviour (violence, threats, intimidation, or coercion or control of a person) against a current or former intimate partner, with the intention of coercing or controlling that person. The new offence provisions will only apply to conduct occurring on or after the commencement of the amendments.

Prospect of disagreement

- **[8-100]** to add reference to *Haile v R* [2022] NSWCCA 71 where it was held that the trial judge's omission of a reference to the power to discharge the jury as required by *Black v The Queen* (1993) 179 CLR 44 was erroneous, and to modify the jury directions at **[8-070]** and **[8-090]** to take account of s 56 of the *Jury Act* 1977.

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December 2023

FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 75

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Child witness/accused

[1-100] Definition of "child"

Last reviewed: September 2023

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

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

- giving of evidence by CCTV and the use of alternative arrangements, at **[1-362]**–**[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]**

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]

Closed court, suppression and non-publication orders

[1-349] Introduction

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

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

The onus is on the parties to make an application for appropriate orders at the hearing. Such orders may include an application for a pseudonym order or the suppression of certain evidence, such as evidence related to assistance given during the proceedings: *Darren Brown (a pseudonym) v R (No 2)* [2019] NSWCCA 69 at [13]–[14]. Note the observations of the court concerning the approach usually taken to assistance at [31]–[34], although these must be read in light of *HT v The Queen* [2019] HCA 40: see *Sentencing Bench Book* at **[12-210] Procedure** (in **Power to reduce penalties for assistance to authorities**).

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

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

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

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

Common law and suppression and non-publication orders

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

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

[1-350] The principle of open justice

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

John Fairfax Publications Pty Ltd v District Court of NSW (2004) 61 NSWLR 344 per Spigelman CJ at [18]. However, in appropriate cases courts have jurisdiction to modify and adapt the content of general rules of open justice and procedural fairness and to make non-publication orders for particular kinds of cases: *HT v The Queen* (2019) 269 CLR 403 at [44], [46].

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

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

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

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

The *Suppression Act* confers broad powers on courts to make suppression or non-publication orders: s 7. Such orders may be made at any time during proceedings or after proceedings have concluded: s 9(3). The power in s 7 is broad and may, depending on the particular circumstances, extend to a judicial officer in one court (for example, the District Court) making non-publication orders with the capacity to affect proceedings in another (for example, the Supreme Court): *Munshizada v R* [2021] NSWCCA 307 at [31]–[33]; cf *Sultani v R* [2021] NSWCCA 301 at [15]–[16].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Take-down orders

A take-down order will fail the necessity test under s 8(1) if it is futile. However, an order will not necessarily be futile merely because the court is unable to remove all offending material from the internet or elsewhere, or the material is available on overseas websites: *AW v R* [2016] NSWCCA 227 at [17]; *Nationwide News*

Pty Ltd v Quami (2016) 93 NSWLR 384 at [83]; *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [76]. Where the application for a take-down order relates to proceedings before a jury, the test of necessity will not readily be satisfied without considering whether the jury is likely to abide by the judge's directions to decide the matter only by reference to the evidence: *Fairfax Digital* at [77]. However, full effect should be given to the received wisdom that jurors act responsibly and in accordance with their oath, including complying with directions of the trial judge: *AW v R* at [16]; *Nationwide News Pty Ltd v Quami* at [90].

Content of the order

An order *must* specify:

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

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

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

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

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

Review and appeals

Orders made under the Act are subject to review and appeal: ss 13–14. Section 13 is confined to a review by the original court which granted the relevant order while s 14 deals with an appeal by leave, either in respect of the original order or the order of that court on a review: *D1 v P1* [2012] NSWCA 314 at [42]. Given the powers under s 14(5) to admit additional or substituted evidence, together with the fact that, subject to leave, a review under s 13 and an appeal under s 14 appear to be alternatives, the

hearing on the appeal is a hearing de novo: *D1 v P1* at [43]; *Fairfax Digital* at [6]. As to who may make an application under s 13 for review of an order see *JB v R* [2019] NSWCCA 48 at [25]–[27]. In that case the court concluded the NSW Bar Council had standing to make an application for review.

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

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

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

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

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

Commonwealth provisions

The relevant Commonwealth provisions include:

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

[1-358] Closed courts

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

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

When a complainant's evidence is being given or heard before the court (whether this is in person or via an audio visual or audio recording) proceedings are to be held in

camera unless otherwise ordered: s 291(1). Where a record of the original evidence of the complainant is tendered in proceedings by the prosecutor under Ch 3, Pt 5, Div 3 *Criminal Procedure Act*, the record does not need to be tendered in camera: s 291(6).

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

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

Children in criminal proceedings

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

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

Terrorism

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

Witness protection

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

Commonwealth provisions

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

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

Information (Criminal and Civil Proceedings) Act 2004 (Cth) which establishes a regime for dealing with national security information in federal criminal proceedings. For a discussion of the operation of s 31, which governs non-disclosure orders that can be made under that Act, see *R v Collaery (No 7)* [2020] ACTSC 165 at [41]–[43], [102]–[110].

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

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

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

See the following:

- *Bail Act* 2013, s 89(1) prohibits publication of association conditions in terms similar to *Crimes (Sentencing Procedure) Act* 1999, s 100H (see below).
- *Child Protection (Offenders Prohibition Orders) Act* 2004, s 18.
- *Children (Criminal Proceedings) Act* 1987, s 15A prohibits the publication or broadcast of the names of children involved as offenders, witnesses, or brothers and sisters of child victims in criminal proceedings (see below).
- *Crimes Act* 1900, s 578A prohibits the publication of matters identifying a complainant in proceedings in respect of a prescribed sexual offence. As to publication, once proceedings are finalised see: ss 578A(4)(a)–(f) and 578A(3).

  The prohibition in s 578A(2) extends to the reporting of appeals even if a prescribed sexual offence, which was part of the original proceedings, is not the subject of the appeal, because publication of the identity of the victim of the offence(s) the subject of the appeal would identify them as the complainant in the original proceedings: *Z (a pseudonym) v R* [2022] NSWCCA 8 at [56].
- *Crimes (Appeal and Review) Act* 2001, s 111.
- *Crimes (Domestic and Personal Violence) Act* 2007, s 45(1) prohibits the publication of names or identifying information concerning children in AVO proceedings.
- *Crimes (Sentencing Procedure) Act* 1999, s 100H prohibits the publication or broadcast of persons named in non-association orders (other than the offender) made under s 17A(2)(a), or any information calculated to identify any such person.
- *Evidence Act* 1995, s 195 prohibits the publication of prohibited questions, the nature of which are set out in that section.
- *Law Enforcement (Controlled Operations) Act* 1997, s 28.
- *Law Enforcement and National Security (Assumed Identities) Act* 2010, s 34.
- *Status of Children Act* 1996, s 25.

Publication of children's names in criminal proceedings

Children (Criminal Proceedings) Act 1987, s 15A prohibits the publication or broadcast of the names of children involved as offenders, witnesses, or brothers and sisters of child victims in criminal proceedings. Where there has been breach of an

order under s 15A(1), proceedings should be commenced under s 15A(7) instead of seeking a non-publication order under s 7 of the *Suppression Act*: *R v AB (No 1)* (2018) 97 NSWLR 1015 at [38]-[39].

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

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

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

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

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

Commonwealth provisions

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

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

A person commits an offence if:

(a) the person publishes any matter; and

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

(c) the matter:

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

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

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

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

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

Checklist for suppression orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) Ensure a copy of the order is:

  (a) entered on Justicelink

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

[The next page is 71]

Evidence given by alternative means

[1-360] Introduction

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

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

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

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

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

Complainants in sexual offence proceedings

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

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

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

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

Sexual offence witnesses

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

Vulnerable persons in personal assault offence proceedings

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

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

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

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

(a) an intellectual disability

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

(c) a neurological disorder

(d) dementia

(e) a severe mental illness

(f) a brain injury.

