CONTENTS

1. CONTENTS

2. TABLE OF CASES

3. INTRODUCTION

DURING THE TRIAL

4. Trial Procedure

4A. Judge's opening remarks

5. Unrepresented defendant

6. Fitness for trial

7. Protected witnesses: s 21M *Evidence Act* 1977

8. Protected witnesses: s 5 Criminal Law (Sexual Offences) Act 1978

9. Evidence of affected children

10. Child witnesses 93A Statements

11. Special witnesses

12. Competency of witnesses, including children

13. Hostile witnesses

13A. Privilege against self-incrimination

DIRECTIONS BEFORE SUMMING-UP

14. Directed verdict

15. Jury questions

16. Evidence admitted against one defendant only

17. Dismissal during trial of some charges against single defendant

18. Discharge of defence counsel during trial

19. Disposition of charge against co-defendant

20. Tape recordings, transcripts and exhibits

21. Interpreters and Translators

22. Retrial warnings

SUMMING-UP

23. General

24. Views and demonstrations

25. Evidence of defendant in respect of co-defendant

26. Defendant giving evidence

27. Defendant not giving evidence, where no adverse inference

28. Defendant not giving evidence, where adverse inference may follow

29. Defendant's right to silence

30. Co-offender who has pleaded guilty

31. The Rule in *Jones v Dunkel*

32. The Rule in *Browne v Dunn*

33. Alternative charges

34. Separate consideration of charges – single defendant

35. Separate consideration of charges – Multiple defendants confronting multiple charges

36. Out-of-Court confessional statements

37. Hearsay confessions by another exculpating the defendant

38. Accomplices

39. Lies told by defendant (consciousness of guilt)

40. Lies told by the defendant (going only to Credit)

41. Alibi

42. Good character

43. Bad character Previous Convictions

44. Cross-examination as to complainant's motive to lie

45. Absence of complainant's motive to lie

46. Prior inconsistent statements *Evidence Act* 1977: ss 17, 18, 19, 101 & 102

47. Privilege against self-incrimination

48. Circumstantial evidence

49. Motive

50. Flight and other post offence conduct as demonstrating consciousness of guilt

51. Identification

52. Similar fact evidence

53. Jury unanimity – specific issues

54. Jury failure to agree

55. Majority verdict

56. DNA

57. Fingerprints

58. Expert witnesses

59. Intention

60. Reasonable doubt

61. Caution in using hearsay: s 93C(2) *Evidence Act* 1977

62. Corporate defendant

63. Witnesses whose evidence may require a special warning (***"Robinson"*** direction)

64. Closed Court – Exceptions to the General Rule of Openness

65. Defences in relation to sexual offences which relate to Specific Age or Person with Impairment of the Mind

66. Defence not raised but available

DIRECTIONS ON SEXUAL OFFENCES

67. Distressed condition

68. Preliminary complaint

69. *Longman* Direction

70. Evidence of other Sexual or Discreditable Conduct of the Defendant

CRIMINAL RESPONSIBILITY

71. Attempts: s 4

72. Conspiracy (other than under the Criminal Code (Cth))

73. Evidence in conspiracy cases

74. Parties to an offence: ss 7, 8

75. Accessory after the fact

76. Claim of right: s 22(2)

77. Unwilled acts (Automatism) s 23(1)(a)

78. Accident: s 23(1)(b)

79. Mistake of fact

80. Mistake of fact in sexual cases

81. Extraordinary emergency: s 25

82. Insanity: s 27

83. Unintentional Intoxication s 28

84. Intentional Intoxication s 28

85. Capacity: s 29

86. Compulsion: s 31(1)(c)

87. Compulsion: s 31(1)(d)

88. Defence of a dwelling house: s 267

89. Defence of moveable property

90. Domestic discipline: s 280

91. Provocation: ss 268, 269

92. Prevention of repetition of insult: s 270

93. Criminal negligence: s 289

94. Self-defence: Overview and s 271(1)

95. Self-defence against unprovoked assault when there is death or GBH: s 271(2)

96. Self-defence against provoked assault when there is death or GBH: s 272

97. Provocation – before 4 April 2011

98. Provocation – after 4 April 2011

99. Killing for preservation in an abusive domestic relationship: s 304B

100. Diminished responsibility: s 304

OFFENCES UNDER QUEENSLAND LAW

101. Acts intended to cause grievous bodily harm and other malicious acts – s 317

102. Administering a stupefying drug

103. Administering poison with intent to harm: s 322

104. Arson

105. Endangering particular property by fire: s 462

106. Assault

107. Assault occasioning bodily harm

108. Assault on a police officer in execution of his duty: s 340(1)(b)

109. Attempt to pervert the course of justice: s 140

110. Bomb hoaxes: s 321A(1)

111. Bomb hoaxes: s 321A(2)

112. Burglary: s 419

113. Carnal knowledge: s 215

114. Choking, suffocation or strangulation in a domestic setting: s 315A

115. Involving child in making exploitative material

116. Making child exploitation material

117. Distributing child exploitation material

118. Possessing child exploitation material

119. Carnal knowledge of a person with an impairment of the mind: s 216

120. Child Abduction

121. Child Stealing

122. Child Taking

123. Cruelty to children under 16

124. Circumstances of aggravation (robbery, assault, burglary)

125. Circumstances of aggravation in sexual offences

126. Conspiracy

127. Corruption of witness: s 127

128. Damaging Evidence with Intent s 129

129. Dangerous operation of a motor vehicle

130. Deprivation of Liberty

131. Drugs: Possession – *Drugs Misuse Act* 1986

132. Drugs: Trafficking in a dangerous drug

133. Escape from lawful custody

134. Extortion: s 415(1)(a)

135. Extortion: s 415(1)

136. False statement under oath: s 193

137. Forgery: s 488(1)(a)

138. Fraud

139. Going armed in public

140. Grievous bodily harm

141. Grooming children under 16: s 218B

142. Imposition

143. Improper interference with a corpse: s 236(b)

144. Incest: s 222

145. Indecent assault: s 352

146. Indecent dealing: Indecent dealing with a child under 16: s 210(1)(a)

147. Indecent Dealing with a person with an impairment of the mind: s 216.

148. Indecent dealing: Unlawfully procuring a child under 16 to commit an indecent act: s 210(1)(b)

149. Indecent dealing: Permitting indecent dealing: s 210(1)(c)

150. Indecent dealing: Wilfully and unlawfully exposing a child under 16 to an indecent act: s 210(1)(d)

151. Indecent dealing: Exposing a child under 16 to an indecent object etc: s 210(1)(e)

152. Indecent dealing: Taking an indecent photograph etc of a child under 16: s 210(1)(f)

153. Kidnapping

154. Kidnapping for ransom

155. Maintaining a sexual relationship with a child: s229B (offences between 3 July 1989 and 1 July 1997)

156. Maintaining a sexual relationship with a child: s229B (offences between 1 July 1997 and 1 May 2003)

157. Maintaining a sexual relationship with a child: s229B (offences after 1 May 2003)

158. Official corruption: s 87(1)(a)

159. Official corruption: s 87(1)(b)

160. Perjury

161. Possession of child abuse computer game

162. Possession of housebreaking implements: s 425(1)(c)

163. Privacy offences: Observations or Recordings in Breach of Privacy: s 227A(1) (Commencement date: 8 December 2005)

164. Privacy offences: Observations or Recordings in Breach of Privacy: s 227A(2) (Commencement date: 8 December 2005)

165. Privacy offences: Distributing prohibited visual recordings: s 227B (Commencement date: 8 December 2005)

166. Procuring prostitution

167. Rape – before 27 October 2000

168. Rape – after 27 October 2000

169. Receiving: s 433

170. Receiving: s 433 (from 1 December 2007)

171. Recent possession

171A. Direction on retaliation against judicial officer: s119B

172. Riot and unlawful assembly (offences prior to 1 December 2008)

173. Riot s 61 (offences after 1 December 2008)

174. Robbery: s 409 and s 411

175. Secret commissions: s 442B, 442M

176. Serious animal cruelty: s 242

177. Stalking (offences alleged to have occurred between 23 November 1993 and 30 April 1999)

178. Stalking (offences alleged to have occurred after 30 April 1999)

179. Stealing

180. Threatening violence: s75(1) or (2)

181. Threats: s 359

182. Torture: s 320A

183. Unlawful killing: Murder s 302(1)(a)

184. Unlawful killing: Murder s 302(1)(b)

185. Unlawful killing: Manslaughter s 303

186. Unlawful killing: Attempted murder s 306(2)

187. Unlawful Striking Causing Death s 314A

188. Unlawful sodomy: Of a person under 18 s 208(1)(a)

189. Unlawful sodomy: Permitting sodomy by a male person under 18: s 208(1)(b)

190. Unlawful sodomy: Of an intellectually impaired person: s 208(1)(c)

191. Unlawful use of a motor vehicle: s 408A(1)(a)

192. Unlawful possession of a motor vehicle: s 408A(1)(b)

193. Unlawful wounding: s 323

194. Using the Internet to procure children under 16

195. Uttering: s 488(1)(b)

196. Wilful damage

COMMONWEALTH OFFENCES

197. Commonwealth Code – Proof of physical and mental elements of an offence

198. Conspiracy – Commonwealth Criminal Code s 11.5

199. Defrauding the Commonwealth: s 29A *Crimes Act*

200. Drugs: Commonwealth Drug Offences under s 233B of the *Customs Act* before the application of the *Criminal Code Act* 1995

201. Drugs: Commonwealth Offences under s 233B of the *Customs Act* after the operation of Ch 2 of the Criminal Code Act 1995

202. Drugs: Commonwealth Drug Offences under the *Criminal Code Act* 1995

203. People smuggling

ADDITIONAL MATERIAL

204. Guidelines for Conducting Pre-Recording of an Affected Witness

205. Jury Handout: No outside influence or information

Table of Cases

Case Name	Number	Direction
A [2000] QCA 520	12	Competency of witnesses, including children
Abbrederis – unreported (1981) High Court 8 October 1981	202	Drugs: Commonwealth offences
Abbrederis [1981] 1 NSWLR 530	202	Drugs: Commonwealth offences
Adams [1998] QCA 64	74	Parties to an offence: ss 7, 8
A-G v B [2001] QCA 169	7	Fitness for trial
Ahern (1988) 165 CLR 87	72 73	Conspiracy Evidence in conspiracy cases
Alexander [1979] VR 615	24	Views and demonstrations
Alister v R (1984) 154 CLR 404	186	Attempted murder
Allie [1999] 1 Qd R 618	177	Stalking – offences between 23 November 1993 and 20 April 1999
Amore [1994] 1 WLR 547	51	Identification
Andelman v The Queen (2013) 38 VR 659	5	Unrepresented Defendant
Andrews v DPP [1937] AC 576	183	Unlawful killing: murder s 302(1)(a)
Ashbury v Reid [1961] WAR 49	202	Drugs: Commonwealth offences
Ashcroft (1989) 38 A Crim R 327	139	Going armed in public
Ashley [2005] QCA 293	34	Separate consideration of charges – single defendant
Ashton (1994) 61 WN (NSW) 134	24	Views and demonstrations
ASIC v ActiveSuper Pty Ltd (in liq) (2015) 235 FCR 181	75	Accessory after the Fact
ASIC v Managed Investments Ltd and Ors (No 9) (2016) 308 FLR 216	75	Accessory after the Fact
Aston – Brien [2000] QCA 211	43	Bad character
Attorney- General's Reference (No 2 of 1999) [2000] 3 WLR 195	93	Criminal negligence: s 289
Australian Trade Commission v Goodman Fielder Industries Ltd (1992) 36 FCR 517	202	Drugs: Commonwealth offences
Avetysan [2000] 2 SCR 745	26	Defendant giving evidence
Aziz [1996] AC 41	36	Out-of-court confessional statements
Azzopardi (2001) 205 CLR 50; (2001) 75 ALJR 931	23 26 27 - 28 31	General summing up directions Defendant giving evidence Defendant not giving evidence The rule in *Jones v Dunkel*
B (Unreported CA No 369 of 1997)	85	Capacity: s 29

Case Name	Number	Direction
B (Unreported CA No 429 of 1998, delivered 13 April 1999)	51	Identification
Bacon v Salamane (1965) 112 CLR 85	142	Imposition
Bahri Kural (1987) 162 CLR 502	202	Drugs: Commonwealth offences
Baker v R (2012) 289 ALR 614	35	Separate consideration of charges – multiple defendants confronting multiple charges
	37	Hearsay confessions exculpating the defendant
Barbeler [1977] Qd R 80	186	Attempted murder
Barlow (1997) 188 CLR 1	71	Parties to an offence: ss 7, 8
Barry [1984] 1 Qd R 74	82	Insanity
Barton (1931) 25 QJPR 81	110 – 111	Bomb hoaxes
Bartram [2013] QCA 361	88	Defence of dwelling house
BBD [2007] 1 Qd R 478	93	Criminal negligence
BCQ [2013] QCA 388	70	Evidence of other sexual or discreditable conduct of the defendant
Beach (1994) 75 A Crim R 447	53	Jury unanimity – specific issues
Beble [1979] Qd R 278	51	Identification
	120	Abduction of child under 16
Bell [2004] QCA 219	5	Unrepresented defendant
Bellino & Conte (1992) 59 A Crim R 322	4	Trial procedure
	5	Unrepresented defendant
Biess [1967] Qd R 470	100	Diminished responsibility: s 304
Birks (1990) 19 NSWLR 677	32	The rule in *Browne v Dunn*
Black (1993) 179 CLR 44	37	Out-of-court confessional statements
	54	Jury failure to agree
Bojovic [2000] 2 Qd R 183	94	Self-defence: s 271(1)
	95	Self-defence: s 271(2)
	96	Self-defence: s 272
Borland (1907) 10 GLR 241	112	Burglary: s 419
Boughey v The Queen (1986) 161 CLR 10	94	Self-defence: s 271(1)
	140	Grievous bodily harm
Box & Martin [2001] QCA 272	39	Lies told by defendant (consciousness of guilt)
Boxshall [1956] QWN 45	24	Views and demonstrations
Boyesen [1982] AC 768	118	Possessing child exploitation material
	161	Possession of a child abuse computer game
Bradley [2013] QCA 163	13	Hostile witnesses

Case Name	Number	Direction
Breene v Boyd, ex parte Boyd [1970] Qd R 292	77 183	Automatism: involuntariness Unlawful killing: murder s 302(1)(a)
Brennan [1999] 2 Qd R 529	39	Lies told by defendant (consciousness of guilt)
Brien & Paterson [1999] 1 Qd R 634	74	Parties to an offence: ss 7, 8
Bromley (1986) 161 CLR 315	23 63	General summing up directions Witnesses whose evidence may require a special warning
Brooks (1999) 103 A Crim R 234	63	Witnesses whose evidence may require a special warning
Brougham (1986) 43 SASR 187	112 124	Burglary Circumstance of aggravation (robbery, assault, burglary)
Brown (1984) 79 Cr App R 115	53	Jury unanimity – specific issues
Brown (1985) 40 SASR 29	202	Drugs: Commonwealth offences
Browne v Dunn (1893) 6 R 67	32	The rule in *Browne v Dunn*
BRS (1997) 191 CLR 275	43	Bad character
Bruce (1987) 74 ALR 219	171	Recent possession
Bryant [1984] 2 Qd R 545	146 147	Indecent dealing with a child under 16 Indecent dealing with a person with an impairment of the mind
Bulejcik (1996) 185 CLR 375	51	Identification
Bull (1974) 1331 CLR 203	101	Drugs: s 233B *Customs Act*
Burns (1975) 132 CLR 258	36	Out-of-court confessional statements
Burns (1999) 107 A Crim R 330	32	The rule in *Browne v Dunn*
Burns [2000] QCA 201	182	Torture
Butera (1987) 164 CLR 180	20	Tape recordings, transcripts and exhibits
Buttigieg (1993) 69 A Crim R 21	97 – 98	Provocation
C [2002] QCA 166	69	*Longman* direction
Calides (1983) 34 SASR 355	26	Defendant giving evidence
Callaghan (1952) 87 CLR 115	183 184	Unlawful killing: murder s 302(1)(a) Unlawful killing: murder s 302(1)(b)
Callaghan [1994] 2 Qd R 300	36	Out-of-court confessional statements
Cameron v Holt (1980) 142 CLR 342	197	Commonwealth offences – mens rea and actus rea
Campbell [1997] QCA 127	134 - 135	Extortion

Case Name	Number	Direction
Campbell v R [2008] NSWCCA 214	202	Drugs: Commonwealth offences under the *Criminal Code Act* 1995
Cao v The Queen (2006) 198 FLR 200 ; [2006] NSWCCA 89	197 202	Proof of mental and physical elements: Commonwealth offences Drugs: Commonwealth offences under the *Criminal Code Act* 1995
Carter & Savage, Ex Parte A- G [1990] 2 Qd R 371	75	Accessory after the fact
Castiglione [1963] NSWR 1	74	Parties to an offence: ss 7, 8
CDR [1996] 1 Qd R 183	85	Capacity: s 29
CEV v The Queen [2005] NTCCA 10	23	General summing up directions
Chai (2002) 76 ALJR 628	3	Introduction
Chamberlain (1984) 153 CLR 521	51	Identification
Chan [2001] 2 Qd R 662	33 74	Alternative charges Parties to an offence: ss 7, 8
Chang (2003) 7 VR 236	39	Lies told by defendant (consciousness of guilt)
Charlie (1999) 199 CLR 387	183	Unlawful killing: murder s 302(1)(a)
Chester [1982] Qd R 252	58 100	Expert witnesses Diminished responsibility: s 304
Chevathen & Dorrick (2001) 122 A Crim R 441	40	Lies told by defendant (going only to credit)
Chignell [1991] 2 NZLR 257	53	Jury unanimity – specific issues
Chin (1985) 157 CLR 671	4	Trial procedure
Christophers (2000) 23 WAR 106	69	*Longman* direction
Clare [1994] 2 Qd R 619	131	*Drugs Misuse Act* 1986 – DMA
Clarke & Johnstone [1986] VR 643	53	Jury unanimity – specific issues
Clough (1992) 28 NSWLR 396	36	Out-of-court confessional statements
Clout (1995) 41 NSWLR 312	51	Identification
Collins v The Queen, ex parte A-G [1996] 1 Qd R 631	4	Trial procedure
Conder, CA No 39 of 1999, 20 July 1999	41	Alibi
Cooper v McKenna ex parte Cooper [1960] Qd R 406	77	Unwilled acts (automatism) s 23(1)(a)
Corcoran (2000) 111 A Crim R 126	94 – 95	Self-defence: s271(2); ss 272 & 273
Cormack [2013] QCA 342	104	Arson
Courtney-Smith (No 2) (1990) 48 A Crim R 49	202	Drugs: Commonwealth offences