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

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

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

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

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

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

Commonwealth sexual offence proceedings

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

Government agency witnesses

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

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

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

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

[1-363] Implied power to make screening orders

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

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

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

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

New South Wales offence proceedings

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

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

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

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

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

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

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

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

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

Commonwealth sexual offence proceedings

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

[1-368] Right to a support person

New South Wales offence proceedings

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

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

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

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

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

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

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

Commonwealth sexual offence proceedings

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

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

Vulnerable persons

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

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

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

The hearsay and opinion rules under the *Evidence Act* 1995 do not prevent the admission or use of recorded evidence: s 306V: *Tikomaimaleya v R* (2017) 95 NSWLR 315 at [54]. The recording is not to be admitted unless it is proved that the accused person and his or her lawyer were given a reasonable opportunity to listen to, or view the recording, in accordance with the regulations: s 306V(2); Pt 5 *Criminal Procedure Regulation* 2017. However, s 306V(3) provides that a recorded statement may be admitted into evidence, despite a failure to comply with notice requirements in the regulations, where the parties consent or if the accused has been given a reasonable opportunity to access the recording and it would be in the interests of justice for it to be admitted. The trial judge retains a discretion to rule that the whole or any part of the contents of a recording is inadmissible: s 306V(4).

Competence and recorded interviews

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

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

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

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

Domestic violence complainants

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

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

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

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

The judge must warn the jury not to draw any inference adverse to the accused or give the complainant's statement any greater or lesser weight because it is recorded rather than oral: s 289J. See **Suggested direction — evidence in the form of a recording** at [1-376], which includes a form of words for the warning and where the transcript of the recorded statement is provided to the jury.

Commonwealth sexual offence proceedings

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

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

Vulnerable persons

Section 306X *Criminal Procedure Act* 1986 provides:

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

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

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

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

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

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

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

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

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

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

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

If a transcript of the recording is provided, add:

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

Warnings in Commonwealth sexual offence proceedings

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

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

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

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

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

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

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

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

(e) If the tape is to be replayed or the transcript of the tape provided to the jury, the judge should caution the jury about their approach to that evidence when the tape is being replayed to them or the transcript of the tape returned to them in terms to the effect that "because they are hearing the evidence in chief of the complainant repeated a

second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case";

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

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

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

[1-380] Evidence given via audio visual link

The *Evidence (Audio and Audio Visual Links) Act* 1998 permits evidence to be taken via audio link or audio visual link from elsewhere in NSW, non-participating States and foreign countries (other than New Zealand) (Pt 1A), or from participating States (Pt 2). Links to New Zealand are dealt with in Pt 6 *Trans-Tasman Proceedings Act* 2010 (Cth).

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

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

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

Evidence may be taken via video link or telephone from New Zealand provided the necessary facilities are available: ss 51 and 52 *Trans-Tasman Proceedings Act* 2010 (Cth); *Derbas v R* [2007] NSWCCA 118 at [35].

As long ago as 1993, Hunt CJ at CL observed that the use of video links "has proved to be very successful from a technical point of view in demonstrating the demeanour of

the witness": *DPP v Alexander* (1993) 33 NSWLR 482 at 498. The broad acceptance of the use of video-link facilities for taking evidence was more recently recognised in *R v Lodhi* (2006) 163 A Crim R 488 at [37]. In *R v Wilkie* [2005] NSWSC 794, Howie J said at [69]:

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

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

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

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

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

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

> Making a direction that the evidence of an accusing witness be received by audiovisual link external to the courtroom must, by its very nature, involve unfairness to the accused because it deprives him or her of a face-to-face confrontation with the witness. The provision cannot mean *any* unfairness, however small. The Court must consider the degree and effect of the unfairness. In a criminal trial, the best measure is whether the making of a direction will cause the trial to be an unfair one to the accused. An accused person has the fundamental right to a fair trial. A direction should not be made if it would mean that an accused could *not* have a fair trial.

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

Commonwealth offences

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

There are also specific provisions in Div 279 *Criminal Code Act* 1995 (Cth) regarding proceedings for child sex tourism offences. The court may, on application by a party to the proceeding, direct that evidence from a witness (other than the defendant) be taken by video link from outside Australia if satisfied that facilities are available and it is in the interests of justice that evidence be taken in this way. The court must also be satisfied that attendance of the witness at court would cause unreasonable expense or inconvenience, cause the witness psychological harm or unreasonable distress, or cause the witness to become so intimidated or distressed that the witness's reliability would be significantly reduced: s 279.2. Sections 279.1–279.7 provide for the technical requirements for video link, the application of laws about witnesses, and the administration of oaths and affirmations.

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

New South Wales legislation

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

> It seems to me at this point in the proceedings against the accused that appropriate directions and warnings to the jury would cure much of the asserted prejudice that would flow from the use of audiovisual means of adducing the evidence of the two witnesses. For example, the jury would be told, if it were necessary to do so, that as the credit of the witnesses was a crucial issue in the resolution of the charges against the accused, any difficulty they might encounter in assessing the credibility of the witness by reason of the fact that the evidence was adduced before them by the use of a video link should be resolved in favour of the accused. So if they thought that demeanour might be important and they were having difficulty in properly assessing the demeanour of the witness by the restrictions or limitations placed upon that task because of the use of the video link, that might be a matter that would give rise to a doubt about whether they could rely upon the witness and, therefore, may give rise to a doubt that the prosecution had proved its case.
>
> These directions and any other that the accused thought necessary to address deficiencies in the evidence or the difficulties in cross-examination caused by the video link

> procedure would simply be to remind the jury of the practical limitations of the onus of proof in the circumstances of these two witnesses giving evidence by video link. Much of the criticism of the procedure overlooks the fact that deficiencies or difficulties encountered with the evidence of the witnesses caused by the use of the video link should rebound on the Crown and the jury simply need to be reminded of this fact in fair but forceful terms.

Proceedings for Commonwealth offences

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

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

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

[1-385] Complainant not called on retrial

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

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Sexual assault trials — procedural matters

[The next page is 711]

Pre-recorded evidence in child sexual offence proceedings

[5-400] Introduction

Last reviewed: December 2023

The pilot scheme (proceedings commenced before 29 January 2024)

The *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act* 2015 amended the *Criminal Procedure Act* 1986 (the Act) to insert Pt 29 (now repealed), a pilot scheme, permitting the pre-recording of the evidence of a witness who is a child complainant or child prosecution witness in a trial before the District Court for a prescribed sexual offence ("prescribed proceedings"): cl 82. The definition of "child", for the purposes of the pilot, was a person under 18 years. A prescribed sexual offence is defined in s 3(1) of the Act. All evidence of a child under 16 must be given by way of pre-recorded evidence, and such evidence may be given for a child under 18: cl 84.

These provisions apply to proceedings for a prescribed sexual offence (regardless of when it was committed) in Newcastle or Downing Centre, Sydney District Courts ("prescribed places") that commenced on or after 5 November 2015 but before 29 January 2024: *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act*, cl 83; 2015, s 2 (now repealed); the Act, Sch 2, Pt 44, cl 120, District Court Practice Note 11: "Child Sexual Evidence Pilot".

See further at **[5-410] Requirements for, and conduct of, pre-recorded hearings**.

The current scheme (proceedings commenced on and from 29 January 2024)

The *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act* 2023 (commencing 29 January 2024) amended the Act by inserting new Div 1A, extending the pilot scheme, with some amendments, to all District Courts ("relevant places") in NSW: *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act*, Sch 2, Part 44, cl 119, definition of "Court". Div 1A applies to proceedings:

(a) in relation to a prescribed sexual offence whenever committed, or

(b) if the proceedings relate to more than 1 offence — if at least 1 of the offences is a prescribed sexual offence whenever committed,

including an appeal or rehearing: s 294F.

These amendments apply to all proceedings commenced by a court attendance notice filed, or an indictment presented, in a prescribed or relevant place, on or after 29 January 2024: Sch 2, Pt 44, cl 121–122. Such proceedings are governed by District Court Practice Note 28: "Child Sexual Offence Evidence" (commencing 29 January 2024).

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

Last reviewed: December 2023

Note: The equivalent provisions applicable under the pilot scheme (Pt 29 of the Act, repealed) are provided in parentheses following each reference to the current provisions of Div 1A. See also Practice Notes 11 and 28.

A child who is under 18 years of age must, subject to a contrary order by the court, give their evidence by way of a pre-recording in accordance with s 294I: ss 294G and 294E. These provisions vary from those under the pilot scheme which required evidence of witnesses *under 16 years* of age when the accused is committed for trial to be given at a pre-recorded evidence hearing: cl 84.

A contrary order under s 294G(1)(a) not authorising a pre-recorded evidence hearing may only be made if the court is satisfied it is in the interests of justice: s 294G(2) (see cl 84(4)).

When determining whether to make an order under s 294G(1)(a), the primary factors for consideration are the wishes and circumstances of the witness: s 294G(3) (see cl 84(5)). Other factors that may be taken into account include:

(a) the availability of court and other facilities necessary for a pre-recorded hearing to take place,

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

(c) the continuity and availability of counsel at both the pre-recorded evidence hearing and the trial,

(d) other relevant matters: s 294G(4) (see cl 84(6)).

A witness is entitled to give their evidence in this way even if they become an adult by the time the accused was committed for trial: s 294E (definition of "witness") (cf cl 84(2) which refers to 16 or more years of age rather than adult).

The pre-recorded evidence hearing must be held as soon as practicable after the accused's first appearance in the court, but not before the prosecution's pre-trial disclosure required by s 141: s 294H (see cl 85(1)). This hearing must take place in the absence of the jury: s 294I(2) (see cl 85(3)).

A witness may give evidence in chief (as provided by s 306U) and be cross-examined and re-examined during the pre-recorded evidence hearing: s 294I(1), and (6) (see cll 85(2), 85(6)). Section 306U entitles a vulnerable person, defined in s 306M to include a child, to give their evidence in chief in the form of a recording made by an investigating official. However, the Child's Interview (commonly referred to as a JIRT interview) is not played during the pre-recorded evidence hearing. The practice is for the child to have had the opportunity to watch their interview (or interviews) about 1 to 3 days before the hearing so it is fresh in their memory. See also **[1-372] Giving evidence of out-of-court representations**. At the balance of the trial, the jury will be shown the JIRT interview, followed by the recording of the pre-recorded evidence hearing. Any edits to the recordings are to be agreed between the parties and sent to the presiding judge and edits will be ordered by the court. If the edits cannot be agreed, the matter is to be relisted before the pre-recorded evidence hearing judge.

A vulnerable person is also entitled to give their evidence orally in the courtroom or from a location outside the courtroom via closed-circuit television facilities: ss 306S, 306W, 306ZB. Where evidence is given from a remote location, the court may order a court officer and a support person also be present at that location: s 306ZD. A vulnerable person is entitled to choose a support person to be present: s 306ZK(2). The court may disallow a chosen support person if it is likely to prejudice the accused's right to a fair trial (eg, the person is a witness in the proceedings): s 306ZK(3A).

Section 164A(3A) clarifies that s 164A (which permits a new judge to be nominated or the jury to be discharged if the former presiding judge is unable to continue proceedings) does not apply: (a) to a pre-recorded evidence hearing, or (b) where the former presiding judge only presides over a pre-recorded evidence hearing and not over proceedings thereafter. It does not matter if a different judge conducts the pre-recorded hearing and the balance of trial, nor whether the parties, accused, witness and witness intermediaries are in different places and appear by audio visual link: s 294I(7)–(8).

Witness intermediaries

Appointment

The court must appoint a witness intermediary to assist with the giving of the child's evidence where the child is under 16 years of age. A witness intermediary may also be appointed by the court on its own motion or on the application of a party to the proceedings, where the witness is 16 or older if the court is satisfied the witness has difficulty communicating: s 294M(3) (see cl 89(3)). Victim Services has established a panel of persons suitable for appointment: s 294M(1) (see cl 89(1)). In *SC v R* [2020] NSWCCA 314, the court observed that it was implicit from the terms of cl 89 (now s 294M) that the intermediary would be on the panel: at [25]. Witness intermediaries are accredited professionals from the fields of speech pathology, social work, psychology, teaching, or occupational therapy.

A witness intermediary cannot be a relative, friend or acquaintance of the witness, or a person who has assisted the witness in a professional capacity (other than as a witness intermediary), or a party or potential witness in the proceedings: s 294M(5) (see cl 89(5)). However this does not prevent a person who has assisted the witness in a professional capacity (other than as a witness intermediary) from being appointed if the court, in the interests of justice, appoints the person, or merely because the person carries out the functions of a witness intermediary for the witness during a criminal investigation that takes place before or after the commencement of proceedings: s 294M(6). In *SC v R*, a speech pathologist, who had conducted one session with the complainant but had subsequently supervised a student working with her, was disqualified from acting as a witness intermediary by cl 89(5)(b) (now s 294M(5)(b)). The court concluded that, in those circumstances, the trial judge's failure to revoke the intermediary's appointment was erroneous: at [68]. The court held that the disqualifying conditions in cl 89(5) (now s 294M(5)) continued to operate after the witness intermediary had been appointed. The prohibition imposed by cl 89(5)(b) (now s 294M(5)(b)) is on appointing an intermediary with a prior professional association with the witness; there is no requirement the assistance provided warrants a conclusion that the intermediary is no longer neutral or impartial; nor is it limited to direct assistance with a therapeutic component or function: *SC v R* at [65]–[66].

Role

The witness intermediary is an officer of the court. Their role is to communicate to the court whether the witness can understand questions put to the witness, and explain to the court and person asking the questions the best way a witness can be asked questions the witness can understand: s 294L(1) (see cl 88(1) which differs slightly). If requested by the court, the witness intermediary must give the court a written report about the communication needs of the witness, a copy of which must be given to the

parties before the witness gives evidence: s 294M(7), (8). A witness intermediary will typically present the report and discuss recommendations at a Ground Rules Hearing convened by the court and attended by counsel: District Court Criminal Practice Note 11. See also **[5-430] Child Sexual Assault List — procedure**.

The *Evidence Act* 1995 applies to witness intermediaries in the same way as it applies to interpreters: s 294N(4), *Evidence Act* 1995, s 22. For the form of the oath or affirmation an intermediary must take before acting as an intermediary see *Criminal Procedure Regulation* 2017, cl 111.

During a pre-recorded evidence hearing, the witness may only give evidence if the witness intermediary is at the place from which the witness is giving evidence, in the court room or at a different place appearing by audio visual link and the witness, Court and a legal practitioner acting in the proceedings is able to see and hear the witness intermediary: s 294N(1). The court and legal practitioner acting in the proceedings must be able to see and hear the giving of evidence and communicate with the witness intermediary and, except for evidence given under Ch 6, Pt 6 or Div 1A by a recording, the jury are able to see and hear the giving of the evidence: s 294N(2).