Case Name	Number	Direction
Coyne [1996] 1 Qd R 512	29	Defendant's right to silence
Craikip (1880) 5 QBD 307	110 - 111	Bomb hoaxes Malicious acts with unlawful intent
Cramp (1999) 110 A Crim R 198	53	Jury unanimity – specific issues
Crampton (2000) 206 CLR 161	23 69	General summing up directions *Longman* direction
Crawford [1997] 1 WLR 1329	43	Bad character
Crowther v Sala [2007] QCA 133	197	Commonwealth offences – mens rea and actus rea
Croxford v The Queen [2011] VSCA 433	74	Parties to an offence
Cutter (1997) 71 ALJR 638; 143 ALR 498	29 59 71 186	Defendant's right to silence Intention Attempts Attempted murder
Dally (2001) 115 A Crim R 582	53	Jury unanimity – specific issues
Danahay [1993] 1 Qd R 271	127	Corruption of a witness
Darch v Weight [1984] 1 WLR 659	133	Escape from lawful custody
Darkan v The Queen (2006) 80 ALJR 1250	74	Parties to an offence
Davies & Cody (1937) 57 CLR 170	51	Identification
DBG [2013] QCA 370	90	Domestic discipline
De Gruchy v R (2002) 190 ALR 441	49 59	Motive Intent
De Simoni (1981) 147 CLR 383	112 124 174	Burglary: s 419 Circumstance of aggravation (robbery, assault, burglary) Robbery
De Voss [1995] QCA 518	58	Expert witnesses
Dellit v Small [1978] Qd R 303	108	Assault on a police officer in execution of his duty: s 340
Delon (1992) 29 NSWLR 29	24	Views and demonstrations
Denver v Cosgrove [1972] 3 SASR 130	24	Views and demonstrations
Derbas (1993) 66 A Crim R 327	36	Out-of-court confessional statements
Dhanhoa v R (2003) 217 CLR 1	39 40	Lies told by defendant (consciousness of guilt) Lies told by defendant (going only to credit)
Dick [1966] Qd R 301	58 82 100	Expert witnesses Insanity Diminished responsibility: s 304
Doan (2001) 3 VR 349	33	Alternative Charges

Case Name	Number	Direction
Doggett (2009) 208 CLR 343	34 69	Separate consideration of the charges – single defendant *Longman* direction
Doheny and Adams [1997] 1 Cr App R 369	56	DNA
Doklu v R (2010) 208 A Crim R 333	23 54 55	General summing up directions Jury failure to agree Majority verdict
Domican (1992) 173 CLR 555	51	Identification
Donnini (1972) 128 CLR 114	42	Bad character
Donnini [1973] VR 67	51	Identification
Donovan [1990] WAR 112	6	Fitness for trial
DPP (Cth) v Hogarth (1995) 93 A Crim R 452	158 159	Official corruption s 87(1)(a) Official corruption s 87(1)(b)
DPP v Boardman [1975] AC 421	52	Similar fact evidence
Dryburgh (1961) 105 CLR 522	24	Views and demonstrations
Dryburgh (1961) 105 CLR 532	24	Views and demonstrations
Dunn [1973] 2 NZLR 481	146 – 152	Indecent dealing
Dyers v R (2002) 210 CLR 285	31 41	The rule in *Jones v Dunkel* Alibi
E (1995) 89 A Crim R 325	26	Defendant giving evidence
Eastman (2000) 203 CLR 1	6	Fitness for trial
Easton [1994] 1 Qd R 531	138	Fraud
Edwards (1992) 173 CLR 653	50	Flight as demonstrating consciousness of guilt
Edwards (1993) 178 CLR 193	39 41	Lies told by defendant (consciousness of guilt) Alibi
El Adl [1993] 2 Qd R 195	50	Flight and other post offence conduct as demonstrating consciousness of guilt
Elhusseini [1988] 2 Qd R 442	132	Drugs: trafficking in a dangerous drug
Ely Justices, ex parte Burgess [1992] Crim LR 888	24	Views and demonstrations
Ettles (1997) 27 MVR 265	43	Bad character
Evgeniou (1964) 37 ALJR 508	183	Unlawful killing: murder s 302(1)(a)
Falconer (1990) 171 CLR 30	77 82 183	Automatism: involuntariness Insanity Unlawful killing: murder s 302(1)(a)
Falzon (No 2) [1993] 1 Qd R 618	63	Witnesses whose evidence may require a special warning

Case Name	Number	Direction
FAR [1996] 2 Qd R 49	10 11	Child witnesses Special witnesses
Fernandes (1996) 133 FLR 477.	24	Views and demonstrations
Festa (2000) 111 A Crim R 60	50	Flight as demonstrating consciousness of guilt
Fingleton v The Queen (2005) 227 CLR 166; (2005) 79 ALJR 1250	23 66	General summing up directions Where a defence is not raised by counsel
Finlay v The Queen [2007] QCA 400	51	Identification
Fitzgerald (1999) 106 A Crim R 215	78 183 184	Accident: s 23(1)(b) Unlawful killing: murder s 302(1)(a) Unlawful killing: murder s 302(1)(b)
Flesch (1987) 7 NSWLR 554	3	Introduction
Foley [2000] 1 Qd R 290	32	The rule in *Browne v Dunn*
Foster v The Queen (1982) 38 ALR 599	5	Unrepresented Defendant
Foy [1960] Qd R 225	82 83	Insanity Unintentional Intoxication
Frangos (1979) 21 SASR 331	202	Drugs: Commonwealth offences
G [1994] 1 Qd R 540	26	Defendant giving evidence
Gately v R (2007) 232 CLR 208	10	Evidence of affected children
Geary [2003] 1 Qd R 64	44	Cross-examination as to complainant's motive to lie
George [2013] QCA 267	184	Unlawful killing: murder s 302(1)(b)
Ghosh [1982] QB 1053	199	Defrauding the Commonwealth
Gilbert (2001) 201 CLR 414	33	Alternative charges
Gilson (1991) 172 CLR 353	33	Alternative charges
Giorgianni (1985) 156 CLR 473	74 75 197 202	Parties to an offence Accessories after the fact Commonwealth offences – mens rea and actus rea Drugs: Commonwealth offences
Gipp (1998) 194 CLR 106	50	Flight as demonstrating consciousness of guilt
Glebow [2002] QCA 442	59 186	Intention Attempted murder
Glenmont Investments Pty Ltd v O'Lauchlin (No.2) (2000) 79 SASR 185	138	Fraud

Case Name	Number	Direction
Glennon (1992) 173 CLR 592	4 23	Trial procedure General summing up directions
GLM 1999 BCCA 467	53	Jury unanimity – specific issues
GNM v ER [1983] 1 NSWLR 144	82	Insanity
Goldie; Ex parte Picklum (1937) 59 CLR 254	202	Drugs: Commonwealth offences
Gouroff (1979) 1 A Crim R 367	73	Evidence in conspiracy cases
Graham (2000) 116 A Crim R 108	41 50	Alibi Flight as demonstrating consciousness of guilt
Gray (1998) 98 A Crim R 589	94 95 96	Self-defence: s 271(1) Self-defence: s 271(2) Self-defence: s 272
Green v The Queen (1971) 126 CLR 28	23	General summing up directions
Greenwood [2002] QCA 360	94 – 96	Self-defence: s 271(1), (2); ss 272 & 273
Griffiths (1994) 69 ALJR 77	36 59 77 183 184	Out-of-court confessional statements Intention Automatism: involuntariness Unlawful killing: murder s 302(1)(a) Unlawful killing: murder s 302(1)(b)
Guise [1998] QCA 159	59 77 183	Intention Automatism: involuntariness Murder: s 302(1)(a)
Gurney [1976] Crim LR 567	24	Views and demonstrations
H [1999] 2 Qd R 283	9 10 11	Evidence of affected children Child witnesses Special witnesses
Hall (1992) 106 FLR 458	142	Imposition
Hamitov (1979) 21 SASR 596	24	Views and demonstrations
Hammond v The Queen (2013) 85 NSWLR 313	128	Damaging evidence with intent: s 102A
Hann v DPP (Cth) (2004) 144 A Crim R 534; [2004] SASC86	197	Proof of mental and physical elements: Commonwealth offences
Hanna v R (2008) 73 NSWLR 390	55	Majority verdict
Hart (1932) 23 Cr App R 202	32	The rule in *Browne v Dunn*
Harwood (2002) 188 ALR 296	33	Alternative charges

Case Name	Number	Direction
Hawkins (1994) 179 CLR 500	23 82	General summing up directions Insanity
He Kaw Teh (1985) 157 CLR 523	197 201 202	Commonwealth offences – mens rea and actus rea Drugs: Commonwealth offences Drugs: s 233B *Customs Act*
Hennah (1877) 13 Cox CC 547	110 - 111	Bomb hoaxes Malicious acts with unlawful intent
Hickey & Komljenovic (1995) 89 A Crim R 554	63	Witnesses whose evidence may require a special warning
Hildebrant [1964] Qd R 43	139	Going armed in public
HML v R (2008) 235 CLR 334	70 155 – 157	Evidence of other sexual or discreditable conduct of the defendant Maintaining a sexual relationship with a child
Hodgetts & Jackson [1990] 1 Qd R 456	93	Criminal negligence: s 289
Holland (1993) 117 ALR 193	3 144	Introduction Incest
Hollingsworth v Bean [1970] VR 819	191	Unlawful use of a motor vehicle
Holman [1997] 1 Qd R 373	48	Circumstantial evidence
Holmes [1953] 1 WLR 686	82	Insanity
Horan v Ferguson [1995] 2 Qd R 490	90 106	Domestic discipline Assault s 335
Houghton v The Queen (2004) 144 A Crim R 343	140	Grievous Bodily Harm
Howell [1982] QB 416	172	Riot and unlawful assembly
Hubbuck [1999] 1 Qd R 314	177	Stalking – offences between 23 November and 20 April 1999
Huber (1971) 2 SASR 142	146 – 152	Indecent dealing
Hughes (1951) 84 CLR 170	184	Unlawful killing: murder s 302(1)(b)
Hughes v The Queen (2017) 92 ALJR 52	70	Evidence of other sexual or discreditable conduct of the defendant
Hutton (1991) 56 A Crim R 211	74	Parties to an offence: ss 7, 8
Hytch (2000) 114 A Crim R 573	3 23	Introduction General summing up directions
I.A. Shaw [1996] 1 Qd R 641	167	Rape s 347 before 27 October 2000

Case Name	Number	Direction
IE [2013] QCA 291	70	Evidence of other sexual or discreditable conduct of the defendant
Isherwood v Tasmania (2010) 20 Tas R 375	5	Unrepresented Defendant
ITA [2003] NSWCCA 174	3	Introduction
J (No 2) [1998] 3 VR 602	41	Alibi
J.W. Dwyer Ltd v Metropolitan Police District [1967] 2 QB 970	172	Riot and unlawful assembly
Jacobson v Piepers [1980] Qd R 448	142	Imposition
Jefferies (unreported CA 154 of 1997)	74	Parties to an offence
Jefferies v Sturcke [1992] 2 Qd R 392	74	Parties to an offence
Jeffrey CA 154/97 19.12.97	26 183	Defendant giving evidence Unlawful killing: murder s 302(1)(a)
Jennion [1962] 1 WLR 317	82	Insanity
Jenvey v Cook (1997) 94 A Crim R 392	131	Drugs: Possession – *Drugs Misuse Act* 1986
Jerome and McMahon [1964] Qd R 595	174	Robbery
Jervis [1993] 1 Qd R 643	193	Unlawful wounding
Jessen [1997] 2 Qd R 213	134 – 135	Extortion
Jiminez (1992) 173 CLR 572	129	Dangerous operation of a motor vehicle
JJB v R (2006) 161 A Crim R 187	63	Robinson direction
Johnson & Honeysett [2013] QCA 171	23	General summing up directions
Johnson [1964] Qd R 1	96	Self-defence: s 272
Johnson and Edwards [1981] Qd R 440	134 – 135	Extortion
Johnston (1998) 45 NSWLR 362	69	*Longman* direction
Johnston [2004] NSWCCA 58	25	Evidence of defendant in respect of co-defendant
Johnston [2013] QCA 171	34	Separate consideration of charges
Joinbee [2013] QCA 246	104	Arson
Jones (1997) 191 CLR 439	68	Preliminary complaint
Jones [1993] 1 Qd R 676	48	Circumstantial evidence
Jones v Dunkel (1989) 101 CLR 298	31	The rule in *Jones v Dunkel*
Joyce [1970] SASR 184	82	Insanity
Judkins [1979] Qd R 527	191	Unlawful use of a motor vehicle
K (1993) 118 ALR 596	108	Assault of a police officer in execution of his duty
Kane (2001) 3 VR 543	33	Alternative charges

Case Name	Number	Direction
Kaporonovski (1973) 133 CLR 209	77 91 140 183 193	Automatism: involuntariness Provocation Grievous bodily harm Unlawful killing: murder s 302(1)(a) Unlawful wounding
KBT (1997) 191 CLR 417	53 155 -157	Jury unanimity – specific issues Maintaining a sexual relationship with a child
Kelly, Baker and Perry (unreported CA 144, 147 and 155 of 1991, 29 August 1991)	134 – 135	Extortion
Kemp [1997] 1 Qd R 383	155 – 157	Maintaining a sexual relationship with a child
Kemp (No.2) [1998] 2 Qd R 510	155 – 157	Maintaining a sexual relationship with a child
Kemp [1957] 1 QB 399	82	Insanity
Kern [1986] 2 Qd R 209	4	Trial procedure
Kerr [1976] 1 NZLR 335	94 95	Self-defence: s 271(1) Self-defence: s 271(2)
Kesavarajah (1994) 181 CLR 230	6	Fitness for trial
Kidd [2001] QCA 536	93	Criminal negligence: s 289
King (unreported CA 66/98; 26/5/98	47	Privilege against self-incrimination
King v R (2012) 245 CLR 588	129	Dangerous operation of a motor vehicle
Kirkby [2000] 2 Qd R 57	75	Accessory after the fact
Knight v R (1992) 175 CLR 495	186	Attempted murder
Knowles v Haritos (SC of Vic 6734.97 29/4/98)	24	Views and demonstrations
Knutsen [1963] Qd R 157	140	Grievous bodily harm
Kozul (1981) 147 CLR 221	24	Views and demonstrations
KRM (1999) 105 A Crim R 437, 438	155 – 157	Maintaining a sexual relationship with a child
KRM (2001) 206 CLR 221	155 – 157	Maintaining a sexual relationship with a child
Kural (1987) 162 CLR 502	197	Commonwealth offences – mens rea and actus rea
Kusu [1981] Qd R 136	84	Intentional intoxication
LAC [2013] QCA 101	34	Separate consideration of charges
Lace [2001] QCA 255	36	Out-of-court confessional statements
Landy, White and Kaye [1981] 1 WLR 355, 367	3	Introduction

Case Name	Number	Direction
Lawless [1974] VR 398	24	Views and demonstrations
Lawrence (1968) 52 Cr App R. 163	24	Views and demonstrations
Lawrence [1982] AC 510	3	Introduction
Lawson [1996] 2 Qd R 587	36	Out-of-court confessional statements
Leaman v The Queen [1986] Tas R 223	75	Accessory after the fact
Leavitt [1985] 1 Qd R 343	71 186	Attempts Attempted murder
Leivers & Ballinger [1999] 1 Qd R 649	53	Jury unanimity – specific issues
Leoni [1999] NSW CCA 14	112 124	Burglary Circumstance of aggravation (robbery assault burglary)
Lewis & Baira [1996] QCA 405	25	Evidence of defendant in respect of co-defendant
Lo Presti [1992] 1 VR 696	15	Jury questions
Lobston [1983] 2 Qd R 720	140	Grievous bodily harm
Lockwood; ex parte A-G [1981] Qd R 209	84 104 105 150 196	Intentional intoxication Arson Endangering particular property by fire Indecent dealing: s 210(1)(d) Wilful damage
Longman (1989) 168 CLR 79	38 69 70	Accomplices *Longman* direction Evidence of other sexual or discreditable conduct of the defendant
Lovelock [1999] QCA 501	63	Witnesses whose evidence may require a special warning
Lowe [1917] VLR 155	160	Perjury
Lowrie [2000] 2 Qd R 529	63 74	Witnesses whose evidence may require a special warning Parties to an offence
Lucas (1970) 120 CLR 171	82	Insanity
M [2001] QCA 458	34	Separate consideration of charges- single defendant
MacKenzie (2001) 11 A Crim R 534	93	Criminal negligence: s 289
MacPherson v The Queen (1981) 147 CLR 512	5	Unrepresented Defendant
Maher [1987] 1 Qd R 171	199	Defrauding the Commonwealth
Mailes (2001) 53 NSWLR 251,297	6	Fitness for trial
Major [2013] QCA 114	92	Prevention of repetition of insult
Maloney [2000] QCA 355	82	Insanity

Case Name	Number	Direction
Manley v Tucs (1983) 40 SASR 1	202	Drugs: Commonwealth offences
Manunta (1990) 54 SASR 17	32	The rule in *Browne v Dunn*
Marijancevic (2001) 3 VR 611	33	Alternative charges
Markuleski (2001) 52 NSWLR 82	34 155 -157	Separate consideration of charges- single defendant Maintaining a sexual relationship with a child
Martin v Osborne (1936) 55 CLR 367	132	Trafficking in a dangerous drug
Martyr [1962] Qd R 398	78	Accident: s 2391)(b)
Marwey (1977) 138 CLR 630	94 95 96	Self-defence: s 271(1) Self-defence: s 271(2) Self-defence: s 272
Masters (1992) 26 NSWLR 450	73	Evidence in conspiracy cases
MBX [2013] QCA 215	33 63 69	Alternative charges *Robinson* direction *Longman* direction
McBride (1966) 115 CLR 44	129	Dangerous operation of a motor vehicle
McCallum [2013] QCA 254	145 146	Indecent assault Indecent dealing
McCann [1998] 2 Qd R 56	158 – 159	Official corruption
McClym ont ; ex parte A-G [1987] 2 Qd R 442	196	Wilful damage
McDowell [1997] 1 VR 473	32	The rule in *Browne v Dunn*
McGreevy [1973] 1 WLR 276	3	Introduction
McKinney (1991) 171 CLR 468	36	Out-of-court confessional statements
McKnoulty (1995) 77 A Crim R 333	197	Commonwealth offences – mens rea and actus rea
McLellan v Bowyer (1961) 106 CLR 95	13	Hostile witnesses
Meissner (1995) 184 CLR 132	109	Attempt to pervert the course of justice: s 140
Meko v R (2004) 146 A Crim R 131	39	Lies told by defendant (consciousness of guilt)
Melbourne v R (1999) 198 CLR 1	42	Good character
Meliton Pimental (1999) 110 A Crim R 30.	202	Drugs: Commonwealth offences
Mellifont (1991) 57 A Crim R 256	160	Perjury
Melrose [1989] 1 Qd R 572	48	Flight as demonstrating consciousness of guilt
MFA (2002) 213 CLR 606	31	The rule in *Jones v Dunkel*
Michaels (1995) 184 CLR 117	133	Escape from lawful custody