Where Div 1A applies, s 294O (previously cl 91) requires the court to inform the jury it is standard procedure to give evidence by a pre-recording or to use a witness intermediary in the proceedings and, warn the jury not to draw an inference adverse to the accused or to give evidence greater or lesser weight because the evidence was given by a pre-recording or a witness intermediary was used. See **[5-420] Suggested direction — pre-recorded evidence** below.

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

Last reviewed: December 2023

You are about to see [*the complainant's/child witness'*] evidence. It consists of an interview with a police officer that was recorded (called a JIRT interview) and questions asked of the witness in court before [*myself/another judge*] that were recorded. The/A Crown Prosecutor/Trial Advocate, the accused's counsel and their instructing solicitors and the accused were all present when [*the complainant/child witness*] was asked questions in court.

When the recording of the evidence in court took place, the evidence of [*the complainant/child witness*] was taken using an audio-visual link between the room [*the complainant/child witness*] was in and the courtroom. **[***If appropriate:* At that time, a support person and a court/sheriff's officer were in the same room as [*the complainant/child witness*].**]**

[*If appropriate*: You will see there is another person with [*the complainant/child witness*] on the recording/on both recordings. This person is referred to as a witness intermediary. The witness intermediary is appointed by the court and their role is to assist [*the complainant/child witness*] with communication if that is required.**]**

Each of these things I have spoken about does not mean you treat the evidence any differently to the evidence of any other witness you hear in the courtroom. This is all standard procedure. You should not draw any inference against the accused because the

evidence is being given in this way or give [*the complainant's/child witness'*] evidence any greater or lesser weight. You assess their evidence in the same way as you assess the evidence of any of the other witnesses in the trial.

As with the evidence of any witness, it is important that you pay attention to the evidence and understand that all witnesses only give their evidence once. Witnesses do not return to court to repeat their evidence after it has been given and nor is the evidence contained in the recordings played again.

Notes:

1. The suggested direction above is in the terms required by s 294O (see cl 91).
2. At the pre-recorded evidence hearing, the judge should take the parties and the witness through the rules of the court such as:
   - the availability of breaks,
   - if the witness doesn't understand a question, they should let the court or witness intermediary know,
   - the witness should not feel any pressure to agree to a question just because an adult is asking the question,
   - it is important for the witness to tell the truth and only talk about things that really happened,
   - the witness should not guess at an answer. If they can't remember or don't know the answer, they can tell the court,
   - if they hear the words "I object", they should not answer,
   - what are Exhibits/MFIs,
   - the formula for *Browne v Dunn* questions.
3. It is open to the judge to make a direction that defence counsel need not "put their case" to the witness where there is a risk the witness will not be able to understand, the witness is becoming distressed, or there is a risk of gratuitous concurrence — acquiescing to leading questions.
4. The court is permitted to control the questioning of a witness (*Evidence Act* 1995, s 26) and must disallow improper questions put to a witness in cross-examination (*Evidence Act*, s 41).
5. Where a witness is giving evidence from a remote location, there will usually also be a support person and a court officer present. It is important to ask the name of the support person present, to ensure they are not (or are not likely to become) a witness in the proceedings.
6. Further evidence can only be given by a witness with the leave of the court: s 294K(1) (see cl 87(1)). This subsection applies despite anything to the contrary in the *Criminal Procedure Act* or the *Evidence Act* 1995: s 294K(5) (see cl 87(5)). Either party may apply for leave: s 294K(2) (see cl 87(2)). Leave must not be given unless the court is satisfied:
   (a) the witness or party has become aware of a matter of which the party could not reasonably have been aware at the time of the recording, or

(b) it is otherwise in the interests of justice to give leave: s 294K(3) (see cl 87(3)).

The further evidence must, to the extent practicable, be given by pre-recording at a hearing in the same way as the original pre-recorded evidence, unless the court otherwise directs: s 294K(4) (see cl 87(4)).

An important consideration in exercising the power under s 294K must reflect the dominant purpose of protecting child witnesses from the trauma of giving evidence, so far as it is reasonably possible to reduce that trauma. The use of a pre-recorded evidence hearing is seen to go part of the way, but even then, is not to be repeated unless the interests of justice require it: *PJ v R* [2023] NSWCCA 105 at [47]. Furthermore, the concern that repeat hearings will potentially add to a child witness' trauma requires legal representatives appearing at these hearings to be aware of the statutory policy not to provide further hearings and to address at that hearing (and where appropriate, put to the child witness) any matter then known to the applicant and which is sought to be relied upon at trial: *PJ v R* at [48]–[49].

7. The accused and their legal representatives do not have a right to a recording (or copy) of the pre-recorded evidence, but reasonable access to listen to or view the recording must be provided: s 294J. It is desirable that there be prior discussion with the parties about whether, in the circumstances of the individual case, a transcript of the recording should be provided to the jury to assist with comprehension: s 294J (see cl 86(5)). If the transcript is to be provided, it is desirable that the discussion also address whether the transcripts provided to the jurors should be retrieved at the end of the playing of the recording. If there is a possibility of this occurring, jurors should be told so that any notes they may wish to make are not made on the transcript. If transcripts are provided but then retrieved, it is suggested they be placed in individual envelopes with juror identification on the outside so they may be returned to the correct juror if that should later occur.

8. Unless the witness otherwise chooses, they must not be present in the court, or be visible or audible to the court by CCTV or other technology, while a recording made pursuant to s 306U or made at the hearing is being viewed or heard: s 294I(4) (see cl 85(5)).

9. The recording of the evidence should not be marked as an exhibit and should not be sent with the exhibits to the jury when they retire to consider their verdict: *CF v R* [2017] NSWCCA 318 at [63]–[65]; *R v NZ* (2005) 63 NSWLR 628 at [192]–[192], [210](a); *Gately v The Queen* (2007) 232 CLR 208 at [93]. See also *AB (a pseudonym) v R* [2019] NSWCCA 82 at [40]–[42].

10. If the jury requests or the sound quality of the recordings is such that a transcript is being provided to the jury during or after the playing of any of the recorded evidence, the usual directions in relation to the provision of transcripts will need to be given. See **[1-530] Suggested direction — use of the transcripts**.

11. If, during deliberations, the jury ask to view the pre-recorded evidence of the witness this should ordinarily be done by replaying the evidence in court in the presence of the trial judge, counsel and the accused: *Gately v The Queen* at [96]. It is generally undesirable to allow the jury unsupervised access to the

complainant's recorded evidence, although a trial judge has a discretion to do so: *CF v R* [2017] NSWCCA 318 at [82]–[83]; see also *R v NZ* at [196], [210](a). However, in determining the procedure to adopt, consideration should be given to the significance of the evidence in the trial as a whole: *R v NZ* at [212]. A relevant consideration is to maintain the balance of fairness in the trial: *Gately v The Queen* at [80]; *R v NZ* at [169]–[176], [212]; see also *CF v R* at [92].

12. Where the evidence is played to the jury again, consideration should be given to repeating the direction that the evidence is not to be afforded any greater weight than other evidence given in the trial: *R v NZ* at [210](e); see also *JT v R* [2021] NSWCCA 223 at [82]–[89] and also *Stevenson v R* [2022] NSWCCA 133 at [62]–[67].

[5-430] Child Sexual Assault List — procedure

Last reviewed: December 2023

The procedure for child sexual offence matters progressing in the NSW District Court is contained in Criminal Practice Note 28.

Div 1A of the *Criminal Procedure Act* applies to prescribed sexual offences involving child complainants (under 18 years of age at date of committal). All such matters that are committed from the Local Court to the District Court for trial enter the Child Sexual Assault List. All case management is administered from this List.

Callover

- First callover: no later than 14 days after committal for trial
- Court sets timetable for:
  - service of outstanding evidence
  - filing of notice of Crown case (*Criminal Procedure Act* 1986, s 142), defence response (s 143), and Crown response (s 144)
  - pre-trial conferences (s 140)
  - filing of Crown disclosure certificate (s 15A)
  - filing of Agreed Facts (s 191)
  - Ground Rules Hearing [GRH] (listed 1 week prior to PRH)
  - Pre-recorded Evidence Hearing [PRH]
  - Balance of trial
- Witness intermediary appointed and report ordered (s 294M(7))
- Crown to file 2 weeks before PRH the PRH bundle (indictment, Crown Case Statement, ss 142–143 Notices, JIRT interviews, discs, exhibits)

Ground rules hearing

- Witness Intermediary sworn/affirmed. Presents report to court and discusses recommendations.
- Report documents communication needs of witness and recommended modes of questioning (eg, non-tag questions), including use of visual aids (eg, timelines).
- Court and parties may pose questions of Witness Intermediary to seek clarification; recommendations may be amended or added.
- Court makes orders that PRH to be conducted according to Witness Intermediary's recommendations.

Pre-recorded evidence hearing

- PRH is commencement of trial.
- Parties to deliver short opening at start of PRH.
- Connection made with remote witness room: witness, Witness Intermediary, support person and Sheriff's officer identified.
- Witness sworn/affirmed.
- Questioning of witness to be conducted in accordance with orders made at GRH.
- Witness Intermediary permitted to interject where mode of questioning not in compliance with recommendations or where witness requires breaks.
- JIRT recording and any transcript to be marked for identification only and not tendered as an exhibit.

Balance of trial

- All agreed edits to JIRT and PRH recordings to be made in advance of trial.
- Copies of edited discs and transcripts to be provided to court in advance of trial.
- Child witness not to give further evidence without court's leave (s 294K(1)).
- Jury to be given direction regarding pre-recorded evidence **[5-420]**.
- Jury to be played JIRT recording and then PRH recording.
- Any exhibits tendered during the PRH are to be distributed to the jury at the relevant time during the playing of the PRH recording.
- JIRT and PRH recordings and any transcripts to be marked for identification only and not tendered as exhibits.

[The next page is 771]

Other offences

False instruments

False or misleading statements

Fraud

House, safe and conveyance breaking implements in possession

Kidnapping — take/detain for advantage/ransom/serious indictable offence

Larceny

Manslaughter

Murder

Negligence and unlawfulness

Receiving stolen property

Robbery

Supply of prohibited drugs

Kidnapping — take/detain for advantage/ransom/serious indictable offence

[The next page is 887]

Abusive behaviour towards intimate partners

[5-2000] Introduction

Last reviewed: December 2023

The *Crimes Legislation Amendment (Coercive Control) Act* 2022 ("the Act") relevantly amends the *Crimes Act* 1900 to create a new offence of abusive behaviour towards intimate partners.

The offence involves engaging in a course of conduct consisting of abusive behaviour (violence, threats, intimidation, or coercion or control of a person) against a current or former intimate partner, with the intention of coercing or controlling that person: s 54D(1).

The new offence provisions are expected to commence between 1 February and 1 July 2024 and will only apply to conduct occurring on or after the commencement of the amendments: *Crimes Legislation Amendment (Coercive Control) Act* 2022, s 2; Sch 1[2], 2[6].

[5-2010] Suggested direction

Last reviewed: December 2023

The accused is charged with engaging in a course of conduct against the complainant that consisted of abusive behaviour, intending to coerce or control the complainant who was **[*or:*** had been**]** an intimate partner.

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

1. The accused was an adult: ss 54D(1), s 54C.
2. The accused and the complainant were **[*or:*** had been**]** intimate partners: ss 54D(1)(b), 54C.
3. The accused engaged in a course of conduct against the complainant: ss 54D(1)(a), 54G.
4. The course of conduct consisted of abusive behaviour: ss 54D(1)(a), 54F.
5. The accused intended the course of conduct to coerce or control the complainant: s 54D(1)(c).
6. A reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause any or all of the following, whether or not the fear or impact was in fact caused:
   (a) fear that violence would be used against the complainant or another person, or
   (b) a serious adverse impact on the capacity of the complainant to engage in some or all of the complainant's ordinary day-to-day activities. **[***Omit any of these matters which are not alleged by the prosecution.***]**: 54D(1)(d).
7. **[*Only where there is evidence capable of raising the defence in s 54E:*** The course of conduct was not reasonable in all the circumstances.**]**: s 54E(2)(b).

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

1. **The accused was an adult.**

   An "adult" is a person who is 18 years of age or older.

2. **The accused and the complainant were [*or:* had been] intimate partners.**

   The complainant will have been an "intimate partner" of the accused if the complainant, at the time the alleged course of conduct occurred or previously: [*specify which of the following is alleged*]:

   (a) was married to the accused; or

   (b) was a de facto partner of the accused; or

   (c) had an intimate personal relationship with the accused, whether or not the intimate relationship involved a relationship of a sexual nature.

3. **The accused engaged in a course of conduct against the complainant.**

   A "course of conduct" means engaging in behaviour either repeatedly or continuously, or both repeatedly and continuously.

   Such behaviour does not have to be engaged in as an unbroken series of incidents or in immediate succession.

   [*Where appropriate:* it must involve behaviour engaged in within this State, but it may also include behaviour engaged in outside the State.**]**

4. **The course of conduct consisted of abusive behaviour.**

   "Abusive behaviour" means behaviour that consists of, or involves:

   - violence or threats against the complainant, or
   - intimidation of the complainant, or
   - coercion or control of the complainant: s 54F(1).

   There are a variety of behaviours that may constitute abusive behaviour.

   In this case the Crown alleges there was abusive behaviour by way of the accused **[***describe the nature and description of the behaviours that are alleged to amount to the course of conduct of abusive behaviour and the particulars of the period of time over which it is alleged to have taken place***]**: s 54H(1)(b).

   [*If there is a dispute about particulars of any specific incident of abusive behaviour alleged: s 54H(2)(b):* In relation to the **[***refer to the incident***]** there is an issue about a matter of detail concerning **[***specify the particular that is in issue***]**. As a matter of law this is not a matter that the Crown is required to prove beyond reasonable doubt.

   [*Summarise the competing cases in relation to elements 3 and 4*.]

The law is that the course of conduct may be constituted by any combination of abusive behaviours. Whether the course of conduct consists of or involves abusive behaviour must be assessed by you considering all of the behaviours that the Crown alleges makes up the course of conduct and determining whether you are satisfied beyond reasonable doubt that they consisted of or involved violence or threats of violence against the complainant, intimidation of the complainant or coercion or control of the complainant**]**.

5. **The accused intended the course of conduct to coerce or control the complainant.**

   This element is concerned with the accused's state of mind. The Crown must prove that the accused intended the course of conduct of abusive behaviour to coerce or control the complainant.