Case Name	Number	Direction
Michaux [1984] 2 Qd R 159	100	Expert witnesses Diminished responsibility: s 304
Middleton (2000) 114 A Crim R 141	26	Defendant giving evidence
Milat SC(NSW) Hunt CJ at CL 12-4-96 (unreported)	24	Views and demonstrations
Milicevic v Campbell (1975) 132 CLR 307	202	Drugs: Commonwealth offences
Millar (No 2) [2013] QCA 29	4 54 55	Trial procedure Jury failure to agree Majority verdict
Miller (No 2) [2000] SASC 152	6	Fitness for trial
Miller v Hrvojevic [1972] VR 305	112 124 139	Burglary Circumstance of aggravation (robbery, assault, burglary) Going armed in public
Miller v Miller (2011) 242 CLR 446	74	Parties to an offence
Moffa v The Queen (1977) 138 CLR 601	97	Provocation pre 4 April 2011
Mogg (2000)112 A Crim R 417	3	Introduction
Mohammadi (2006) 175 A Crim R 384	202	Drugs: s 233 *Customs Act*
Moore [1988] 1 Qd R 252	72 73	Conspiracy Evidence in conspiracy cases
Morgan [1994] 1 VR 567	63	Witnesses whose evidence may require a special warning
Morgan CA 131/1999	183	Unlawful killing: murder s 302(1)(a)
Morris, ex parte A-G [1996] 2 Qd R 68	10 11	Child witnesses Special witnesses
Mowatt [1968] 1 QB 421	3	Introduction
Mule v The Queen (2005) ALJR 1573	36	Out-of-court confessional statements
Mullen (1938) 59 CLR 124	78	Accident: s 23(1)(b)
Muratovic [1967] Qd R 15	94 95 96	Self-defence: s 271(1) Self-defence: s 271(2) Self-defence: s 272
Murdoch v Taylor [1965] AC 574	43	Bad character
Murphy (1988) 52 SASR 186	24	General summing up directions
Murphy [1996] QCA 256	91 91A	Administering a stupefying drug Administering poison with intent to harm

Case Name	Number	Direction
Murray v The Queen (2002) 211 CLR 193	66 74 75 144	Where a defence is not raised by counsel Unwilled acts Accident: s 23(1)(b) Murder: 302(1)(a)
MWJ v The Queen (2005) 80 ALJR 329	32	The rule in *Browne v Dunn*
Myles [1997] 1 Qd R 199	106	Drugs: Possession – *Misuse Act* 1986
Natesan & Subramanian (1996) 134 FLR 199	105	Drugs: Commonwealth offences
Negus [1997] QCA 191	49	Identification
Neilan [1992] 1 VR 57	56	Intention
Nembhard (1982) 74 Cr App R 144, 148	4	Introduction
Nessel (1980) 5 A Crim R 374	26	Evidence of defendant in respect of co-defendant
Neville v R (2004) 145 A Crim R 108	49	Identification
Ngatayi (1980) 147 CLR 1, 9	7	Fitness for trial
Ngati v R [2008] NSWCCA 3	24	General summing up directions
Nguyen [1989] 2 Qd R 72	24 44	General summing up directions Prior inconsistent statements *Evidence Act* 1977: ss 17, 18, 19, 101 & 102
Nguyen [2013] QCA 13	60	*Robinson* direction
Nijamuddin [2012] QCA 124	10	Evidence of affected children
Nixon (1968) 52 Cr App R 218	25	Views and demonstrations
Noll [1999] 3 VR 704	53	DNA
Nona [1997] 2 Qd R 436.	5B	Trial procedure
Nudd [2004] QCA 154	105	Drugs: Commonwealth offences
O'Neill [1996] 2 Qd R 326	71 147	Attempts Attempted murder
Oberbillig [1989] 1 Qd R 342	71	Parties to an offence: ss 7, 8
OGD (No 2) (2000) 50 NSWLR 433	43	Bad character
OKS v Western Australia [2019] HCA 10	40	Lies Told By The Defendant (Going only to credit)
Osland (1998) 197 CLR 316	39 95	Lies told by defendant (consciousness of guilt) Self-defence: s 271(2)
Owen (1991) 56 SASR 397	46	Circumstantial evidence
P (1991) 1 NTLR 157	6	Fitness for trial
P.S. Shaw [1995] 2 Qd R 97	167	Rape s 347 before 27 October 2000

Case Name	Number	Direction
Palmer (1998) 103 A Crim R 299	31	The rule in *Jones v Dunkel*
Palmer (1998) 193 CLR 1	44	Cross-examination as to complainant's motive to lie
Pangilinan [2001] 1 Qd R 56	97 – 98	Provocation: s 304
Pantoja (1996) 88 A Crim R 554	56	DNA
Papakosmas (1990) 73 ALJR 1274	68	Preliminary complaint
Parker (1963) 111 CLR 610	197	Commonwealth offences – mens rea and actus rea
Parker [1919] NZLR 365	174	Robbery
Pattinson & Exley [1996] 1 Cr App R 51	51	Identification
Patton [1998] 1 VR 7	34	Separate consideration of charges- single defendant
Paul [1942] QWN 41.	24	Views and demonstrations
Payless Superbarn (NSW) P/L v O'Ggara (1990) 19 NSWLR 551	32	The rule in *Browne v Dunn*
Pearce & Carter v DPP (No 2) (1992) 59 A Crim R 182	202	Drugs: Commonwealth offences
Pearmine v The Queen [1988] WAR 315	23	General summing up directions
Peel [1999] 2 Qd R 400	57	Fingerprints
Penney (1998) 72 ALJR 1316	49	Flight as demonstrating consciousness of guilt
Perdikoyiannis (2003) 86 SASR 263	33	Alternative charges
Pereira v DPP (1988) 63 ALJR 1	75 197 202	Accessory After the Fact Commonwealth offences – mens rea and actus rea Drugs: Commonwealth offences
Perera [1986] 1 Qd R 211	48	Circumstantial evidence
Perera [1986] 2 Qd R 431	46	Prior inconsistent statements
Peters (1998) 192 CLR 493	72 199	Conspiracy Defrauding the Commonwealth
Petty (1991) 173 CLR 95	29	Defendant's right to silence
Pfennig (1995) 182 CLR 461	40 70	Reasonable Doubt Evidence of other sexual or discreditable conduct of the defendant
Phil Kim Phieu Lam (1990) 46 A Crim R 402	202	Drugs: Commonwealth offences
Phillips v R (2006) 224 ALR 216	52	Similar fact evidence
Pickering v The Queen (2017) 260 CLR 151	87	Compulsion – s 31(1)(d)
Pierpoint (1993) 71 A Crim R 187	202	Drugs: Commonwealth offences

Case Name	Number	Direction
Pimental (1999) 110 A Crim R 30	202	Drugs: Commonwealth offences
Pitkin (1995) 130 ALR 35	51	Identification
PLK [1999] 3 VR 567	44	Cross-examination as to complainant's motive to lie
Podola [1960] 1 QB 325	6	Fitness for trial
Pollitt (1990) 51 A Crim R 227	51	Identification
Pollitt (1992) 174 CLR 558	36 63	Out-of-court confessional statements *Robinson* direction
Pollock (2010) 242 CLR 233	97 – 98	Provocation s 304
Porter (1933) 55 CLR 182	83	Unintentional intoxication
Power v Power (1996) 87 A Crim R 407	49	Flight as demonstrating consciousness of guilt
Presser [1958] VR 45	6	Fitness for trial
Prime Infrastructure (DBCT) Management Pty Ltd v Vero Insurance Ltd [2005] QCA 369	128	Damaging evidence with intent: s 102A
Proudman v Dayman (1941) 67 CLR 536	197	Commonwealth offences – mens rea and actus rea
Question of Law Reserved (No. 2 of 1998) (1998) 70 SASR 502	197	Commonwealth offences – mens rea and actus rea
R & G v R (1995) 63 SASR 417	25	Evidence of defendant in respect of co-defendant
R v AAP [2012] QCA 104	74	Parties to an offence
R v Abraham [2010] QCA 225	4	Trial procedure
R v Adams [1998] QCA 64	74	Parties to an offence
R v Agius [2015] QCA 277	106	Assault: s 335
R v Ahmad [2012] NTCCA 1	203	People smuggling
R v Akgul (2002]) 5 VR 537	51	Identification
R v Ancuta [1991] 2 Qd R 413	74 75	Parties to an offence Accessory after the fact
R v Anderson [1985] 2 All ER 961	72	Conspiracy
R v Anderson [2006] 1 Qd R 250	129	Dangerous operation of a motor vehicle
R v Andres [2015] QCA 167	49	Filght and other post-offence conduct
R v Armstrong [2006] QCA 158	26	Defendant giving evidence
R v Ashley [2005] QCA 293	34 68	Separate consideration of charges – single defendant Preliminary complaint
R v AW [2005] QCA 152	68	Preliminary complaint

Case Name	Number	Direction
R v Awang [2004] 2 Qd R 672	121 122 130 153 154	Child stealing Taking child for criminal purposes Deprivation of liberty Kidnapping Kidnapping for ransom
R v Baden-Clay (2016) 90 ALJR 1013	49	Flight and other post-offence conduct
R v Bagley [2014] QCA 44	36	Out-of-Court confessional statements
R v BAH (2002) 135 A Crim R 150	10 11	Child witnesses Special witnesses
R v Bailey [2003] QCA 506	138	Fraud
R v Baille (1859) 8 Cox CC 238	120 121	Abduction of child under 16 Child stealing
R v Bain [2003] QCA 389	60	Reasonable doubt
R v Bainbridge [1960] 1 QB 129	75	Accessory after the fact
R v Baira [2009] QCA 332	13	Hostile witnesses
R v Baker [2014] QCA 5	23	General summing up directions
R v Barratt [2014] QCA 94	94	Self-defence
R v BAS [2005] QCA 97	145	Indecent (sexual) assault
R v Batchelor [2003] QCA 246	84	Intentional intoxication
R v Bauer (a pseudonym) (2018) 92 ALJR 846; [2018] HCA 40	34 70	Separate consideration of charges – single defendant Evidence of other sexual or discreditable conduct of the defendant
R v BBD [2007] 1 Qd R 478	93	Criminal negligence
R V BBQ [2009] QCA 166	70	Evidence of other sexual or discreditable conduct of the defendant
R v BBR [2010] 1 Qd R 546	12	Competency of witnesses, including children
R v BCG [2012] QCA 167	23 55	General summing up directions Majority verdict
R v Beattie (2008) 188 A Crim R 542	4	Trial procedure
R v Beble [1979] Qd R 278	120	Abduction of child under 16
R v Beck [1990] 1 Qd R 30	74	Parties to an offence
R v Beckett [2015] HCA 38	109	Attempt to pervert the course of justice: s 140
R v Beetham [2014] QCA 131	94	Self-defence
R v Bellis (1893) 62 LJMC 155	121	Child stealing

Case Name	Number	Direction
R v Benedetoo [2003] 1 WLR 1545	63	*Robinson* direction
R v Bennett [1998] QCA 393	139	Going armed in public
R v Birt (1899) 63 JP 328	137 195	Forgery Uttering
R v Bisht [2013] QCA 238	11	Special witnesses
R v Bradfield [2012] QCA 337	155-157	Maintaining a sexual relationship with a child: s 229B
R v Brown (2007) 171 A Crim R 345	74	Parties to an offence
R v Buckett (1995) 132 ALR 669	74	Parties to an offence
R v Buckley, Supreme Court Brisbane, 7 April 1982	84	Intentional intoxication: s 28
R v Burrell (2007) 190 A Crim R 148	54	Jury failure to agree
R v Butler [2006] QCA 51	59	Intention
R v C [2001] QCA 387	191	Unlawful Use of a Motor Vehicle
R v Campbell (2009) 195 A Crim R 374	161	Possession of a child abuse computer game
R v Campbell [2009] QDC 61	121	Child stealing
R v Carter [2014] QCA 120	9	Evidence of affected children
R v CBM [2014] QCA 212	34	Separate consideration of charges – single defendant
R v Chalmers [2011] QCA 134	12	Competency of witnesses including children
R v Chang (2003) 7 VR 236	49	Flight as demonstrating consciousness of guilt
R v Chen [1997] QCA 335	106	Assault s 335
R v Cheshire [1991] 3 All ER 670	129	Dangerous operation of a motor vehicle
R v Chong [2012] QCA 265	71	Attempts
R v Ciantar (2006) 16 VR 26	49	Flight and other post-offence conduct
R v Clarkson, Carroll, and Dodd (1971) 55 Cr App R 445	74	Parties to an offence
R v Conde [2015] QCA 63	178	Stalking
R v Condon [2010] QCA 117	78	Accident
R v Coomer [2010] QCA 6	78	Accident
R v Coss [2016] QCA 44	44	Cross-examination as to complainant's motive to lie
R v Cox [2986] 2 Qd R 55	36	Out-of-court confessional statements
R v Crossman [2011] 2 Qd R 435	24 140	Views and demonstrations Grievous bodily harm
R v Cuskelly [2009] QCA 375	88	Defence of a dwelling house: s 267

Case Name	Number	Direction
R v D (2003) 141 A Crim R 471	12 155-157	Competency of witnesses, including children Maintaining a sexual relationship with a child
R v Dan [2007] QCA 66	49	Flight and other post-offence conduct
R v Davies (1974) 7 SASR 375	139	False statement under oath
R v De Silva [2007] QCA 201	71	Attempts
R v Dean [2009] QCA 309	94	Self-defence: s 271(1)
R v Deemal [2010] 2 Qd R 70	160	Perjury
R v Dillon and Riach [1982] VR 434	175	Secret commission
R v Dillon; Ex parte Attorney-General (Qld) [2015] QCA 155	138	Fraud: 408C
R v DM [2006] QCA 79	9	Evidence of affected children
R v Doheny and Adams [1997] 1 Cr App R 369	56	DNA
R v Dookhea (2017) 91 ALJR 960; [2017] HCA 36	60	Reasonable Doubt
R v Doolan [2014] QCA 246	34	Separate consideration of charges – single defendant
R v Douglas [2018] QCA 69	70	Evidence of other sexual or discreditable conduct of the defendant
R v Douglas [2014] QCA 104	202	Drugs: Commonwealth offences under the *Criminal Code Act* 1995
R v Dykstra [2011] QCA 175	39	Lies told by defendant (consciousness of guilt)
R v E (1995) 89 A Crim R 325	26	Defendant giving evidence
R v EI [2009] QCA 177	85	Capacity
R v Ellis [2007] QCA 219	77	Automatism: involuntariness
R v Ensbey; Ex parte Attorney-General (Qld) [2005] 1 Qd R 159	128	Damaging evidence with intent: s 129
R v Emelio [2012] QCA 111	74	Parties to an offence
R v Eustance [2009] QCA 28	84 104	Intentional intoxication: s 28 Arson
R v Evan, Robe and Bivolaru [2006] QCA 527	51	Identification
R v F (1995) 83 A Crim R 502	74	Parties to an offence
R v F, ex parte Attorney General [2004] 1 Qd R 162	153 154	Kidnapping Kidnapping for ransom
R v F; ex parte A-G [1999] Qd R 157	85	Capacity

Case Name	Number	Direction
R v FAE [2014] QCA 69	9	Evidence of affected children
R v Filewood [2004] QCA 207	79	Mistake of fact
R v Flynn [2010] QCA 254	10 11	Child witnesses Special witnesses
R v Ford [2006] QCA 142	34	Separate consideration of charges – single defendant
R v Foster [2014] QCA 226	68	Preliminary complaint
R v Fowler; R v Aplin [2012] QCA 258	106 107	Assault Assault occasioning bodily harm
R v Franicevic [2010] QCA 36	51	Identification
R v Frank [2010] QCA 150	39 40	Lies told by defendant (consciousness of guilt) Lies told by defendant (going only to credit)
R v GAO [2012] QCA 54	11	Special witnesses
R v Gaskell [2016] QCA 302	49	Motive
R v GAW [2015] QCA 166	34	Separate consideration of charges – single defendant
R v Gee [2016] 2 Qd R 602	106	Assault: s 335
R v Gemmill (2004) 8 VR 242	58	Expert witnesses
R v Georgiou [2002] 1 Qd R 203	74	Parties to an offence
R v Gillard (1988) 87 Cr App R 189	102 103	Administering a stupefying drug Administering poison with intent to harm
R v GK (2001) 53 NSWLR 315	56	DNA
R v Goldsworthy, Goldsworthy & Hill	48	Circumstantial evidence
R v Gould [2014] QCA 164	51	Identification
R v Graham [2016] QCA 73	74 112	Parties to an offence Burglary s 419
R v Grimaldi [2011] QCA 114	129	Dangerous operation of a motor vehicle
R v Gudgeon (1995) 133 ALR 379	72	Conspiracy (other than under the *Criminal Code* (Cth))
R v HAB [2006] QCA 80	9	Evidence of affected children
R v HAC [2006] QCA 291	182	Torture
R v Hadlow [1992] 2 Qd R 440	13	Hostile witnesses
R v Hallin [2004] QCA 18	71	Parties to an offence
R v Hally [1962] Qd R 214	4	Trial procedure
R v Harrison (1997) 68 SASR 304	23 55	General summing up directions Majority verdict

Case Name	Number	Direction
R v Hartfiel [2014] QCA 132	26 27	Defendant giving evidence Defendant not giving evidence, where no adverse inference
R v Hawke [2016] QCA 144	74	Parties to an offence
R v Hawken (1986) 27 A Crim R 32	75	Accessory after the fact
R v Hayden and Slattery [1959] VR 102	13	Hostile witnesses
R v Hayes [1977] 1 WLR 234	12	Competency of witnesses, including children
R v HBN [2016] QCA 341	10	Child witnesses
R v Heaney & Ors [1992] 2 VR 531	74	Parties to an offence
R v Heath [1991] 2 Qd R 182	48	Motive
R v Hellwig [2007] 1 Qd R 17	9	Evidence of affected children
R v Hennig [2010] QCA 244	39	Lies told by the defendant (consciousness of guilt)
R v Heuston (1996) 90 A Crim R 213	41	Alibi
R v Hinschen [2008] QCA 145	42	Good character
R v Ho (2002) 130 A Crim R 545	40	Reasonable Doubt
R v Horvarth [2013] QCA 196	9	Evidence of affected children
R v Hubbuck [1999] 1 Qd R 314	178	Stalking
R v Hung [2012] QCA 341	94	Self-defence: s 271(1)
R v Hutchings [2007] 1 Qd R 25	4	Trial procedure
R v IE [2013] QCA 291	70	Evidence of other sexual or discreditable conduct of the defendant
R v Irlam; ex-parte Attorney-General [2002] QCA 235	23	General summing up directions
R v James and James (1979) Cr App R 215		Malicious acts with unlawful intent
R v Jeffrey [1997] QCA 460; [2003] 2 Qd R 306	74	Parties to an offence
R v JK [2005] QCA 307	34	Separate consideration of charges – single defendant
R v JL [2007] QCA 131	34	Separate consideration of charges – single defendant
R v Johnson (1987) 25 A Crim R 433	21	Interpreters and translators
R v Johnson [1957] St R Qd 594	121 122	Child stealing Taking child for criminal purposes
R v Jones [2011] QCA 19	145 146	Indecent (sexual) assault Indecent dealing with a child under 16
R v Jufri; R v Nasir [2012] QCA 248	203	People smuggling

Case Name	Number	Direction
R v Julian (1998) 100 A Crim R 430	79 80 95	Mistake of fact s 24 Mistake of fact (sexual offences) Self-defence: s 271(2)
R v Jurcik [2001] QCA 390	42	Good character
R v K (1997) 68 SASR 405	23 55	General summing up directions Majority verdict
R v KAH [2012] QCA 154	9 10 11	Evidence of affected children Child witnesses Special witnesses
R v Kaldor (2004) 150 A Crim R 271; [2004] NSWCCA 425	127 202 105B	Proof of mental and physical elements: Commonwealth offences Drugs: Commonwealth drug offences under s233B of the *Customs Act* 1901 Drugs: Commonwealth offences under the *Criminal Code Act* 1995
R v Karger (2002) 83 SASR 135	56	DNA
R v Kashani-Malaki [2010] QCA 222	4	Trial procedure
R v Keenan (2009) 236 CLR 397	74	Parties to an offence, ss 7,8
R v Keevers; R v Filewood [2004] QCA 207	79	Mistake of fact s 24
R v Kelly [2005] QCA 103	132	Trafficking in a dangerous drug
R v Khaled [2014] QCA 349	20	Tape recordings, transcripts and exhibits
R v Kidd [2002] QCA 433	23	General summing up directions
R v Knight & Ors [2010] QCA 372	23	General summing up directions
R v Kuruvinakunnel [2012] QCA 330	129	Dangerous operation of a motor vehicle
R v Lacey & Lacey [2011] QCA 386	40	Lies told by defendant (going only to credit)
R v Lacey ; ex parte A-G (Qld) (2009) 197 A Crim R 399	81 94	Extraordinary emergency Self-defence
R v Lake (2007) 174 A Crim R 491; [2007] QCA 209	198	Conspiracy – Commonwealth *Criminal Code*
R v Lake, Carstein and Geerlings [2007] QCA 209	20	Tape recordings, transcripts and exhibits
R v Lam (Ruling No10) (2005) 191 FLR 261	197	Proof of mental and physical elements: Commonwealth offences
R v Lawrie [1986] 2 Qd R 502	13	Hostile witnesses

Case Name	Number	Direction
R v Le (2007) 173 A Crim R 450	20	Tape recordings, transcripts and exhibits
v Lee and Scott (1834) 6 Car & P 536; 172 ER 1353	75	Accessory after the fact
R v Lennox [2007] QCA 383	49	Flight as demonstrating consciousness of guilt
R v Levy [1912] 1 KB 158	75	Accessory after the fact
R v Libke [2006] QCA 242	119 147	Carnal knowledge of a person with an impairment of the mind Indecent dealing with a person with an impairment of the mind
R v Lopuszynski [1971] QWN 33	71	Parties to an offence
R v Lorraway [2007] QCA 142	4	Trial procedure
R v Lovell; Ex parte Attorney-General (Qld) [2015] QCA 136	140	Grievous bodily harm: s 320
R v LR [2006] 1 Qd R 435	34	Separate consideration of charges – single defendant
R v M (1977) 16 SASR 589	85	Capacity
R v M [1996] QCA 230	34	Separate consideration of charges – single defendant
R v M [2001] QCA 458	155-157	Maintaining a sexual relationship with a child
R v Main and Tanid [2012] QCA 80	51	Identification
R v Marcus (1981) 73 Cr App R 59		Malicious acts with unlawful intent
R v Mark [1961] Crim Law Review 173	108	Assault on police officer
R v MBE (2008) 191 A Crim R 264	9	Evidence of affected children
R v MBT [2012] QCA 343	12	Competency of witnesses, including children
R v MBX [2014] 1 Qd R 438	69	*Longman* Direction
R v McBride [2008] QCA 412	26 145	Defendant giving evidence Indecent (sexual) assault
R v MCC [2014] QCA 253	9	Evidence of affected children
R v McClintock [2010] 1 Qd R 354	55	Majority verdict
R v Meddings [1966] VR 306	82	Insanity
R v Mejac [1954] Tas SR 26	120	Abduction of child under 16
R v Menniti [1985] 1 Qd R 520	74	Parties to an offence
R v Messent [2011] QCA 125	94	Self-defence s 271(1)
R v Middleton [2003] QCA 431	84	Intentional intoxication
R v Mill [2007] QCA 150	76	Claim of right

Case Name	Number	Direction
R v Millar (No 2) [2013] QCA 29	54	Jury failure to agree
R v Miller (2007) 177 A Crim R 528	4	Trial procedure
R v Miller [2009] 2 Qd R 86	97 – 98	Provocation: s 304
R v Millward [1985] QB 519	136	False statement under oath
R v Mitchell [2007] QCA 267	39	Lies told by the defendant (consciousness of guilt)
R v Morrow [1991] 2 Qd R 309	106	Assault s 335
R v Mrzljak [2005] 1 Qd R 308	79 80 167 168	Mistake of fact s 24 Mistake of fact (sexual offences) Rape before 27 October 2000 Rape after 27 October 2000
R v Murphy (1985) 158 CLR 596	109	Attempt to pervert the course of justice
R v Muto & Eastey [1996] 1 VR 336	23 55	General summing up directions Majority verdict
R v Nicholson ex parte DPP [2004] QCA 393	27	Defendant not giving evidence, where no adverse inference
R v Nijamuddin [2012] QCA 124	9	Evidence of affected children
R v NM [2013] 1 Qd R 374	68	Preliminary complaint
R v Nona [1997] 2 Qd R 436	4	Trial Procedure
R v Nuttall [2010] QCA 64	175	Secret commission
R v Oliver [2016] QCA 27	49	Flight and other post-offence conduct
R v O'Loughlin [2011] QCA 123	79 80	Mistake of fact s 24 Mistake of fact (sexual offences)
R v Orgles & Orgles (1993) 98 Cr App R 185	52	Jury failure to agree
R v Oulds (2014) 244 A Crim R 443	4	Trial procedure
R v PAB [2008] 1 Qd R 184	70	Evidence of other sexual or discreditable conduct of the defendant
R v PAR [2015] 1 Qd R 15	4	Trial procedure
R v PAS [2014] QCA 289	68	Preliminary complaint
R v Pascoe (unreported CA no 242 of 1997)	74	Parties to an offence
R v Peachey [2006] QCA 162	78	Accident
R v Pearson [2015] QCA 157	70	Evidence of other sexual or discreditable conduct of the defendant
R v Perham [2016] QCA 123	129	Dangerous operation of a motor vehicle
R v Phelan [1964] Crim LR 468	75	Accessory after the fact
R v Pickering [2016] QCA 124	86	Compulsion

Case Name	Number	Direction
R v Pigg [1983] 1 All ER 56	55	Majority verdict
R v Ping [2006] 2 Qd R 69	182	Torture: s 320A
R v PJ [2012] VSCA	203	People smuggling
R v Plath [2003] QCA 567	129	Dangerous operation of a motor vehicle
R v Pollard [1962] QWN 13	76	Claim of right
R v Pollock [2008] QCA 205	98	Provocation: s 304
R v Pollock [2009] QCA 268	98	Provocation: s 304
R v Prow [1990] 1 Qd R 64	94 – 96	Self-defence: s 271(1), (2); ss 272 &273
R v Punj (2002) 132 A Crim R 595	23	General summing up directions
R v R (2003) 139 A Crim R 371; [2003] QCA 285	70	Evidence of other sexual or discreditable conduct of the defendant
R v Rae [2009] 2 Qd R 463	145 146	Indecent (sexual) assault Indecent dealing with a child under 16
R v Razak [2012] QCA 244	203	People smuggling
R v Reid [2007] 1 Qd R 64	49 59	Motive Intention Malicious acts with unlawful intent
R v Roach [2009] QCA 360	70	Evidence of other sexual or discreditable conduct of the defendant
R v Robert [2002] QCA 366	4	Trial procedure
R v Roberts & Pearce [2012] QCA 82	74	Parties to an offence
R v Roberts [2005] 1 Qd R 408	54	Jury failure to agree
R v Rogers [2013] QCA 52	4	Trial Procedure
R v Rogerson (1992) 174 CLR 268	72 109	Conspiracy (other than under the *Criminal Code* (Cth)) Attempt to pervert the course of justice
R v Roissetter [1984] 1 Qd R 477	67	Distressed condition
R v Rope [2010] QCA 194	4 79	Trial procedure Mistake of fact s 24
R v Rose [2010] 1 Qd R 87	144	Incest
R v Rossborough (1985) 81 Cr App R 139	41	Alibi
R v Rutherford [2004] QCA 481	67	Distressed condition
R v S (2002) 129 A Crim R 339	34 155-157	Separate consideration of charges – single defendant Maintaining a sexual relationship with a child

Case Name	Number	Direction
R v Saengsai-Or (2004) 61 NSWLR 135	197 201 202	Proof of mental and physical elements: Commonwealth offences Drugs: Commonwealth drug offences under s233B of the *Customs Act* 1901 Drugs: Commonwealth offences under the *Criminal Code Act* 1995
R v Samson [2011] QCA 112	8	Protected witnesses
R v Savins [1996] QCA 513	71	Attempts
R v SAW [2006] QCA 378	9	Evidence of affected children
R v SBB (2007) 17 A Crim R 449	49	Flight as demonstrating consciousness of guilt
R v SCG [2014] QCA 118	9	Evidence of affected children
R v SCO & SCP [2016] QCA 248	35	Separate consideration of charges – multiple defendants confronting multiple charges
R v SCJ; Ex parte Attorney-General of Queensland [2015] QCA 123	9 12	Evidence of affected children Competency of witnesses, including children
R v Scott [2011] QCA 343	40	Lies told by defendant (going only to credit)
R v Seery [1995] QCA 389	121	Child stealing
R v Shambayati [2016] QCA 100	4	Trial procedure
R v Shaw (2007) 48 MVR 345	4	Trial procedure
R v Sheldon [2014] QCA 328	81	Extraordinary emergency
R v Sheppard [2010] QCA 342	39 40	Lies told by the defendant (consciousness of guilt) Lies told by the defendant (going only to credit)
R v Shetty [2005] 2 Qd R 540	141 194	Grooming children under 16 Using internet etc to procure children under 16
R v Shew [1998] QCA 333	118 161	Possessing child exploitation material Possession of a child abuse computer game
R v Smith [2005] 2 All ER 29	54	Jury failure to agree
R v Smith [2009] 1 Qd R 239	112	Burglary
R v Smythe [1997] 2 Qd R 223	131	Drugs: Possession – *Drugs Misuse Act* 1986
R v Soloman (2005) 92 SASR 331	20 51	Tape recordings, transcripts and exhibits Identification

Case Name	Number	Direction
R v Soloman [2006] QCA 244	42	Good character
R v Stokes and Difford (1990) 51 A Crim R 25	74	Parties to an offence
R v Stuart [2005] QCA 138	78	Accident s 23(1)(b)
R v Tang (2008) 82 ALJR 1334	197 202	Proof of mental and physical elements: Commonwealth offences Drugs: Commonwealth offences under the *Criminal Code Act* 1995
R v Tevendale [1955] VR 95	75	Accessory after the fact
R v Thomas [1993] 1 Qd R 323	172	Riot and unlawful assembly
R v Thompson [2011] 1 WLR 200	4	Trial procedure
R v Thompson [2019] QCA 29	98	Provocation pre 4 April 2011
R v Thomson (1965) 50 Cr App R 1	72	Conspiracy
R v Tichowitsch [2007] 2 Qd R 462	63	*Robinson* direction
R v Tietie (1988) 34 A Crim R 438	74	Parties to an offence
R v Timmins (1860) Bell 276	120 121 122	Abduction of child under 16 Child stealing Taking child for criminal purposes
R v Trieu [2008] QCA 28	78	Accident
R v Triffett (1992) 1 Tas R 293	75	Accessory after the fact
R v Turner (1910) 3 Cr App R 203		Malicious acts with unlawful intent
R v TZ [2011] QCA 305	42	Good character
R v UC [2008] QCA 194	70	Evidence of other sexual or discreditable conduct of the defendant
R v Vecchio & Tredrea [2016] QCA 71	35	Separate consideration of charges – multiple defendant's confronting multiple charges
R v Viet Dung Ong (2007) 176 A Crim R 366	55 198	Majority verdict Conspiracy – Commonwealth *Criminal Code*
R v VST (2003) 6 VR 569 ; [2003] VSCA 35	54	Jury failure to agree
R v W [1997] QCA 225	5	Unrepresented Defendant
R v WAA [2008] QCA 87	34	Separate consideration of charges – single defendant
R v WAF & SBN [2010] 1 Qd R 370	23	General summing up directions
R v Waine [2006] 1 Qd R 458	76 89	Claim of right Defence of movable property: s 274
R v Walters [2007] QCA 140	4	Trial procedure

Case Name	Number	Direction
R v Wardle [2011] QCA 339	78	Accident
R v Warner [1980] Qd R 207	81	Extraordinary emergency
R v Warradoo [2014] QCA 299	61	Caution in using hearsay
R v WBC	69	*Longman* Direction
R v Webb, ex parte Attorney-General [1990] 2 Qd R 275	74 103	Parties to an offence Endangering particular property by fire
R v Williams [2010] 1 Qd R 276	67	Distressed condition
R v Williamson [1972] 2 NSWLR 281	75	Accessory after the fact
R v Wilmot (2006) 165 A Crim R 14	94	Self-defence
R v Wilson [2009] 1 Qd R 476	79 80 129	Mistake of fact s 24 Mistake of fact (sexual offences) Dangerous operation of a motor vehicle
R v Wilton (1993) 64 A Crim R 359	74	Parties to an offence
R v Winchester [2011] QCA 374	145 167 168	Indecent (sexual) assault Rape s 347 before 27 October 2000 Rape s 347 after 27 October 2000
R v Witchard [2005] 1 Qd R 428	186	Attempted murder
R v Woodward [1970] QWN 30		Malicious acts with unlawful intent
R v Wyles ; ex parte A-G [1977] Qd R 169	74	Parties to an offence
R v Zainudin [2012] SASCFC	203	People smuggling
Re Bromage [1991] 1 Qd R 1	100	Diminished responsibility
Re Gray [2001] 2 Qd R 35	143	Improper interference with a corpse
Re Jenkins 1999 QMHT	33 82	Alternative charges Insanity
Re Lane (QSC, Ryan J, 9 October 1992, unreported)	158 159	Official corruption s 87(1)(a) Official corruption s 87(1)(b)
Re London and Globe Finance Corp [1903] 1 Ch 728	137 195	Forgery Uttering
Re Walton [1992] 2 Qd R 551	6	Fitness for trial
Redshaw (Unreported Ca No 331 of 1997, Delivered 3 November 1997)	51	Identification
Reg v Miard 1 Cox CC 22	134 – 135	Extortion
Reid (Junior) [1990] 1 AC 363	51	Identification
Renton (Unreported CA No 188 of 1997, delivered 12 December, 1997)	51	Identification

Case Name	Number	Direction
Reynhoudt (1962) 107 CLR 381	108 140	Assault on a police officer in execution of his duty Grievous bodily harm
Rezk [1994] 2 Qd R 321	25	Evidence of defendant in respect of co-defendant
RH [2005] 1 Qd R 180	68	Preliminary complaint
Rhaajesh Subramaniam (Unreported CA No 333 of 1998, delivered 9 April 1999)	51	Identification
Richardson v United States 526 US 813 (1999)	53	Jury unanimity – specific issues
Richens [1993] 4 All ER 877	39	Lies told by defendant (consciousness of guilt)
Ritchie [1998] QCA 188	74	Parties to an offence
RJS v R (2007) 173 A Crim R 100; [2007] NSWCCA 241	54 55	Jury failure to agree Majority verdict
RNS [1999] NSWCCA 122	3	Introduction
Robinson (1998) 102 A Crim R 89	6 38	Fitness for trial Accomplices
Robinson (1999) 180 CLR 531	25	Evidence of defendant in respect of co-defendant
Robinson (1999) 197 CLR 162	12 23 36 38 63 69	Competency of witnesses General summing up directions Out-of-court confessional statements Accomplices *Robinson* direction *Longman* direction
Rogers [2013] QCA 52	186	Attempted murder: s 306(2)
Rogerson (1992) 174 CLR 268	109	Attempt to pervert the course of justice
Rolph [1962] Qd R 262	100	Diminished responsibility: s 304
Rose [1961] AC 496	100	Diminished responsibility: s 304
Royall (1991) 172 CLR 378	93 129 140 183 185 187	Criminal negligence: s 289 Dangerous operation of a motor vehicle Grievous Bodily Harm Unlawful killing: murder s 302(1)(a) Manslaughter: s 303 Unlawful striking causing death: s 314A
RPS (2000) 199 CLR 620	3 23 31	Introduction General summing up directions The rule in *Jones v Dunkel*

Case Name	Number	Direction
Rusovan v The Queen (1994) 62 SASR 86	55	Majority verdict
Rv Wibberley [1966] 2 QB 214	191	Unlawful use of a motor vehicle
RWB (2003) 87 SASR 256	70	Evidence of other sexual or discreditable conduct of the defendant
Ryder [1995] 2 NZLR 271	53	Jury unanimity – specific issues
S (2002) 129 A Crim R 339	34	Separate consideration of charges – single defendant
S [1996] 1 Qd R 559	146, 147, 149	Indecent dealing
S [1999] 2 Qd R 89	155-156	Maintaining a sexual relationship with a child
Sainsbury [1993] 1 Qd R 305	51	Identification
Saxon [1998] 1 VR 503	51	Identification
Scatchard (2987) 27 A Crim R 136	107	Assault occasioning bodily harm
Schad v Arizona 501 US 624 (1991)	53	Jury unanimity – specific issues
Schneider [1998] QCA 303	68	Preliminary complaint
Schneider [1998] QCA 303	68	Preliminary complaint
Schneiders [2007] QCA 210	146 147	Indecent dealing with a child under 16 Indecent dealing with a person with an impairment of the mind
Schonewille [1998] 2 VR 625	197	Commonwealth offences – mens rea and actus rea
Scott (1996) 131 FLR 137	34	Separate consideration of the charges – single defendant
Scott [1967] VR 276	133	Escape from lawful custody
Scott v Metropolitan Police Commissioner [1975] AC 819	199	Defrauding the Commonwealth
Scott v Numurkah Corporation (1954) 91 CLR 300	24	Views and demonstrations
Scott v Scott [1913] AC 417	64	Closed court exceptions to the general rule of openness
Scott; Quinn & Bloom [1962] 2 QB 245	24	Views and demonstrations
Scratchard (1987) 27 A Crim R 136	107	Assault occasioning bodily harm
Semyraha [2001] 2 Qd R 208	47	Privilege against self-incrimination
Sexton (2000) 77 SASR 405	6	Fitness for trial
Shannon v United States 512 US 573 (1994)	82	Insanity
Sharp [1960] 1 QB 357	6	Fitness for trial
Sharp; Johnson [1957] 1 QB 552	139	Going armed in public