   A person's intention may be inferred or deduced from what the person may have said or done. Even without the person having said anything, their actions and the circumstances in which they were carried out may provide the most convincing evidence of what their intention was. **[*If appropriate*:** Where a specific result is the obvious and inevitable consequence of a person's act, and the person does that act, a jury may readily conclude that the person acted with the intention of achieving that specific result.**]**

   [A direction on the care required in relation to drawing inferences should be considered: see **[3-150]]**

   To "coerce" someone is to restrain or constrain them by force or to compel them to do or to refrain from doing something. To "control" a person is to exercise restraint or direction over someone; to dominate or have command over them.

   [*Summarise the competing cases on this issue*.]

   The Crown must prove the accused intended the "course of conduct" to coerce or control the complainant. It is not necessary for the Crown to prove that each of the acts of the accused that you find establishes the course of conduct were by themselves intended to have that effect.

6. **A reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause any or all of the following, whether or not the fear or impact was in fact caused**:

   (a) **fear that violence would be used against the complainant or another person, or**

   (b) **a serious adverse impact on the capacity of the complainant to engage in some or all of the complainant's ordinary day-to-day activities. [***Omit any of these matters which are not alleged by the prosecution.***]**

   In deciding what a "reasonable person" would consider you are asked to make an objective assessment based upon community standards of the likely effect of the accused's course of conduct. You must consider this question in the light of all of the circumstances that you regard as relevant.

   The Crown says that the following circumstances are relevant for you to take into account. **[***Summarise those relied upon by the Crown*.**]**

The Crown is not required to prove what the complainant thought, or what was in fact, the effect of the accused's course of conduct. Although there may be evidence from a complainant about this, there does not have to be because this element is concerned with what a reasonable person would consider the course of conduct would be likely to cause, not what may have been, or what was in fact, caused.

[*Refer to any evidence that may have been given and explain its relevance*.**]**

7. **[Where there is evidence capable of raising the defence in s 54E: The course of conduct was not reasonable in all the circumstances.]**

   The defence case is that the course of conduct was reasonable in the circumstances. This is not a matter for the defence to prove. I remind you that the accused is not obliged to prove anything and that the onus remains at all times upon the Crown to prove the accused's guilt beyond reasonable doubt.

   In relation to this issue, it is for the Crown to prove that the course of conduct engaged in by the accused was not reasonable in all the circumstances.

   [*Summarise the evidence and submissions on this issue***]**.

[5-2020] Notes

Last reviewed: December 2023

1. There is no minimum number of incidents required to establish a course of conduct: Second Reading Speech, Crimes Legislation Amendment (Coercive Control) Bill 2022, Legislative Assembly, *Debates*, 19/10/2022, p 9047.
2. If a specific incident of abusive behaviour is alleged to form part of the course of conduct, the prosecution is not required to allege the particulars that would be necessary were the incident charged as a separate offence: s 54H(1)(a). The prosecution is required to allege the nature and description of the behaviours that amount to the course of conduct and the particulars of the period of time over which the course of conduct took place: s 54H(1)(b).
3. The common law in relation to double jeopardy applies to s 54D offences: Note to s 54H. A person cannot be subsequently convicted of a standalone offence if it formed part of a course of conduct for a s 54D(1) charge regarding which the person was either acquitted or convicted. Likewise, there can be no conviction for a s 54D(1) charge if it relies on a standalone offence for which the person was already convicted or acquitted.
4. An offence against s 54D(1) is a "domestic abuse offence": s 11 *Crimes (Domestic and Personal Violence) Act* 2007. Particular procedural provisions of the *Criminal Procedure Act* 1986 apply to proceedings for such offences: **Evidence given by alternative means** at **[1-360]**ff, and **Closed court, suppression and non-publication orders** at **[1-349]**.
5. As the offence is a "domestic abuse offence", s 306ZR of the *Criminal Procedure Act* applies. If evidence is given or a question is asked of a witness that tends to suggest an absence or delay in complaint, the warning and information in s 306ZR(2) must be given.

6. Where evidence of other acts of alleged misconduct by the accused towards the complainant are led, see **Suggested direction — context evidence** at **[4-215]**.
7. Where evidence of complaint is led, see **Complaint evidence** at **[5-000]**.
8. For information and discussion of the dynamics of coercive control, see the *Equality before the Law Bench Book* at 7.5.3, and as to domestic violence offences generally see *Sentencing Bench Book* at **Domestic violence offences** at **[63-500]**. See also *Coercive control resource* on the Judicial Information Research System (for JIRS subscribers and judicial officers only).

[The next page is 893]

Assault

[5-5000] Common assault prosecuted by indictment

Section 61 of the *Crimes Act* 1900 provides:

> Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

[5-5010] General principles

Definitions

An assault is any act — and not a mere omission to act — by which a person intentionally — or recklessly — causes another to apprehend immediate and unlawful violence: *R v Burstow; R v Ireland* [1998] 1 AC 147. Thus it is the fear which is the gist of assault.

Battery is the actual infliction of unlawful force on another. But the word "assault" has come to describe both offences: see *DPP v JWH* (unrep NSWSC, 17 Oct 1997).

Barwick CJ in *The Queen v Phillips* (1971) 45 ALJR 467 at 472 described an assault in the common law sense of the word as follows: "Such an assault necessarily involves the apprehension of injury or the instillation of fear or fright. It does not necessarily involve physical contact with the person assaulted: nor is such physical contact, if it occurs, an element of the assault."

Apprehension of immediate and unlawful personal violence

A number of cases have considered the element of *immediacy* with regard to the requirement of a threat of immediate violence and the following propositions may be deduced from the cases.

Perhaps the concept was most widely construed in *Barton v Armstrong* [1969] 2 NSWR 451 at 455 where it was held that if the threat produces an immediate fear or apprehension of physical violence, there may be an assault, although the complainant does not know when the physical violence may be effected. *Barton v Armstrong* was considered and distinguished in *R v Knight* (1988) 35 A Crim R 314.

There need be no intention or power to use actual violence or power, for it is enough if the complainant on reasonable grounds believes that he or she is in danger of it. Indeed, if it later appears that no violence was intended, it is sufficient if the complainant or a reasonable person thinks that it is intended. Thus, in *Zanker v Vartzokas* (1988) 34 A Crim R 11 a young woman accepted a lift from the accused. While the van was moving, the accused accelerated the vehicle saying: "I'm going to take you to my mate's house. He will really fix you up." She was put in fear and jumped out of the moving vehicle. This was held to be an assault on the basis that the complainant was put in fear of relatively immediate imminent violence which continued to have effect as the vehicle continued toward the threatened destination while she was unlawfully imprisoned and at the continuing mercy of the accused. Again, *Barton v Armstrong* was distinguished.

A threat to strike a person even at such a distance as to make contact impossible may constitute an assault if it instils a fear of immediate violence in the mind of the victim: *R v Mostyn* [2004] NSWCCA 97 at [71].

Recklessness — recklessly causing another to apprehend immediate and unlawful violence

In the case where no physical force is actually applied, and the Crown relies upon recklessness, it is necessary to prove that the accused realised that the complainant might fear that he or she would then and there be subjected to immediate and unlawful force, but none the less went on and took that risk.

In the case where physical force is actually applied, it is necessary to prove that the accused realised that the complainant might be subjected to unlawful force, however slight, as a result of what the accused was about to do, but yet took the risk that that might happen: see *R v Savage; DPP v Parmenter* [1992] 1 AC 699.

Hostile intent

There is no general proposition that the intentional application of force to the person of an unwilling victim cannot constitute unlawful assault at common law unless it be accompanied or motivated by positive hostility or hostile intent on the part of the assailant towards the complainant. Such hostility or hostile intent may however, convert what might otherwise be unobjectionable as reasonably necessary for the common intercourse of life into assault by precluding an excuse or justification of assistance or rescue: *Boughey v The Queen* (1986) 161 CLR 10 at 27.