Case Name	Number	Direction
Shaw v Garbutt (1996) 7 BPR 14,816; [1997] NSW Conv R 56,277	88	Defence of a dwelling house: s 267
	84	Defence of movable property
Shearsmith [1967] Qd R 576	100	Diminished responsibility: s 304
Sheehan [2001] 1 Qd R 198	197	Commonwealth offences – mens rea and actus rea
Shepherd (1990) 170 CLR 573	48	Circumstantial evidence
	70	Evidence of other sexual or discreditable conduct of the defendant
Sherrington & Kuchler [2001] QCA 105	74	Parties to an offence: ss 7, 8
	93	Criminal negligence: s 289
	185	Manslaughter: s 303
Shin Nan Yong (1975) 7 ALR 271	202	Drugs: Commonwealth offences
Sinclair & Dinh (1997) 191 LSJS 53	43	Bad character
	63	Witnesses whose evidence may require a special warning
Skaf, Ghanem & Hajeid [2004] NSWCA 74	25	Evidence of defendant in respect of co-defendant
Sleep [1966] Qd R 47	92	Prevention of repetition of insult
Smith [1949] St R Qd 126	82	Insanity
	83	Intoxication: s 28
Smith v The Queen (2015) 255 CLR 161; (2015) 89 ALJR 698; [2015] HCA 27	4	Trial procedure
	23	General summing up directions
	55	Majority verdict
Solway [1984] 2 Qd R 75	192	Unlawful possession of a motor vehicle
Soma (2001) 122 A Crim R 537	4	Trial procedure
Sorby (1983) 152 CLR 281	47	Privilege against self-incrimination
Sparrow [1973] 1 WLR 488	3	Introduction
Stanton v R (2003) 198 ALR 41	33	Alternative charges
Stapleton (1952) 86 CLR 358	83	Unintentional intoxication
Stevens [2004] QCA 99	33	Alternative charges
Stevens v R (2005) 227 CLR 319	66	Where a defence is not raised by counsel
	78	Accident: s 23(1)(b)
Stingel (1990) 171 CLR 312	66	Where a defence is not raised by counsel
	91	Provocation: ss 268, 269
	97 - 98	Provocation: s 304
Stott & Van Embden [2002] 2 Qd R 313	93	Criminal negligence: s 289
Stott (2000) 116 A Crim R 15	51	Identification

Case Name	Number	Direction
Stuart (1974) 134 CLR 426	74 183 184	Parties to an offence: ss 7, 8 Unlawful killing: murder s 302(1)(a) Unlawful killing: murder s 302(1)(b)
Su [1997] 1 VR 1	202	Drugs: Commonwealth offences
Sullivan & Marshall [2000] QCA 393	74	Parties to an offence: ss 7, 8
Sutton [1978] WAR 94	51	Identification
T [1997] 1 Qd R 623	104 146 - 147 180 196	Arson Indecent dealing: Threatening violence Wilful damage
Tabe (2003) 139 A Crim R 417	74 131	Parties to an offence: ss 7, 8 Drugs: possession – *Drugs Misuse Act* 1986
Tabe v R (2005) 225 CLR 418	131	Drugs: possession – *Drugs Misuse Act* 1986
Taiapa v R (2009) 240 CLR 95	86 87	Compulsion – s 31(1)(c) Compulsion – s 31(1)(d)
Taib ex parte DPP (Cth) [1999] 2 Qd R 649	197	Commonwealth offences – mens rea and actus rea
Taiters [1997] 1 Qd R 333	77 78 184	Automatism: s 2391)(a) Accident Unlawful killing: murder s 302(1)(b)
Tan v R [1979] WAR 149	137 195	Forgery Uttering
Tannous (1987) 10 NSWLR 303	202	Drugs: Commonwealth offences
Taylor (1978) 22 ALR 599	82	Insanity
Thatcher (1987) 32 CCC (3d) 481	53	Jury unanimity – specific issues
Thompson v Bella- Lewis [1997] 1 Qd R 429	47	Privilege against self-incrimination
Thompson v R (1989) 169 CLR 1	23	General summing up directions
Thorne v Motor Trade Association 26 Cr App R 51	134 – 135	Extortion
Tichowitsch [2007] 2 Qd R 462	63	*Robinson* Direction
TJF (2001) 120 A Crim R 209	61	Hearsay
Todd [1957] SASR 305	109	Attempt to pervert the course of justice
Topp [2000] QMHT	6	Fitness for trial

Case Name	Number	Direction
TQ (2007) 173 A Crim R 385	10 11	Child witnesses Special witnesses
Traino (1987) 45 SASR 473	136 160	False statement under oath Perjury
Tripodi (1961) 104 CLR 1	73	Evidence in conspiracy cases
Tully v R (2006) 231 ALR 712, (2006) ALJR 391	63	*Robinson* direction
Turnbull [1977] QB 224	51	Identification
Tyler [1994] 1 Qd R 675	51	Identification
Ugle (1989) 167 CLR 647	36	Out-of-court confessional statements
Ugle v R (2002) 211 CLR 171	77	Unwilled acts (automatism): s 23(1)(a)
United States v Franco 136 F3d 622 (9th Cir 1998)	21	Interpreters and translators
Van Den Bend [1995] 1 Qd R 401	78	Accident: s 23(1)(b)
Van Den Hoek (1986) 161 CLR 158	23 91 97 - 98	General summing up directions Provocation: ss 268, 269 Provocation: s 304
Van Der Zyden [2012] 2 Qd R 568	45 68	Absence of complainant's motive to lie Preliminary complaint
Van Wirdum [1994] QCA 476	36	Out-of-court confessional statements
Vannatter [1999] QCA 104	29	Defendant's right to silence
Viro v The Queen (1978) 141 CLR 88	84	Intentional intoxication
Walton [1978] AC 788	82	Insanity
Walton and Harman [2001] QCA 309	39	Lies told by defendant (consciousness of guilt)
Ward v The Queen [2013] NSWCCA 46	40	Reasonable Doubt
Watkins (unreported, Court of Criminal Appeal NSW, 5 April 1995)	170	Receiving
Watts [1992] 1 Qd R 214	20	Tape recordings, transcripts and exhibits
Watts v R (1980) 71 Cr App R 136	41	Alibi
Way v Way: Heazelwood (1928) 28 SR(NSW) 345.	24	Views and demonstrations
Webb & Hay (1994) 181 CLR 41	25	Evidence of defendant in respect of co-defendant
Webb [1995] 1 Qd R 680	74	Parties to an offence: ss 7, 8
Wedd (2000) 115 A Crim R 205	23 36	General summing up directions Out-of-court confessional statements

Case Name	Number	Direction
Weeder (1980) 71 Cr App R 228	51	Identification
Wehlow [2001] QCA 193	39	Lies told by defendant (consciousness of guilt)
Weissensteiner (1993) 178 CLR 217	28 31	Defendant not giving evidence The rule in *Jones v Dunkel*
Welham v DPP [1961] AC 103	137 195	Forgery Uttering
Wescombe (1987) 25 A Crim R 337	142	Imposition
White v Ridley (1978) 140 CLR 342	74	Parties to an offence
Whitworth [1989] 1 Qd R 437	100	Diminished responsibility: s 304
Will v Borcherdt (no.2) [1991] 2 Qd R 230	142	Imposition
Willersdorf [2001] QCA 183	33	Alternative charges
Willgoss (1960) 105 CLR 295	82	Insanity
Williams (2000) 116 A Crim R 552	33	Alternative charges
Williams [1988] 1 Qd R 289	76	Claim of right: s 22 (2)
Williams [2001] 1 Qd R 212	4 36	Trial procedure Out-of-court confessional statements
Williams, Ex parte The Minister for Justice and A-G [1965] Qd R 86	71	Attempts
Willmot (No 2) [1985] 2 Qd R 413	59 186	Intention Attempted murder
Wilson [2000] NSWSC 1104	6	Fitness for trial
Winmar v W.A. (2007) 35 WAR 159	51	Identification
Winston [1995] 2 Qd R 204	75	Accessory after the fact
Wu v The Queen (1999) 199 CLR 99	4	Trial procedure
Yorke v Lucas (1985) 158 CLR 661	202	Drugs: Commonwealth offences
Young (2004) 142 A Crim R 571	94	Self-defence: s 271(1)
Zaburoni v The Queen (2016) 256 CLR 482	59 71 101	Intention Attempts Acts intended to cause GBH
Zampaglione (1981) 6 A Crim R 287	202	Drugs: Commonwealth offences
Zaphir [1978] 1 Qd R 151	180 181	Threatening violence Threats
Zecevic v DPP (1987) 162 CLR 645	94 95 96	Self-defence: s 271(1) Self-defence: s 271(2) Self-defence: s 272
Zischke [1983] 1 Qd R 240	196 128	Wilful damage Damaging evidence with intent: s 102A

Case Name	Number	Direction
Zoneff (2000) 200 CLR 234	39 41	Lies told by defendant (consciousness of guilt) Lies told by defendant (going only to credit)
Zuccala (1991) 14 MVR 466	81	Extraordinary emergency
Zullo [1993] 2 Qd R 572	51	Identification

Introduction

In the decision of *R v Etheridge* [2020] QCA 34, Sofronoff P observed that the following statements from *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ (see also *Fingleton v The Queen* (2005) 227 CLR 166 at 196-197) should constitute the preface to this Benchbook:

> "**And it may be recalled that the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility of deciding what are the real issues in the particular case, and of telling the jury, in the light of the law, what those issues are. If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the *asportavit*, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny. It may be that the issues in a civil case tend, generally speaking, to be more complex than in a criminal case. But the same principle is applicable, and looking at the matter from a practical point of view, the *real* issues will generally narrow themselves down to an area readily dealt with in accordance with Sir Leo Cussen's great guiding rule.**"
>
> (footnotes omitted)

Use of this Bench Book

The sample directions contained in this bench book are not intended as an elaborate specification to be adopted religiously on every occasion. A summing-up should be tailored to fit the facts of the particular case, and not merely taken ready-made "off the peg".[1] As Sofronoff P explained in *R v Sunderland* [2020] QCA 156, sample directions are not to be:

> "treated as a draft that can be cut and pasted into a summing up. There is 'no magic formula or incantation' that can be invoked in every case to satisfy the burden that the law places upon a trial judge to give appropriate and adequate directions. Each summing up must be tailor-made to fit the requirements of the case at hand".[2]

---

1 *Nembhard (Neville) v The Queen* (1982) 74 Cr App R 144 at 148. In *Holland v The Queen* (1993) 117 ALR 193 at 200 the High Court approved a statement in *R v Lawrence* [1982] AC 510 at 519 that "a direction to a jury should be custom built to make the jury understand their task in relation to a particular case"; cf. *R v Mogg* (2000) 112 A Crim R 417 at [50]-[52], [70]-[74]; and *R v Hytch* (2000) 114 A Crim R 573 at [10]: "A trial judge ordinarily has an obligation to sum up the respective cases of both the prosecution and the defence [*R v RNS* [1999] NSWCCA 122] and to remind the jury in the course of identifying the issues before them of the arguments of counsel [*RPS v The Queen* (2000) 199 CLR 620]."

2 At [55] (footnotes omitted).

The particular form and style of a summing-up, provided it contains what must, on any view, be certain essential elements, must depend not only upon the particular features of the particular case, but also on the judge's view as to the form and style which will be fair, reasonable and helpful.[3]

Trial Judge's role in summing up

A summing-up should be clear, concise and intelligible. If overloaded with detail, whether of fact or law, and following no obvious plan, it will not have the attributes it should display.[4]

The object of the summing-up is to help the jury. A jury is not helped by a colourless reading out of evidence. The judge is more than a mere referee, who takes no part in the trial save to intervene when a rule of procedure or evidence is breached. The judge and the jury try a case together. It is the judge's duty to give the jury the benefit of the judge's knowledge of the law and to advise them in the light of the judge's experience as to the significance of the evidence.[5]

The function of a summing-up is not to give the jury a general dissertation on some aspect of the criminal law, but to tell them the issues of fact upon which they must make up their minds in order to determine whether the defendant is proven guilty of a particular offence.[6]

In *R v ITA* [2003] NSWCCA 174 the Court remarked at [90] *inter alia* that:

> 'The precise nature of the task of the judge depends on many things, including the context of the trial, its length, its complexity, the way that it has been run, the issues that arise and, importantly, whether counsel seek more from the judge than that which has been provided. The judge must ensure that the case of the accused is put fairly before the jury and, of course, must ensure that the accused has a fair trial. In fulfilling this duty, the judge will derive important assistance from counsel. The atmosphere at a criminal trial is not easy to assess on appeal. Counsel at trial are well placed to determine whether, in the light of the way in which the case has been run, particular directions to the jury are defective'.

McMurdo P described it this way in *R v Mogg* (2000) 112 A Crim R 417 at 427 at [54]:

> 'The onerous duties of a Trial judge will ordinarily include identifying the issues, relating the issues to the relevant law and the facts of the case and outlining the main arguments of counsel'.

---

3 *McGreevy v DPP* [1973] 1 WLR 276 at 281.

4 *R v Landy, White and Kaye* [1981] 1 WLR 355 at 367; and *Flesch v The Queen* (1986) 7 NSWLR 554 at particularly at 558, where Street CJ stated "a summing up should be as succinct as possible in order not to confuse the jury".

5 *R v Sparrow* [1973] 1 WLR 488 at 495. In *Holland,* the High Court approved a statement from *Lawrence* that "a direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book".

6 *R v Mowatt* [1968] 1 QB 421 at 426. In *Holland,* the High Court approved a statement from *Lawrence* that "the purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case." See also *R v Adams, ex parte A-G* [1998] QCA 64; and *Mogg* at [71]-[72]: "A trial judge's duty…will rarely if ever be discharged by presenting in effect an abstract lecture upon legal principles followed by a summary of the evidence. It is of little use to explain the law to the jury in general terms and then leave it to them to apply to the case… the law should be given to the jury with an explanation of how it applied to the facts …". Cf *R v Chai* (2002) 76 ALJR 628 at 632 [18].

Gaudron A-CJ, Gummow, Kirby and Hayne Justices said in *RPS v The Queen* (2000) 199 CLR 620 at 637 that:

- the fundamental task of a Trial judge is to ensure a fair trial of the accused;
- this will require the judge to instruct the jury about so much of the law as the jury need to know in order to dispose of the issues;
- that will require instructions about the elements of the offence, the burden and standard of proof and of the respective functions of judge and jury;
- and will require the judge to identify the issues in the case and to relate the law to those issues; it will require the judge to put fairly before the jury the case which the accused makes.
- In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence.
- None of this must be permitted to obscure the division of functions between judge and a jury, and that it is for the jury and it alone to decide the facts.
- Although a Trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it.
- Often, perhaps much more often than not, the safer course for a Trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.

***Statutory requirements: Jury Act* 1995**

The judge must ensure that the jury is informed in appropriate detail of:

(a) the charge contained in the indictment: *Jury Act* s 51

(b) the jury's duty on the trial: *Jury Act* s 51

(c) the prohibition upon jurors of inquiring about the defendant in the trial: *Jury Act* s 69A.

The judge may also give directions about:

(a) the elements of the offence(s) or as to the defence(s) (if there is consensus about them), so that the jury may focus primarily upon them.

(b) an opening statement by defence counsel after the prosecutor's opening, if defence counsel wishes to deliver such a statement: *R v Nona* [1997] 2 Qd R 436.

- In *R v Oulds* (2014) 244 A Crim R 443, the Court of Appeal discussed the parameters of an opening statement by defence counsel. Such a statement can identify the issues in dispute and those not in dispute. However, it is not the function of an opening statement to identify the evidence to be called in the defence case, because that is specifically provided for by *Criminal Code* s 619(3).

(c) the joint trial. For example:

> **More than one person is being tried. The separate cases against each of them must be decided solely on evidence admissible against that defendant. Some evidence may be admissible against one and not against the other(s), [or in respect of one charge and not another]. Later, I will give you detailed directions about the evidence in the respective cases.**

Body of Opening Remarks

Note to judges:

These draft opening remarks do not include information about circumstantial evidence.

You may consider it necessary to inform the jury about circumstantial evidence before they hear any evidence; or you may consider it more appropriate to instruct the jury about circumstantial evidence once the evidence has been led, so that your instructions have context.

The following is an example of an introductory instruction on circumstantial evidence if you wish to include such an instruction in your introductory remarks:

Your function is to decide whether the defendant is guilty or not guilty of the charge he faces. That involves considering the facts of the case based on the evidence to

be placed before you in this courtroom. The evidence will be presented to you by way of the oral testimony of witnesses, or via exhibits such as photographs or recordings.

You may find some facts are directly proved by the evidence presented to you.

And it may be that you decide during the course of your deliberations to accept that evidence and, therefore, to accept those facts that are directly proved by it.

It might be something a witness heard or saw, or it might be something depicted in a photograph, or something which you hear on a recording.

In addition to facts which are directly proved by the evidence, you may also draw reasonable inferences or reasonable conclusions from the facts which you find to be established by the evidence.

But whenever you are considering drawing a reasonable inference from facts which you find proved by the evidence, it is important you keep three things in mind:

- First, you may only draw *reasonable* inferences based on the facts you find to be proved by the evidence;
- Secondly, there must be a logical and rational connection between the facts you find and the inferences you draw; and
- Thirdly, if more than one inference is reasonably open, that is, an inference adverse to the defendant – in other words, pointing to his guilt – and an inference in his favour – in other words, pointing to his innocence – you must give the defendant the benefit of the inference in his favour.

Let me give you a relatively benign example of drawing a reasonable inference. If you see someone in Melbourne at 10.00 am one day, and then you see the same person in Brisbane at 5.00 pm that same day, the inference is that they have flown to Brisbane. You don't actually know that they have flown from Melbourne to Brisbane; you didn't see them boarding a flight in Melbourne or disembarking in Brisbane, but you may *reasonably infer* that they have flown based on the facts that you actually know, i.e. seeing them in Melbourne at 10.00 am and then in Brisbane at 5.00 pm. You are able to reasonably draw the *inference* that they flew from Melbourne to Brisbane because the only way to get from Melbourne to Brisbane in a few hours is to fly. So that is an example to inferring something from facts you do know and that you accept.