[5-5020] Suggested direction — assault where no physical force is actually applied

The accused is charged that the accused did on the [*day*] of [*month*] at [*location*] assault the complainant. *Assault* is a word in common, everyday use. No doubt it immediately conjures up in your minds the image of one person striking another person physically, whether with a hand, a fist or perhaps some hand held implement. In most cases, any such striking would also be regarded by the law as an assault.

However, there are differences between the law and what is perhaps ordinary, everyday speech. For example, if I raise my hand at you in a menacing fashion and thereby cause you to fear that you are about to be struck, then the law says that I have assaulted you. Ordinary use of the word *assault* would probably not have extended that far. It is, therefore, necessary that I should tell you what an assault is in law.

An assault is any act by which a person intentionally, or recklessly, causes another person to apprehend immediate and unlawful violence. There are four elements which constitute an assault. They are:

1. An act by the accused which intentionally, or recklessly, causes another person (the complainant) to apprehend immediate and unlawful violence.
2. That such conduct of the accused was without the consent of the complainant.
3. That such conduct was intentional or reckless in the sense that the accused realised that the complainant might fear that the complainant would then and there be subject to immediate and unlawful violence and none the less went on and took that risk.
4. That such conduct be without lawful excuse.

[*The relevant evidence should be related to the four elements set out above, together with the competing arguments*]

The Crown must be able to satisfy you beyond reasonable doubt of each of the four elements which I have mentioned, before you may convict the accused of assault.

[5-5030] Suggested direction — assault where physical force is actually applied

The accused is charged that the accused did on the [*day*] of [*month*] at [*location*] assault the complainant.

The Crown contends that the accused [*here outline the specific physical force which the Crown contends constituted the assault*]. There are four elements which constitute an assault. They are:

1. A striking, touching or application of force by the accused to another person (the complainant).
2. That such conduct of the accused was without the consent of the complainant.
3. That such conduct was intentional or reckless in the sense that the accused realised that the complainant might be subject to immediate and unlawful violence, however slight as a result of what he or she was about to do, but yet took the risk that that might happen.
4. That such conduct be without lawful excuse.

[*The relevant evidence should be related to the four elements set out above, together with the competing arguments*]

The Crown must be able to satisfy you beyond reasonable doubt of each of the four elements which I have mentioned, before you may convict the accused of assault.

[5-5040] Notes

1. Should any issue of intention or voluntariness arise, it will have to be pointed out to the jury that the Crown must prove that the act was voluntary and intentional, not merely accidental. Should any issue of "lawful excuse" arise, that will also have to be dealt with for example, by pointing out that the Crown must prove beyond reasonable doubt that the assault was not consented to, or that the accused was not acting in lawful self defence.
2. As to mens rea, a person using unnecessary violence to push through a crowd would have the necessary intent: *R v Court* [1988] 2 WLR 1071 at 1073–1074.
3. Mere use of words may in certain circumstances amount to an assault: *R v Tout* (1987) 11 NSWLR 251 at 254–255. Threats made over the phone have been held to amount to more than "mere words" depending on the circumstances: *Barton v Armstrong* [1969] 2 NSWR 451 at 455. Mere silence, as in silent telephone calls, may constitute an assault: *R v Burstow; R v Ireland* [1998] AC 147.
4. The following passage from para 19–175 of *Archbold, Criminal Pleading, Evidence and Practice*, 2004, Sweet and Maxwell, London, is instructive.

> The effect [of the fundamental principle that every person's body is inviolate] is that everybody is protected not only against physical injury but against any

form of physical molestation: *Collins v Wilcock* 79 Cr App R 229, DC. There are exceptions, for example, the correction of children, the lawful exercise of the power of arrest, the use of reasonable force when the necessity to act in self-defence arises. Further, a broader exception exists which caters for the exigencies of everyday life such as jostling in crowded places and touching a person for the purpose of engaging his attention. The approach to the facts of any particular case where there is an element of persistence in the touching should not be unreal. In each case, the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct.

[5-5050] Examples of assault

The following examples of assault, which may be of assistance to trial judges, are set out in para 19–172 of *Archbold*.

- Striking at a person with a stick or a fist is an assault, even though the person striking misses the aim; drawing a weapon such as a knife or throwing a bottle or glass with intent to wound or strike, will constitute an assault; so will any other like act indicating an intention to use violence against the person of another: *Martin v Shoppe* (1837) 3 C & P 373.
- To strike a horse causing the rider to fall, would be an assault. An act may cause grievous harm or other injury, yet not constitute an assault. Causing a deleterious drug to be taken by another is not an assault: *R v Walkden* (1845) 1 Cox 282.
- An unlawful imprisonment is also an assault: *Hunter v Johnson* (1884) 13 QBD 225 (detention of a child after school hours by a master, without lawful authority).
- For a discussion of s 58 of the *Crimes Act* 1900 (assault with intent to commit a serious indictable offence on certain officers) and s 60 (assault and other actions against police officers), see *DPP v Gribble* (2004) 151 A Crim R 256.

[The next page is 901]

Return of the Jury

[The next page is 1455]

Prospect of disagreement

[8-050] Introduction

Last reviewed: September 2023

It is a fundamental principle that the jury must be free to deliberate without any pressure being brought to bear upon them: *Black v The Queen* (1993) 179 CLR 44 at 50. In *Black v The Queen* at 51, the High Court formulated model directions which must be carefully followed. The directions set out below have adopted that formulation but with variations required for the purpose of trials to which the majority verdict provisions inserted in the *Jury Act* 1977 in 2006 apply (see Note 6 at **[8-100]** below).

The consequences of failing to follow the guidance followed in *Black v The Queen*, above, was highlighted in *Timbery v R* [2007] NSWCCA 355, where it was held that a miscarriage of justice was occasioned when the trial judge urged the jury to reach a verdict and indicated that it would be "just terrible" if the jury had to be discharged without verdict after a trial of four weeks. The words used were "emotive" and the trial judge failed to clearly indicate that each juror had a duty to give a verdict according to the evidence: at [122].

The trial judge in *Burrell v R* [2009] NSWCCA 163 received a note from a juror which stated that any continued deliberations would serve no purpose and that other jury members were pressuring him or her into agreeing with them. The judge gave directions in accordance with the model direction formulated in *Black v The Queen*: *Burrell v R* [2007] NSWCCA 65 at [301]–[302]. The Court of Criminal Appeal held that the directions were "appropriately formulated": *Burrell v R* [2009] NSWCCA 163 at [224].

The judge's direction in *Isika v R* [2015] NSWCCA 304 (extracted at [6]) given in response to a question from the jury "[w]hat happens if we cannot agree?" contravened *Black v The Queen*. The direction referred to the time and cost of trials and also "arguably implied that jury members would not be performing their duties if they did not agree on verdicts": *Isika v R* at [15].

[8-060] Suggested (*Black*) direction — Commonwealth offences — or State offences where a majority verdict is unavailable because of insufficient jurors — unanimity required

Last reviewed: December 2023

You have informed me that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has either sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have, and may convince you that your original opinion was wrong.

That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

[If appropriate add additional directions approved in *R v Tangye* (unrep, 10/4/1997, NSWCCA)

I remind you that your verdict — whether it be "guilty" or "not guilty" — must be a unanimous one.

All 12 of you must, in the end, agree upon that verdict. It may be that the particular paths which lead each of you to that unanimous decision are not quite the same, but, nevertheless, your verdict of "guilty" or "not guilty" must be the verdict of you all. In other words, provided that you all agree that a particular verdict should be given, it does not matter that you do not agree as to why that particular verdict should be given.**]**

As I have said, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be discharged.

So, in the light of what I have said, I ask you to retire again and see whether you can reach a verdict.

In cases in which majority verdicts cannot be returned, if there is still no likelihood of agreement, then, and only then, following *R v Tangye* (unrep, 10/4/1997, NSWCCA), and in accordance with s 56 *Jury Act* 1977, one or more jurors (usually the foreperson) must be examined on oath or affirmation to establish that fact before the jury can be discharged. This process is done in the presence of all jurors.

The juror (foreperson) must be informed that nothing should be said which would disclose the voting figures or the reasons for the absence of agreement.

After ascertaining the fact that agreement had not so far been reached, an inquiry may be made, if thought to be appropriate, as to whether there is any further assistance which could be given — by way of explaining the law to be applied or the factual issues to be decided — which might bring about an agreement. If the answer is still in the negative, the jury must then be discharged.

A suggested script for this process is as follows:

(1) Have you all agreed upon your verdict/s? Yes or no?

(2) (If no) Is there anything I can do that would assist you to reach a unanimous verdict/s, for example repeating or further explaining any direction of law, reminding you of any of the evidence (if the jury has not got a copy of the trial transcript)? Yes or no?

(3) (If no) In your opinion is it likely the jury would reach a unanimous verdict/s if given more time to deliberate? Yes or no?

A majority verdict cannot be taken from a jury consisting of less than 11 persons: s 55F(1) *Jury Act* 1977. Where a jury consists of 10 persons or less, s 56(3) permits the court to discharge the jury if it finds, after examination on oath of one or more of the jurors, that it is unlikely the jurors will reach a unanimous verdict.

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

Last reviewed: December 2023

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

You have informed me that you have not been able to reach a verdict so far.

[If the possibility of a majority verdict was not referred to in the course of the trial and summing-up, the following direction does not arise and is not necessary.

The circumstances in which I may take a verdict which is not unanimous have not yet arisen and may not arise at all. You should understand that your verdict of guilty or not guilty must be unanimous.**]**

As the judge in this trial, I have the power in certain circumstances to discharge you from giving a verdict, but I may only do so if and when I am satisfied that there is no likelihood of you arriving at a verdict after further deliberation.

Experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has either sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong.

That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

[If appropriate, add additional directions approved in *R v Tangye* (unrep, 10/4/1997, NSWCCA):

I remind you that your verdict — whether it be "guilty" or "not guilty" — must be a unanimous one.

All 12 of you must, in the end, agree upon that verdict. It may be that the particular paths which lead each of you to that unanimous decision are not quite the same, but, nevertheless, your verdict of "guilty" or "not guilty" must be the verdict of you all. In other words, provided that you all agree that a particular verdict should be given, it does not matter that you do not agree as to why that particular verdict should be given.**]**

As I have said, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict.

So, in the light of what I have said, I ask you to retire again and see whether you can reach a verdict.

[8-080] Notes

Last reviewed: December 2023

1. A trial judge should be careful not to undermine the effect of a direction in accordance with *Black v The Queen* (1993) 179 CLR 44 direction by making reference to a specific time when a majority verdict can be taken: *RJS v R* [2007] NSWCCA 241 at [22]; *Ingham v R* [2011] NSWCCA 88 at [84] (d)–(e). The above direction is in similar terms to that endorsed in *R v Muto* [1996] 1 VR 336 at 341–344, (affirmed in *R v Di Mauro* (2001) 3 VR 62 at [13]–[14]) and *Ingham v R* at [85] (b). No enquiry of the jury as to whether it is likely a majority verdict will be reached (for the purpose of discharge under s 56(2)) should be made by the judge until such time as a majority verdict is capable of being taken: *Hunt v R* [2011] 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: December 2023

The two preconditions of s 55F for the availability of majority verdicts are:

(a) that the jury has deliberated for a period of time that the court considers reasonable having regard to the nature and complexity of the proceedings (not less than eight hours), and

(b) that the court is satisfied, after examination on oath of one or more jurors, that the jury is unlikely to reach a unanimous verdict.

A majority verdict direction *cannot* be given until the court has "strictly observed" and "properly determined" these two "essential preconditions": *RJS v R* [2007] NSWCCA 241 at [19]; *AGW v R* [2008] NSWCCA 81; *Hanna v R* (2008) 73 NSWLR 390 at [72];

KE v R [2021] NSWCCA 119 at [101]. Failure to address the two pre-conditions will mean the trial is not conducted according to law: *AGW v R* at [27]; *Hanna v R* at [72]; *Hunt v R* [2011] 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.

As the judge in this trial, I have the power in certain circumstances to discharge you from giving a verdict, but I may only do so if and when I am satisfied that there is no likelihood of you arriving at a verdict after further deliberation.

Experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom, and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong.

That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

As I have said, experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict.

You should continue your deliberations with a view to reaching a unanimous verdict. However, if that becomes impossible but you are able to reach a verdict by agreement of 11 of you [or 10 where there are 11 jurors] you may return such a majority verdict in this case, that is to say a verdict of 11 out of 12 of you [or 10 where there are 11 jurors]. These alternative ways are the only ways in which you may return a verdict according to law.

So, in the light of what I have said, I ask you to retire again and see whether you can reach a verdict in this trial.

[8-100] Notes

Last reviewed: December 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.

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.

In *Haile v R* [2022] NSWCCA 71, the trial judge purported to give a *Black* direction before the preconditions in s 55F(2) of the *Jury Act* for receiving a majority verdict were satisfied. It was held (at [143], [202]–[206]) that the trial judge's omission of the statement, "I have the power to discharge you from giving a verdict, but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation," was erroneous. The suggested directions above (at **[8-070]** and **[8-090]**) include a reference to the power to discharge the jury (as required by *Black*) but in a modified form to avoid misstatement as to when this power may be exercised. The modification has been included to take account of s 56 of the *Jury Act* (the effect of which was not addressed in *Haile v R*).

7. Section 68B *Jury Act* 1977 provides it is an offence for a juror to disclose deliberations including voting numbers except with the consent, or at the request, of the judge. Jury votes or voting patterns are irrelevant and should not be disclosed: *Smith v The Queen* (2015) 255 CLR 161 at [32], [53].

   It is highly desirable that judges inform juries, before retirement, that they should not disclose to the judge their votes or voting patterns in order to minimise such a disclosure occurring before verdict: *Smith v The Queen* at [32]; *R v Burrell* [2009] NSWCCA 163 at [217]. Disclosure of voting numbers is not necessary to enable the jury to perform its role in reaching a verdict or for the judge to form a view on whether to ask the jury to consider a majority verdict: *Smith v The Queen* at [48]–[49]. The judge must, however, disclose to counsel the precise terms of a question asked by a jury where it relates to a relevant issue before the court and both counsel should be given an opportunity to make submissions: *Smith v The Queen* at [58].

   In *Hawi v R* [2014] NSWCCA 83 at [457]–[460], it was held that the judge was not required to disclose the full contents of jury notes which revealed specifics about the jury's deliberations. The judge's summary to counsel of the notes was sufficient.

[The next page is 1501]

Miscellaneous

para

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[10-530] Non-publication paper

The paper which previously appeared here by Mr N Bruni, High Court Lawyer DPP (NSW), "Non-publication and suppression orders", has been archived following the enactment of the Court Suppression and Non-publication Orders Act 2010. It is now available online through JIRS and the Judicial Commission's public website. (August 2011)

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