Introduction

Members of the jury, we will be working together during this trial although, as I will discuss shortly, we have different roles and tasks. My first task is to give you some information about how this trial will unfold, relevant legal principles and what is expected of you.

Being a juror may be entirely new to you. Some of you may have served on a jury before. You have, in any event, seen a film this morning about jury service and

received some printed material about your work as jurors. Some of what I say may sound familiar to you, but we recognise that you are being asked to digest a great deal of material in a short period of time and briefly repeating some of it will, we hope, assist your understanding.

You represent a very important institution in our community – the institution of trial by jury. Over many centuries our legal system has developed to guarantee to any individual charged with a criminal offence the right to have the case against them decided by twelve independent and open-minded members of the community.

In the course of these introductory remarks, I will, as I've mentioned, discuss your role and duty as jurors and the nature of this case.

I will explain in a general way the principles of law that apply in this case. Explaining the law to you, and giving you directions about how to apply it, is my task. My explanations and directions about legal matters are critical to the job you have to do and bear repeating, so as well as hearing something about them now and, possibly, during the trial, you will hear about them in more detail at the end of the trial before you finally retire to consider your verdict.

Introduction of lawyers, defendant(s)

The defendant [X] **is the person sitting in what is called the 'dock'. Don't read anything into the fact that** [X] **is sitting in the dock, with officers either side of him. That is just one of the historical traditions of our criminal law courts, as are our wigs and gowns. Where he is sitting communicates nothing about him. Importantly, it does not affect the fact that, under our law, he is presumed to be innocent until proven guilty.**

The barrister sitting […] is [Y]**, the Crown prosecutor. The barrister sitting […] is** [Z]**, who represents the defendant.**

In a criminal trial, the prosecutor presents the charges in the name of the State but that does not mean that anything the prosecutor says is more persuasive or important than defence counsel's submissions.

You must even-handedly exercise your own judgment about arguments and submissions from both the prosecutor and defence counsel, accepting or

rejecting them upon your evaluation of their merit and, importantly, how they sit with your own findings of fact, based upon the evidence.

Role of judge and jury

Your ultimate role in this case is to decide if the defendant is guilty or not guilty. That will be your decision alone, not mine. But it does involve us working together.

My job is to ensure the trial is conducted fairly, and in accordance with the law, and to explain the principles of law that you must apply to make your decision.

You are the sole judges of the facts in this case. That means that it is you and not me who resolves disputes or differences about matters of fact.

And you are to reach your decisions about the facts only on the basis of the evidence. You must ignore all other considerations. Emotion is to play no part. In particular, you must ignore any feelings of sympathy for, or prejudice against, the defendant or anyone else connected in any way to this trial.

You will make your decision solely on the basis of the evidence, and you alone will decide what evidence to accept, or reject.

The evidence will be what witnesses say from the witness box and any documents or other materials which are admitted during the trial. It is on that evidence – and nothing else – that you will decide if the Crown has proved the defendant's guilt, beyond reasonable doubt. (The statement about the witness box may need to be amended where a child witness's evidence is to be admitted pursuant to *Evidence Act* s 93A and a pre-recording of evidence is to be played during the trial.)

You will be the people deciding on the ultimate question in this case – whether the defendant is guilty or not guilty. And, as I have said, I have no role to play in that decision. So, while you must keep an open mind until all of the evidence has been placed before you, you will appreciate that you need to pay close attention to the evidence as it is being presented to you – from the first witness to the last.

You will need to pay close attention to *how* each witness gives evidence: how a witness presents to you and how they respond to questioning, especially in cross-examination where their factual assertions may be tested or challenged, may help you to decide if they are truthful and reliable (or accurate) witnesses – or, if you accept some of their evidence but not all of it, as you are entitled to do.

My role is to deal with legal matters. Sometimes a legal matter will arise that I can deal with on the spot. You may be familiar with barristers objecting to one another's questions. Often, that is a matter that I can deal with immediately. Sometimes though, I will not be able to deal with a legal matter on the spot and I will need to hear submissions from the lawyers about it.

If a legal matter of that kind arises, I am likely to ask you to retire to your jury room while I deal with it. I will do this to ensure that your mind is not cluttered by information which is not evidence. Your job is hard enough without exposing you to information which is unnecessary to it.

So if this happens, I ask for your patience and understanding; the lawyers and I will certainly try to minimise any time you have to spend away while we resolve questions like that. To limit your inconvenience, I may extend your morning tea time or ask you to take an early lunch break.

Burden and standard of proof

Now to some principles of law.

There are two fundamental principles which apply to every criminal trial. The first is that a defendant is presumed innocent. The second is that a jury may not find a defendant guilty of a criminal offence unless and until the prosecution has satisfied the jury that the defendant is guilty of the offence beyond a reasonable doubt.

A defendant, who is *presumed* innocent, does not have to prove *anything*, and is under no obligation to produce any evidence at any stage. They can give evidence and they can call evidence in their case – but they are not obliged to.

In reaching your verdict you must consider all of the evidence placed before you – whether it is placed before you by the prosecution or by the defendant. In reaching your verdict, you will ask yourself whether, on the whole of the evidence, the prosecution has satisfied you of the guilt of the defendant beyond a reasonable doubt. The defendant is entitled by law to the benefit of any reasonable doubt that may be left in your mind at the end of your deliberations. So it is important, and logical, that you keep an open mind as the case progresses.

Keeping deliberations confidential; no independent investigation

As I have said, you must pay careful attention to the evidence, and ignore anything you may hear or read about the case out of court. You may discuss the case amongst yourselves but only amongst yourselves. But you must not discuss it with anyone else and this includes using electronic means.

The reason is this: you are the 12 people who are to determine the outcome of this trial; and solely on the evidence presented here in the courtroom. Do not take the risk of any external influence on your minds. So do not speak to anyone who is not a member of this jury about the case. If anyone else attempts to talk to you about this trial, try to discourage them. Do not tell anyone else who is on this jury, but mention the matter to the bailiff when you get back to court so that it can be brought to my attention. In the same way, if, while you are outside this courtroom, you inadvertently overhear something about this trial, do not tell anyone else on the jury but tell the bailiff so that that can also be brought to my attention. And do not attempt to investigate it or to inquire about anyone involved in the case yourselves.[1]

It is unjust for you to act on information which is not in evidence and the prosecution and defence do not know you are acting on.

You will appreciate that information in the public arena is not always accurate. It may well be fake news. Or it may be information introduced into the public domain by someone who has a certain agenda. And the prosecution and the defence have not had the opportunity to test it. Also private inquiries may lead to inaccuracies, for example, a scene may well have changed dramatically over time.

There have been trials that have been aborted, or convictions quashed and re-trials ordered, because a jury has made private investigations. So do not view or visit the locations where the events of the case took place. Do not consult any source such as a newspaper, dictionary, reference manual or the internet for information about anyone or anything related to this case. Do not do your own

[1] This warning might be repeated at the end of the first day.

research on any matter of law.[2] If any member of the jury refers to information or matters not in evidence, please inform the Bailiff. [3]

If you have a question about the law or the evidence or need additional information about anything, I will attempt to assist you. Reduce your request to writing - pass it on to the bailiff. S/he will give it to me. I will discuss your request with the lawyers and respond to it as soon as possible.

The charge

Let me explain now the charge/s the defendant faces.

It is alleged by the Crown that [defendant's name] **committed the offence of** [details of offence]**.**

[Where appropriate**: Details of the charge appear in a document which my Associate will distribute to each of you.** (This may occur during the prosecution opening if the prosecutor has prepared the document. Canvass this issue with counsel before the judge's opening remarks.) **It contains some legal language which I will explain to you later.]**

The defendant has pleaded 'not guilty' to that charge. You have been given the responsibility of deciding or judging whether the defendant is guilty, or not guilty. You will do that by what is called 'returning a verdict' after the trial. Your final verdict will be your judgment as to whether the defendant is guilty or not guilty.

Criminal charges have elements or parts.

To find the defendant guilty of a charge, the Crown must prove every element of the offence beyond a reasonable doubt.

---

[2] Where there has been pre-trial publicity, further emphasis may be required both at the beginning of the trial and in the summing-up: *R v Bellino & Conte* (1992) 59 A Crim R 322, 343; *R v Glennon* (1992) 173 CLR 592, 603-604, 616, 624. The following additional direction might be given in such a case:

> "**You must not use any aid, such as a textbook, to conduct research, and except in this courtroom you must not in any way seek or receive information about questions that arise in the trial or about the accused, or about any witnesses or the deceased, for example, by conducting research using the internet, or by communicating with someone by phone, email or Twitter, through any blog or website, including social networking websites such as Facebook, LinkedIn and YouTube.**"

The directions given by trial judges should underline unequivocally the collective responsibility of jurors for their own conduct: *R v Thompson* [2011] 1 WLR 200.

[3] In some cases a further warning may be given: "**Apart from the issue of unfairness, it is also a criminal offence to conduct your own inquiries about a defendant and I would not want to see any of you charged with an offence**": *Jury Act* 1995 (Qld), s 69A(1).

The charge of [XX] **has the following elements …**

[Explain the charge**]**

It is likely that the critical issues for you in this case will be [outline issues**].**

Where there are multiple charges:

You will see that the defendant has been charged with a number of offences. They are all being tried together. You will be required to consider each charge separately, and return a verdict on each of them. For the moment, you should know that your verdicts don't have to be the same on every charge. I will explain more about your verdicts later.

You must not be prejudiced against the defendant because he/she is facing a number of charges. All defendants are presumed innocent and treated as being not guilty of any offence unless and until they are proved guilty through your evaluation of all the evidence in the case and the application of the law as I explain it to you.

The charges are being tried together as a matter of convenience and also because the Crown alleges there is some connection between them; but that still means that you must consider each charge separately – and the Crown has to prove each of them beyond reasonable doubt.

Trial Procedure

Shortly, the prosecutor will give you an outline of the case, outlining the evidence the prosecution relies upon.

[If there is to be a defence opening at the start of the trial, add: **Defence counsel will then respond, and that should alert you to the factual disputes you will have to decide.]**

Then you will hear evidence from the prosecution witnesses. The prosecutor will call them one by one. When the prosecutor has finished questioning a witness, defence counsel can – but they do not have to – cross-examine the witness. Sometimes, after cross-examination, the prosecution may ask a few more questions.

When all the prosecution witnesses are finished, the prosecution will close their case. The defendant will be asked if he/she intends to give evidence or call

witnesses. Remember that a defendant has no obligation to give, or call, evidence but he/she may choose to.

If that happens, the procedure will be the same as for the prosecution witnesses. The witnesses will be called by defence counsel and questioned. They may be cross-examined by the prosecution and, if there is cross-examination, they may be re-examined by defence counsel.

Writing materials will be made available to you so that you can take notes if you wish. However, be careful not to let detailed note-keeping distract you from hearing and observing the witnesses. Any notes that you take must remain in the court precincts and must not be taken home. The Bailiff will ensure they remain confidential by having them destroyed at the end of the trial.

After all of the evidence has been given, counsel will address you and make submissions and present arguments to you about the evidence you have heard and seen.

Finally, I will 'sum up' the case to you, reminding you of the law that you have to apply during your deliberations and the issues you will need to consider. Then, you will retire to consider your verdict(s).

Daily sitting hours are 10.00 am until 1.00 pm, and 2.30 to 4.30 pm. There will be a break for morning tea about 11.30 am. At 1.00 pm we break for lunch until 2.30 pm. It may sound relaxed compared to your normal working day but you will find that paying very close attention to the evidence, as you must to do your job fairly, is tiring.

You will go home each evening; we no longer lock up juries, other than in exceptional circumstances. This is so even after you start your deliberations.

When you have reached your verdict, you will be brought back into court and your speaker will state that verdict, on behalf of all of you.

Assistance

If you experience a problem related to this trial, please let me know. I will help you as much as I can. If you wish to communicate with me while you are here in the courtroom, write the question down and ask the bailiff to give it to me, or attract my or the bailiff's attention so that the matter can be addressed.

If the problem arises when you are not in the courtroom, hand the bailiff a note of it, or else tell the bailiff that there is a matter you wish to raise with me. I will then decide how to deal with it. But do not disclose the voting numbers in favour of conviction or acquittal in any such communication.[4]

As you can see, these proceedings are being recorded. It is not the practice in Queensland for a jury to be supplied with a copy of the transcript of the evidence so recorded. If you need to be reminded of what any of the witnesses said, I can arrange for it to be read back to you. Just give the Bailiff a note identifying the evidence.[5]

Reserve jurors

I want to explain the role of our reserve jurors. The twelve of you who were first chosen are the jury in this case; but we also have […] reserve jurors. This is anticipated to be a long trial and, should it happen for whatever reason that any juror can't complete their jury service, they can be replaced. So our reserve jurors will be with the jury the whole time and must perform the same important work but, when the time comes for the jury to retire and consider the verdict, they may find themselves excused. I appreciate that may be frustrating (or, of course, a relief) but it is a precaution that, in light of the possible length of this trial and past experience, it is wise to take.

We will start the trial now. You will understand from what I have said that a fair trial – one which is fair to both sides – requires that you pay close attention to the evidence, keep an open mind, and weigh all the evidence in an unbiased and unprejudiced and rational way. It is an important and responsible task which I am confident that you will treat with the utmost seriousness.

Mr/Ms Prosecutor …

---

4 Jury deliberations should remain confidential: *Smith v The Queen* (2015) 255 CLR 161; [2015] HCA 27 at [32] and [53].

5 *R v Rope* [2010] QCA 194. If the jury require reminding of the evidence, or parts of it, or elucidation of some questions of fact which the record of the trial could provide, it should be given to them.

Trial Procedure

Commentary

This part sets out the usual procedure for the commencement of a criminal trial.

It rests on the proposition that the brochures and video material provided to and shown to jurors will, together with the judge's opening remarks, sufficiently inform jurors about the nature of their role and what they can and cannot do.

However, there may be cases where, because of publicity, media interest, concern about jury interference or the like, a judge may consider giving the jury a document to be referred to during the judge's opening remarks which deals with some of the following:

- The respective role of judge and juror
- The nature of a criminal trial
- The onus and standard of proof
- The importance of not discussing the trial with any person outside the jury
- That jurors should discuss the case only in the jury room, and with all jurors
- The duty of jurors to bring irregularities in the conduct of the trial to the judge's attention
- Reporting any jury/juror's misconduct to the judge
- The prohibition against independent enquiry and investigation, with particular emphasis upon the use of the Internet
- The need to ignore media reporting
- The principal issues in the case

Even if there are no particular concerns about the misunderstanding of the jury's role or jury interference, a judge may consider it appropriate to give the jury a document to accompany their opening remarks which might include (for example) the fundamental principles which apply to a criminal trial and the elements of a defence or any of the matters listed above.

If a judge wishes to give a jury a document during their opening remarks, it is prudent for the judge to show the document to counsel before the opening and invite submissions on it.

Opening the court

1. Bailiff opens court.

2. Judge deals with any renewed applications for excusal:

    - The associate hands the juror's card to the judge and the affected panellist comes to the bench to discuss the matter.

    - The court microphone should be muted whilst the issue is discussed with the juror.

    - If excused, the associate writes the name, number and period of excusal in the notebook and on the jury form and removes the panellist's card.

3. Prosecutor and defence counsel announce their appearances.

4. Interpreter sworn, if necessary.

5. Prosecutor mentions indictment – either by presenting it or advising that it is already before the court (or, by asking for its return for the purposes of amendment).

6. Associate hands indictment to judge for perusal.

Arraignment

7. Judge says **Arraign the defendant** and hands indictment to associate, who arraigns in accordance with the *Criminal Code* s 597C and the *Criminal Practice Rules* 1999 r 46.

8. Section 597C(2) permits a plea to any number of counts to be taken, with consent, at one and the same time on the basis that the plea to one will be treated as a plea to any number of similar counts on the same indictment. Subject to that, the associate adopts the following procedure:

9. Single defendant

    Associate: (*Name), you are charged that on … (date) … at … (place) …, you … (continue from indictment).*

    (Name), how do you plead, guilty or not guilty?

    Defendant: *Not guilty.* (Or otherwise as the case may be, for example, a plea of double jeopardy or which challenges the jurisdiction).

    The associate turns to the judge and repeats the plea given by the defendant, e.g. *Not guilty, Your Honour.*

10. If there is more than one count, the associate will continue with:

    You further stand charged, that … (continue from indictment)

    (Name), how do you plead, guilty or not guilty?

11. If there are alternative charges, after reading the first charge and taking the plea to that charge, state:

    In the alternative you are charged that … (continue from indictment)

    (Name), how do you plead, guilty or not guilty?

12. If there is more than one alternative charge, continue with:

    Further in the alternative, you are charged that … (continue from indictment)

13. Where the prosecution refuses to accept a plea to a lesser or alternative offence, the Court may either:

(a) stand down the count the subject of the plea, with the prosecution proceeding only on the principal count, and if an acquittal results, then accept the plea on the lesser charge; or

(b) leave both counts to the jury, directing on the use which may be made of the guilty plea as an admission: see *R v Rogers* [2013] QCA 52 and *Collins v The Queen; ex parte A-G* [1996] 1 Qd R 631 at 640.

14. If there is more than one defendant, the associate goes through the whole indictment for each (taking counts individually) in turn.

15. Where on arraignment a defendant fails to plead to the indictment, his/her silence usually operates as a plea of not guilty: *Criminal Code* s 605.

Jury empanelment

16. Judge directs associate to empanel the jury and inform the defendant of his or her right to challenge.

17. Associate addresses the defendant in accordance with *Criminal Practice Rules* 1999 r 47:

> *(Name/s), these representatives of the community whom you will now hear called may become the jurors who are to decide between the Prosecution and you on your trial.*
>
> *If you wish to challenge them, or any of them, you, or your representative, must do so before the bailiff begins to recite the words of the oath or affirmation.*

18. Associate addresses panel members: "*Members of the jury, please answer to your names*".

19. Associate draws cards in accordance with the following procedure:

- The associate places the jury cards of eligible jurors into the barrel.
- After spinning the barrel, the associate takes out a card.
- The associate calls the number, pauses, then calls the name.
- If a juror is challenged or stood by (*see below*), the associate puts the card for the juror aside in the appropriate pile.
- If a juror is sworn, the associate notes the number in his/her notebook and gives the card to the judge.
- When 12 jurors are empanelled, the associate sits down and leaves the cards alone.

Challenges to jury members

20. In a criminal trial, the prosecution and defence are entitled to eight peremptory challenges.

21. If there are two or more defendants, each defendant is entitled to the number of peremptory challenges allowed to the defence (i.e. 8 each – if 2 defendants – 16 in total). The prosecution is entitled to an equal number of peremptory challenges as are available to all defendants (i.e. 16 for 2 defendants) (*Jury Act* s 42(5)).

22. If reserve jurors are required, the prosecution and defence are entitled to:

    (a) for 1 or 2 reserve jurors: 1 additional peremptory challenge;

    (b) for 3 reserve jurors: 2 additional peremptory challenges.

23. For the rules governing challenges for cause, see *Jury Act* 1995 ss 43, 47.

24. It is necessary for an effective challenge (whether by the defendant or by his/her counsel) that the challenge be audible to the court: *R v Shambayati* [2016] QCA 100 at [16]. See also *Jury Act* 1995 ss 39, 41.

Jury impartiality; judge remarks to jury after empanelling

25. After the jury is empanelled, and before the balance of panel is released, the judge says:

> **Jury members, and those of you who have not been selected, may I have your attention?**
>
> **The defendant in this case is** [name of defendant]. **He/She is charged with** [Describe offence, including name of complainant].
>
> **The Crown prosecutor will now read out the names of all the prosecution witnesses. Please listen to see if you recognise any of them.**

26. After names have been read out by Crown prosecutor:

> **You will appreciate how important it is that all members of a jury are impartial and that our community sees that you are impartial. You may know something about the defendant, or a witness, or somebody connected with them and feel that your knowledge means that you could not be completely impartial or that others might suspect that you are not impartial.**
>
> **Or, there may be some other reason why you feel you could not be completely impartial.** (Note: The nature of the alleged offence might affect a juror's ability to be completely impartial – an obvious example is alleged sexual offences committed upon children. In such a case, a trial judge may specifically refer to the nature of the offence in the course of this inquiry.)
>
> **It is important that anything which might adversely reflect on the fairness of this trial is cleared away before the trial starts. If you are concerned about**

anything like this – or, even if you are uncertain about something that you know or feel which might affect your impartiality – would you tell me now?

27. The judge may discharge a juror if there is reason to doubt their impartiality. The procedure is as follows:

- A juror who signifies that they may have a problem should be invited to approach the bench.
- The judge will decide whether the juror should be discharged.
- The court microphone should be muted for the conversation between judge and juror. The reason may be private and embarrassing to the juror (e.g. as a victim of a sexual offence). As such it should not be discussed with counsel, but the juror should be discharged.
- If that occurs, the issue should be raised with counsel in court at the first available opportunity in the absence of the jury and the jury panel.
- If the juror discloses that he/she knows a witness or party, submissions should be sought from counsel as to whether the juror should be discharged.
- If a substitute juror is sworn, that juror should be asked if they heard and understood the enquiry concerning impartiality.

Defendant placed in the charge of the jury

28. After jury selection is completed, the judge says to the associate:

Place the defendant in the charge of the jury.

29. Associate to jury:

Members of the jury, please answer to your names. [Read out the jurors' names in the order sworn in].

Members of the jury, (Name/s) *is/are charged that on* … (date)… *at* … (place)… *he/she/they* [read the short form of the charge from the coversheet].

To this/these charge/s he/she/they say/s that he/she/they is/are not guilty. You are the jurors appointed according to law to say whether he/she/they is/are guilty or not guilty of the charge. It is your duty to pay attention to the evidence and say whether he/she/they is/are guilty or not guilty. Members of the jury, as early as is convenient, you must choose a person to speak on your behalf. You may change the speaker during the trial and any of you is free to speak.

Post empanelment

30. Judge asks bailiff to: **Make the proclamation as to witnesses.**

31. Judge asks associate to: **Swear the bailiff**.

32. Judge's further remarks to jury:

33. Selecting a speaker/foreperson

> **Although you have just heard my Associate say that you should select a jury speaker 'as soon as convenient' that does not have to happen immediately. You will find a brochure about jury service in the jury room and in it there are some notes about the speaker's (sometimes called 'the foreperson's') role.**
>
> **Their job will include communicating with me about any questions or concerns you may have during the trial and, at the end of the trial, telling the court what your verdict is. As the brochure mentions, your speaker may also play a useful part in guiding your discussions in the jury room.**
>
> **The choice of speaker you make early in the trial is not final. You can, as a jury, change your speaker at any time. And your speaker is not your leader, or boss, and has no more rights or powers than any of you. You are all equal; it is just that your speaker is given some extra tasks.**

34. Short adjournment after empanelling

> **Before the trial starts, we will have a short break of about 10 minutes. You may let family or work associates know that you have been selected for this jury and the duration of the trial. Although we cannot give any guarantees, the trial is expected to last about** [expected duration of the trial]. **During this break, you'll be taken to your jury room where you can meet your fellow jurors, and settle in.**
>
> **When you return, I will tell you some things about your role in this trial as jurors, and explain the trial procedure.**

Judge's opening remarks

35. For the relevant statutory requirements and a sample body of opening remarks, see Direction No 4A 'Judge's Opening Remarks'.

Procedure during the trial

36. At the conclusion of the prosecution case, the associate[1] addresses the defendant (or, where more than one, the first named on the indictment) as follows:[2]

---

1 Or the judge, if the judge prefers.

2 *Criminal Practice Rules* 1999 r 50.

> *The prosecution having closed its case against you, I must ask you if you intend to adduce evidence in your defence. This means you may give evidence yourself, call witness/es, or produce evidence. You may do all or any of those things, or none of them.*

37. If the first defendant adduces evidence,[3] the associate calls upon the next defendant named in the indictment at the end of that defendant's case, and so on.

38. After all the evidence has been adduced (and it has been established that the prosecution proposes not to adduce rebuttal evidence),[4] it is advisable to discuss with the lawyers, in the absence of the jury, any special directions likely to be required in the summing-up and the nature of the cases the prosecution and the defence propose to develop in address. The order of addresses is prescribed by *Criminal Code* s 619.[5]

39. Before the jury retires to consider its verdict, the bailiff is sworn in as the jury keeper by the associate, if that has not already occurred.

Appellate Authority on the Role of a Prosecutor and the Limits of a Closing Address

Role of the prosecutor

40. A prosecutor's closing address may be robust and firm but it must be fair.

41. A prosecutor's address does not need to be staid and the cases permit "flourishes" but they must not inflame a jury's emotion or prejudices.

42. The unique role of a prosecutor was summarised by McMurdo P (with whom Morrison JA and Atkinson J agreed) in *R v Gathercole* (at [49], citations omitted):[6]

> It is well established that in conducting an Australian criminal trial, which is both accusatorial and adversarial, the prosecutor has a duty not to obtain a conviction at any cost but to act as a minister of justice. The prosecutor's role is to place before the jury the evidence the prosecution considers credible and to make firm and fair submissions consistent with that evidence but without any consideration for winning or losing. The central principle is that the prosecution case must be presented with fairness to the accused. Unfairness may arise from the manner in which the prosecutor addresses the jury.[7]

---

3 Ordinarily, the order of cross-examination follows the order of the names of the defendants on the indictment.

4 See *Kern v The Queen* [1986] 2 Qd R 209, 211-212; *R v Chin* (1985) 157 CLR 671; *R v Soma* (2001) 122 A Crim R 537.

5 Where the defendant is undefended and does not adduce evidence, the prosecutor has no right of reply unless he/she is a Crown law officer: *Criminal Code* s 619.

6 [2016] QCA 336. Note – the seminal statement of the responsibilities of a Crown Prosecutor in a criminal trial appears in *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 (Deane J).

7 A longer statement of the role of a prosecutor is set out in *R v Smith* (2007) 179 A Crim R 453 at [38] by McMurdo P, with whom Keane JA and Daubney J agreed.

The limits of trial advocacy: closing address

43. The New South Wales Court of Criminal Appeal, in *Livermore v The Queen*,[8] identified a number of matters in a prosecutor's address which can lead to a miscarriage of justice (at [31]):

    (i) A submission to the jury based on material which is not in evidence.

    (ii) Intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury.

    (iii) Comments which belittle or ridicule any part of an accused's case.

    (iv) Impugning the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.

    (v) Conveying to the jury the Crown Prosecutor's personal opinions.

Illustrative cases

Submissions based on material not in evidence and personal opinions

44. In *R v Callaghan*,[9] the Court of Appeal held that:

> …it is not appropriate that Crown Prosecutors use the dignity of their office in order to 'tell' a jury something that is not in evidence. It should not be forgotten that whether the address is to a judge or to a jury, counsel's role is to make submissions, not express personal opinions or enter the fray as a contestant.

Intemperate or inflammatory language

45. In *R v Smith*,[10] McMurdo P (with whom Keane JA and Daubney J agreed) said (at [39]-[40]):

> In determining whether to allow an appeal on the basis of an inflammatory jury address by a prosecutor, the critical question is not whether the prosecutor's remarks were improper but whether they may have improperly influenced the jury so as to cause a miscarriage of justice: *R v M* and *R v McCullough*. Central to that question is the underlying right of an accused person to a fair trial according to law…
>
> An intemperate and improper prosecution address can result in a miscarriage of justice and lead to the setting aside of a conviction; it is important a prosecutor's jury address does not distract from the true issues in the trial: *R v Freer and Weekes*. (Citations omitted).

Comments which belittle or ridicule any part of the accused's case

46. While putting the Crown case to the jury, advocates must not ridicule an accused's case.

---

8 [2006] NSWCCA 334.

9 (1993) 70 A Crim R 350, 356; [1993] QCA 419.

10 (2007) 179 A Crim R 453; [2007] QCA 447.

47. In *Hughes v The Queen*,[11] the New South Wales Court of Criminal Appeal considered 27 comments from the prosecutor's final address which the applicant submitted were inappropriate.

48. Phrases that the Court held were acceptable included:

- characterising the evidence of an accused an "inherently unreliable";
- submitting that the accused was attempting to "desperately and artificially" distance himself from the complaints;
- that he had "got away with his crimes for years";
- that his evidence was "thoroughly unsatisfactory"; and
- submitting that the evidence of the complainants was "utterly convincing" and "disturbing".

49. The Court held the following remarks were not appropriate:

- the use of the words "depravity", "horrible" and "haunting" – for being loaded with emotional connotations;
- submitting that a submission by the accused's counsel was "actually just there to distract you";
- describing the evidence of the accused as "a complete load of rubbish" – this was belittling of him; and
- referring to the accused being taken "off script".

Duty not to undermine the judge's ruling

50. Counsel must not undermine a judge's ruling in a closing address.

51. In *R v Lewis*,[12] Macrossan CJ said (at [627]):

> Counsel should not suggest or endeavour to hint to a jury that the trial judge's rulings on law are wrong or that they disagree with them…

52. This sentiment was also emphasised by Pincus JA (at [646]):

> It is indeed manifest that every member of the Bar must absolutely accept the judge's directions to the jury on the law, from which it follows that there is an obligation not to put to the jury arguments against those directions."

[11] (2015) 93 NSWLR 474; [2015] NSWCCA 330.

[12] [1994] 1 Qd R 613.

Other relevant cases where a conviction has been set aside because of a prosecutor's improper final address:

53. *R v Smith* (2007) 179 A Crim R 453.[13] Impugning the credit of crown witnesses (security guards), where those witnesses were not afforded an opportunity to respond to the attack on their credit, amounted to a miscarriage of justice.

54. *R v Gathercole* [2016] QCA 336: The appellant had been convicted of murder. The only issue was the appellant's intention. He accepted that he had unlawfully killed the deceased. The prosecutor, in his closing address, relied upon the accused's mental health vulnerability in his arguments about his intention. The accused had not obtained treatment for his mental health issues, had stopped taking his medication and had previously attempted suicide. The prosecutor submitted to the jury that the fact that the appellant had previously attempted suicide reflected, in effect, the little value he placed on human life – suggesting that that was relevant to whether or not he formed an intention to kill.

    The appellant argued (at [42]) that:

    > …There was no logical connection between the despair and depression which may have driven the appellant to attempt suicide in the past and his state of mind when he killed the deceased. It was not evidence relevant to his intention to kill or do grievous bodily harm to the deceased. The prosecutor took unfair advantage of the evidence of the appellant's vulnerable mental condition to make illegitimate and prejudicial submissions to the jury. There was a risk that the jury may have been wrongly persuaded by them.

    The Court agreed – concluding that the prosecutor's submissions in relation to the appellant's history of depression were "…illogical, unfair and concerning as they encouraged the jury to follow an impermissible path of reasoning."[14]

55. *R v PBC* [2019] QCA 28: The appellant was convicted of indecent treatment and rape. At trial he argued that the alleged conduct was fabricated because there were similarities between the complainant's description of the alleged conduct and the complainant's description of consensual sexual activity with a person other than the appellant.

    In addressing the jury, the prosecutor stated that:

    - the similarities were the result of the "sexualisation" of the complainant by the appellant;
    - the conduct of the appellant in relation to the consensual sexual activity had a "very plausible explanation"; and
    - the jury could infer that the complainant "had applied her experience of sex with the appellant in choosing 'the same position'" during the consensual sexual activity. That is, the consensual sex was said to be probative of the appellant's guilt.

[13] [2007] QCA 447.

[14] At [52].

The Court said that "[t]he prosecutor's argument was more serious than an 'advocate's flourish';[15] there was a real risk that this argument wrongly influenced the verdict, resulting in a miscarriage of justice."[16]

Adjournment of trial

56. As a general rule once a jury has been empanelled and the hearing of evidence has commenced it is most undesirable that there should be any prolonged adjournment of a criminal trial: see Gibbs J in *R v Hally* [1962] Qd R 214 at 220.

57. However, as noted in *R v Miller* (2007) 177 A Crim R 528 at [3] a trial judge has power to adjourn a criminal trial at any time after the accused has been put in charge of the jury, at least up until the jury retires to consider its verdict.

58. There may be many causes for such an adjournment. Illness, unavailability of a witness, and weather conditions not permitting a juror to get to the court are but a few examples of why such an adjournment may become necessary.

59. The length of the adjournment must however not be so long as to prejudice the fair trial of the accused.

60. Whether an adjournment prejudices the fair trial will be a question to be answered in the context of each case. A lengthy adjournment may have the effect of altering the essential accusatory nature of a criminal trial, with its focus on oral evidence and the impression gained of the witnesses, particularly where credibility features prominently and may have the effect of disrupting the integrity of the criminal trial process so that a fair trial cannot be ensured: *R v Miller* (2007) 177 A Crim R 528.

Discharging a juror

61. Section 33 *Criminal Code* enshrines the common law principle that conviction for an offence should be the decision of a jury of 12. However, that principle is qualified by s 56 *Jury Act* pursuant to which a judge may discharge a juror without discharging the whole jury if in the judge's opinion the juror becomes incapable of continuing to act as a juror.

62. The circumstances calling for the exercise of the discretion may vary. For a discussion of the procedures to be followed see: *R v Robert* [2005] 1 Qd R 408, *R v PAR* [2015] 1 Qd R 15. Disclosure of the jury's interim votes or voting pattern is not necessary to enable a judge to reach a view on whether to discharge the jury under *Jury Act* s 60(1).[17]

63. The judge has a discretion under *Jury Act* s 57 to direct (where there is no reserve juror) that the trial continue with the remaining 11 jurors where a juror was discharged under s 56. Nevertheless, the exercise of that power has to be balanced against the fundamental right of an accused person to a trial by a jury of 12 persons: *R v Hutchings* [2007] 1 Qd R 25; *R v Shaw* (2007) 48 MVR 245.

64. It is plainly desirable that a judge exercising the powers to discharge a juror and the power to proceed with a jury of less than 12 members does so in unmistakeable terms: *Wu v The Queen* (1999) 199 CLR 99 (at 103). Ordinarily that will be made by the judge making two separate orders.

---

15 cf *R v Smith* (2007) 179 A Crim R 453 at 464.

16 At [38].

17 *Smith v The Queen* (2015) 255 CLR 161; [2015] HCA 27 at [49].

65. The exercise of the discretion to proceed with less than 12 jurors is to be approached consistently with the principles enunciated in *Wu* with the reasons for the exercise of the discretion clearly identified. Guiding considerations are the fair and lawful trial of the defendant with relevant considerations including the primary right to be tried by a jury of 12, the burden on the defendant of delay in the trial, the consequences of delay to others, including witnesses, the expense to the community and the nature of the charge. See also *R v Hutchings* [2007] 1 Qd R 25; *R v Shaw* (2007) 48 MVR 245 and *R v Walters* [2007] QCA 140.

Jury Notes and Aids

66. Any jury notes should be marked for identification for the purposes of the record.

67. In *R v Lorraway* [2007] QCA 142, the Court of Appeal stated that trial judges who receive a jury's written request for redirection should ordinarily read it into the trial record and then mark it for identification, directing that it be placed on and remain on the court file until the expiry of the appeal period or the determination of any appeal.

68. Similarly, a copy of any jury aids or documents given to the jury to assist them should be marked for identification and directed to be placed on and remain on the court file: see *R v Beattie* (2008) 188 A Crim R 542 at [31].

69. Where a juror's note raises an issue or issues that could be material to or affect the jury's consideration of the case, the judge should reconvene the court in the presence of the defendant and the prosecutor, initially in the absence of the jury. The judge should then read into the record the note or that part of the note that was material to or related to the jury's consideration of the case.

70. If it concerns information confidential to the jury room such as voting figures, that part of the note should not be disclosed in open court.[18] The judge should mark the note as an exhibit for identification purposes and place it on the court file. If it contains confidential information such as voting figures, it should be placed in a sealed envelope and marked not to be opened without an order from a judge before being placed on the court file. The judge should then invite the parties to make submissions as to the appropriate course to be taken. Having informed the parties of the judge's decision as to the appropriate course to take the judge should have the jury return to the court room. The judge should then read the pertinent part of the juror's note to the jury and offer immediate assistance on the particular topic of concern.[19]

71. An individual juror may ask a question of the judge directly.[20]

Separation of Jury

72. Pursuant to *Jury Act* 1995 s 53(7)(a) (commencement 23 October 2008), after the jury has retired to consider its verdict, the judge may allow the jury to separate or an individual juror to separate from the jury, if the judge considers that allowing the jury or juror to separate would not prejudice a fair trial.

73. Section 53(7)(b) provides that the judge may impose conditions to be complied with by the jurors or juror. Suggested directions are:

---

[18] *R v Millar (No 2)* [2013] QCA 29 at [27].

[19] *R v Kashani-Malaki* [2010] QCA 222.

[20] Ibid.

You are now in the process of deliberating on your verdict. I am going to allow you to separate at this point. [Consideration might be given to imposing the following conditions]**:**

1. **Do not discuss the trial with anyone outside the jury.**

2. **Do not conduct any inquiries or independent research about the matters the subject of the trial.**

3. **Ignore any press reports or anything else you might hear about the trial.**

4. **Report to the judge through the Bailiff any approaches by others outside the jury in relation to the trial.**

5. **Do not conduct any further deliberations on your verdict until you are all reconvened together.**

74. If a juror is permitted to separate for any significant period, the judge should consider whether or not the jury's deliberations should be suspended until that juror returns: (*R v Walters* [2007] QCA 140).

Verdict

75. The amendments to the *Jury Act* 1995 make provision for the taking of majority verdicts in certain cases and circumstances.[21]

76. The judge, having ascertained from the bailiff in open court that there is a verdict, invites the bailiff to bring in the jury. The jury lines up in front of the jury box, usually with the speaker at the end nearest the jury room door.

77. After the bailiff reports to the judge that the jury is all present, the associate takes the verdict from the jury.[22]

78. The judge will then thank and discharge the jury, usually inviting the jurors to remain in court if they so wish or, if they prefer, to disperse.

---

[21] See Direction No 52A on Majority Verdicts.

[22] The associate asks: "*Members of the jury, are you agreed upon your verdict/s".*

Answer: *"Yes".*

Associate then asks: "*Do you find the defendant* (naming him or her where there is more than one) *guilty or not guilty of* (describing the offence) (and doing this for each count)."

The speaker will say "*guilty or not guilty*".

The associate, for each count, repeats the verdict to the judge. After each verdict is reported to the judge, the associate will say to the jury: *"So says your speaker, so say you all?"* (for each count) and all members of the jury answer in the affirmative to signify that the verdict announced by the speaker is the verdict of all. See further the section on "Delivering the verdict" in the "General Summing Up Directions", No 24. The judge's associate should have regard to the Associates' Manual on taking a verdict.

Conviction and sentence

79. If the verdict[23] is guilty, the judge tells the associate to: **Call on him/her**.[24]

80. For sentence procedure, see Sentencing Benchbook.

Procedure after an acquittal

81. The judge will say to the defendant:

> **[Name]… you have been found not guilty of the charge(s) of …[here summarily describe the charges]… You are discharged.**

Orders for return of exhibits

82. The judge should make any orders appropriate for the custody or disposal of any exhibits tendered during the trial.[25] For example, an order for the return of the exhibit to the party who produced it at the conclusion of the appeal period, if no appeal is lodged.

83. A Court giving its final decision on an appeal may make the orders it considers appropriate about the return of an exhibit used in the appeal.[26]

---

[23] The procedure for a change to a plea of guilty during the trial may be adapted accordingly; and see *Criminal Code* s 631A.

[24] This is the Allocutus. To call on "the prisoner", though hallowed by usage, has some potential to seem to prejudge the punishment; cf *R v Williams* [2001] 1 Qd R 212 at 218.

The associate calls upon the defendant by saying: (see *Criminal Practice Rules* 1999 r 51): "… (Full name)…, *you have been convicted of* … (state the offence charged and the words of the indictment or by stating the heading of the schedule form for the offence)… *Do you have anything to say as to why sentence should not be passed on you?"* When represented the defendant will usually say "*No*". In such circumstances, the judge may care to add, addressing the defendant, "**I will hear from your counsel**".

[25] *Criminal Practice Rules* 1999 r 55.

[26] Ibid r 100.

Unrepresented Defendant

Legislation

Criminal Code s 619
Criminal Practice Rules 1999 r 50

Commentary

A self-represented defendant must be given sufficient information to enable them to have a fair trial: *MacPherson v The Queen* (1981) 147 CLR 512.

This can extend to advising a defendant of their right to a voir dire, and the advantages and disadvantages: *Foster v The Queen* (1982) 38 ALR 599. There is authority that it may also extend to advising the defendant of any fundamental procedure, or right, which could be advantageous to their defence: *Isherwood v Tasmania* (2010) 20 Tas R 375 at 391; *Andelman v The Queen* (2013) 38 VR 659 at 678.

Special care is required where a co-defendant is represented*: Bellino & Conte v The Queen* [1993] 1 Qd R 521; and see *R v Bell* [2004] QCA 219.

NB:

1. An accused cannot personally cross-examine children under 16, intellectually impaired witnesses, or the victim of a sexual or violent offence: see sections 21L to 21S of the *Evidence Act* 1977;

2. Where the accused is unrepresented and does not adduce evidence, the crown prosecutor (other than the Director) has no right to a final address*: Criminal Code* s 619; *R v W* [1997] QCA 255.

Judge's remarks to defendant

Before jury panel brought into courtroom

> **You have been charged with … and you are here to be tried by a jury on that charge. There are essential elements to that charge which the prosecution must prove beyond reasonable doubt** [detail elements of offence]**.**
>
> **In a criminal trial the burden of proving that you are guilty is placed squarely on the prosecution. That burden rests upon the prosecution in respect of every essential fact that makes up the offence with which you have been charged. There is no obligation whatsoever upon you to prove any fact or issue that is in dispute. You do not have any obligation to call any evidence, or to prove anything.**
>
> **In a criminal trial the judge and the jury have different roles. The jury is the sole judge of the facts; all disputes and differences about matters of fact in the case will be decided by the jury, and not me. Generally, that means that it is entirely up to the jury to decide what evidence they accept, and what they do not accept. I am**

not involved in making decisions about the facts; I am here to be the judge of the law which means that, during the trial, I am required to ensure that all the rules of procedure and evidence are followed and to explain, to the jury, the legal principles which apply to the case. I will give them directions about those principles, and how they should be applied to the issues of fact they have to decide, at the end of the case before they retire to consider their verdict.

My role overseeing the legal aspects of the case may mean that I have to decide a question of law during the trial; for example, if an argument arises about whether particular evidence should be admitted. I may need to hear submissions from the prosecutor, and from you. If that arises it may be necessary to do that in the absence of the jury. That is to prevent the minds of the jurors from being distracted by matters which are irrelevant to their role as the judges of the facts; and you will hear me explain that to the jury later today.

I am now going to bring into court the group of citizens from whom the jury for this trial will be selected. As soon as they are in the court, I will tell you some more things about the way the jury is chosen, and the procedure during the trial including what you may do in your own defence.

After jury panel brought into courtroom

[Name of defendant] **you are to be tried by a jury of twelve chosen from those members of the public who are now here in court in response to jury summonses.**

The name of each person is on a card. The cards will be placed in a barrel and drawn out at random, one by one. As each card is drawn out, the name will be called out, and that person will come forward to the bailiff to be sworn as a juror. Being sworn means that the bailiff will recite the words of the oath, to which the juror says "so help me God", or the juror will read an affirmation.

You may challenge as many as 8 prospective jurors without giving any reason for your challenge. Those are the standard challenges which both the defence and the prosecution have as their right in every trial. If you wish to challenge any particular person, then you should say the word "challenge" before the bailiff begins to recite the oath or the juror commences to read the affirmation.

In addition to those challenges, there is another form of challenge, called "challenge for cause". That is a challenge which can be made only on the grounds that a prospective juror is not qualified by law to act as a juror, or is not impartial.

If you wish to challenge for cause you should do so by saying "challenge for cause" before the individual juror commences to recite the terms of the oath or affirmation. I will then determine the challenge in the absence of the jury panel. You will be required to inform me of the reasons for the challenge and to produce any information or materials you have to support it.

If you wish to challenge the entire jury panel, you must tell me so, and also tell me of your reasons for the objection before any juror is sworn.

Do you understand?

After jury empanelled, but in the absence of the jury

The prosecutor will, when the jury is brought back into court, explain to the jury the nature of the charge(s) and the prosecution case alleged against you. He will then call witnesses, and perhaps produce documents or other material, to seek to prove the charge(s).

You have a right to cross-examine any witness: that is, to ask questions which you think may help to weaken the case against you or to advance your case.[1] They must be questions, not statements or comments. You may, in asking those questions, suggest answers to the witness.

If you have in mind contradicting the evidence of a witness, or later suggesting that the witness is telling lies, you should put your allegations to the witness in the form of questions to give the witness the opportunity to answer your suggestions. If you fail to do so, I may comment on such failure in my summing-up or else permit the prosecution to call further evidence later in the trial.[2]

You are entitled to object to any question asked by the prosecutor if it may be objectionable in law. If you wish to object, for example on some such ground as that the question relates to an irrelevant matter or invites hearsay, you should stand up and say, as soon as it is asked, "I object". I will then hear whatever you want to say about that question. I may, indeed probably will, do so in the absence of the jury. It is not a proper ground of objection that you disagree with the

---

1 NB: An unrepresented defendant is not entitled to cross-examine a protected witness; s 21M *Evidence Act* 1977. If the section applies, the judge should inform the defendant of its effect at this stage of the trial: see "Protected Witness".

2 Cross on Evidence, Australian Ed. at [17460].

evidence. You may object only on legal grounds. If you are in doubt as to your right to object to a question on legal grounds, you may seek clarification from me.

You may also object to the reception into evidence of things tendered by the prosecutor such as documents, photographs, and other things. Here again, if you wish me to rule that such material should not be received, you should stand and say "I object". I will then hear any argument to support your objection. Again, I may do so in the absence of the jury.

After the prosecution has called all the evidence for the prosecution, you may submit that the case should be taken away from the jury on the ground that there is insufficient evidence to justify the defence being called upon to answer the case. If you do not make such an application, or you make the application and it is rejected, you will have the opportunity to present any evidence you wish in answer to the prosecution case. For at the end of the prosecution case, you will be asked by my Associate whether you wish to adduce evidence in your defence.

You may, if you wish, choose not to give or to call evidence.

Alternatively, you may, if you wish, enter the witness box and give evidence, just as the prosecution's witnesses will have done. If you do that, you will be liable to cross-examination by the prosecutor.

You will understand that these are matters you must decide for yourself; they are not matters about which I can give you legal advice.

Whether or not you go into the witness box yourself and testify, you may, if you wish, call witnesses to give relevant evidence. If you do call witnesses, you may ask them questions which do not directly suggest the answer. All such witnesses are liable to cross-examination. At the conclusion of any such cross-examination, you may ask each witness any further questions in order to explain matters touched upon in that cross-examination.

You may also tender for reception into evidence documents or other things which are relevant.

If you will be giving or calling evidence you may, if you wish, first address the jury, outlining the case you intend to present.

When all of the evidence has been presented, you may address the jury, presenting arguments as to why the case against you should not be accepted, or as to why you should otherwise be found not guilty. You may discuss the law and also the evidence already given; but you cannot then introduce new evidence.

If, but only if, you have not adduced evidence, the prosecutor will not address the jury after your address concludes.

If at any stage you want guidance concerning the trial, stand and say "there is a matter I wish to raise in the absence of the jury". I will send the jury out while I deal with it.

If you would like time to think about what I have said, I will allow that. If you would like me to repeat anything I have told you, I will do so if you ask. If you would like me to explain further anything I have said or any other matter concerning the trial, I will do so if you ask.

Do you have any questions?

Special remarks

Admissions

There are other matters I should mention now.

If the prosecution alleges that you have made any admission, that alleged admission is not admissible in evidence unless you made it voluntarily. It is for me, not for the jury, to decide whether any such alleged admission was made voluntarily. If you wish that issue to be canvassed, you should indicate that to me by saying that you wish to raise a matter in the absence of the jury. I will send the jury out and hear you. Similarly, if you wish to suggest that the alleged admissions should not be admitted against you for some such reason as that it would be unfair to do so, or indeed for any other reason, you should say that there is a matter you wish to raise with me. I will send the jury out before hearing you.

Good character

If you contend that you are a person of good character, you are entitled to raise that good character for consideration by the jury. You may do so either by asking appropriate questions of prosecution witnesses or by giving evidence yourself to that effect, or by calling witnesses to give such evidence. However, if you question a witness with a view to establishing that you are of good character, or if you give

evidence of your good character, the prosecution may become entitled to lead evidence that you are not of good character. This might include any criminal record you may have. The same result may ensue if the nature or conduct of your defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution [or of any other person charged]**.**

Alibi

If you wish to rely on an alibi – that is, to suggest in evidence that you were not at a relevant place – unless proper notice of the alibi has already been given to the prosecution, you may not rely upon it unless you first obtain my permission to do so. If you want that, you should say so at the end of these remarks.

At end of prosecution case; in absence of jury

[Name of defendant]**, do you remember what I told you at the beginning of the trial concerning your rights now that the prosecution case has been presented? If not, I will repeat what I then told you. If there is any other matter on which you now seek guidance, now is the time to say so.**

…

The jury will now be brought back in. The law requires that I must formally inform you, in the jury's presence, about these matters.

Next step; in presence of jury

NB: Thereafter, in the presence of the jury, the defendant should be addressed in the manner required by rule 50 of the *Criminal Practice Rules* 1999:

The prosecution having closed its case against you, I must ask you if you intend to adduce evidence in your defence. This means you may give evidence yourself, call witnesses, or produce evidence. You may do all of these things, or none of them.

Fitness for Trial

You have been empanelled to decide whether the defendant is capable of understanding the proceedings at this trial so as to be able to make a proper defence. There is reason to think that because of [mental illness; or an inability to communicate; or intellectual impairment], the defendant may not be so capable. You are to decide that question. If you find that the defendant is not so capable, you are to say what the reason is.[1]

The question must be decided before the trial proceeds. It would be unfair to the defendant to put him on trial if he is unable to take a sufficient part in the proceedings. A defendant must be able to answer the charge brought against him. He cannot do so unless he is capable of understanding the proceedings, so as to be able to make a proper defence.

The test of fitness is not a demanding one but it does require that the defendant be able to understand the proceedings and the substance of the evidence to be led [or which has been led] against him.

The defendant must be able to understand that he is on trial, ie that a charge of [name offence] has been made against him by a prosecuting authority which will call [or has called] evidence in an attempt to prove guilt. The defendant must be able to understand the difference between guilt and innocence and to understand, in a general way, the nature of the offence. He must be able to understand that he has a right to challenge the jurors, even though in practice the challenging is usually done by defence counsel.

It is also necessary that the defendant be able to make sense of the evidence, so as to be able to contest it or to provide an answer to it. It is not necessary that the defendant understand the law or the various formalities and procedures of the court. It is enough that he understands the substantial effect of the evidence that may be given against him, so that he can give his counsel instructions for conducting the defence. The defendant must have a sufficient capacity to be able to decide what defence he will rely on and to

[1] Section 613(3) *Code*.

make his version of the facts known to the court and to his counsel. When he is called upon to decide whether to give evidence, he must be capable of making an informed election, after receiving legal advice.

If the doubt about fitness arises from a defendant's lack of powers of communication the suggested direction is:

Is the defendant capable of communicating with his advisors and with the court? [He may not be able to communicate by word of mouth. But if you are satisfied he could communicate by some other means, [eg in writing or signs], that is enough if it allows the defendant to tell his advisors and the court what his defence is and to give his version of the facts.] The question is whether the evidence to be led against the defendant may be communicated to him so that he can clearly understand it and be able to make his defence known.

Whether a defendant is fit to stand trial is usually determined by the Mental Health Court. However, the *Code* makes provision for a determination of that question by a court of criminal jurisdiction. Two provisions in the *Code* may apply, depending upon the time at which the question arises. Section 613 is applicable to a defendant's state of mind at the time he is called upon to plead to the indictment. Section 645 applies when a question of fitness arises later during the trial.

Although the two sections appear to describe different criteria to determine whether a defendant should be put on trial, the phrase "not of sound mind" when used in s 645 refers to the same concept as a defendant being "capable of understanding the proceedings … so as to be able to make a proper defence". The High Court so construed "insane" in the cognate provision in the (Victorian) *Crimes Act* 1958: *Kesavarajah* (1994) 181 CLR 230 at 244.

The requirement in s 645 must be complied with if there is reason to believe that the defendant is unfit. It does not matter what stage the trial has reached, or what inconvenience or cost will be occasioned by a finding that the defendant is unfit for trial. See *Kesevarajah*; cf *Mailes* (2001) 53 NSWLR 251 at 297.

Presser [1958] VR 45 at 48 sets out the most frequently cited exposition of fitness for trial.

> *"The question … is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him. … He needs to be able to follow the course of proceedings so as to understand what is going on in court in a general sense, … he needs to be able to understand … the substantial effect of any evidence that may be given against him; and he needs to be able to make a defence or answer to the charge. Where he has counsel he needs to be able to do this … by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not … have the mental capacity to make an able defence; but he must … have sufficient capacity to be able to decide what defence he will rely upon to make his defence and his version of the facts known to the court and to his counsel."*

See also *Ngatayi v The Queen* (1980) 147 CLR 1 at 9; *Topp* [2000] QMHT; *R v Sexton* (2000) 77 SASR 405; *Eastman v The Queen* (2000) 203 CLR 1; *R v Wilson* [2000] NSWSC

1104; *R v Miller (No 2)* (2000) 209 LSJS 20; [2000] SASC 152; and *A-G v B* [2003] 1 Qd R 114;; *Mailes* at 273ff.

Generally speaking, it is enough if a defendant can understand that he is on trial and what that means, and can understand the evidence led by the prosecution in support of the charge so that he can put forward whatever answer he has to it.

A lack of capacity to stand trial may arise "for any reason", including:

(a) mental disease such as schizophrenia;

(b) gross intellectual impairment or retardation;

(c) any physical condition rendering communication with the defendant extremely difficult, ie a deaf mute;

(d) inability to speak English where no interpreter can be found to translate the proceedings into the defendant's language;

or a combination of these conditions.[2]

There is authority for the proposition that the standard of proof varies with whether defence or prosecution alleges unfitness. The onus on the defence is to prove lack of capacity on the balance of probability. If the prosecution alleges unfitness it must prove it beyond reasonable doubt. See *R v Podola* [1960] 1 QB 325 at 329-330; *R v Robertson* [1968] 1 WLR 1767; *R v Donovan* [1990] WAR 112; *R v P* (1991) 1 NTLR 157.

This rule appears unsatisfactory. It was criticised in *Re Walton* [1992] 2 Qd R 551 at 557-8, where it was pointed out that in *Podola* the reference to proof beyond reasonable doubt occurred in the context of the prosecution undertaking to prove that a defendant was *fit* to stand trial. The view in *Presser (*at 49) has much to commend it. It was that the inquiry directed by ss 613 and s 645 "is not to be regarded in the same way as a trial of an issue joined between the parties … considerations of onus … would seem to be foreign to an inquiry of the kind in question". On this approach, if a jury is satisfied on the balance of probabilities that a defendant is unfit for trial, the sections will be satisfied whichever side initiates the inquiry.

The direction does not address the dilemma posed by the authorities as to standard of proof. If *Podola* is to be followed, the direction will have to include an instruction on the question which will depend upon whether the defence or the prosecution raised the issue for determination. If the opinion expressed in *Presser* is adopted, it will be sufficient to tell the jury that they must be satisfied on the balance of probabilities before they can find a defendant is fit for trial.

The direction borrows from the summing-up in *Sharp* [1960] 1 QB 357 at 360-361.

[2] See *Ngatayi v The Queen* (1980) 147 CLR 1 at 7.

Protected Witnesses: s 21M *Evidence Act* 1977[1]

Where the defendant has a lawyer to cross-examine the witness

> **It is a fundamental right of every person accused of a crime to represent himself at his trial. The defendant has elected to do so. You must not draw any adverse inference against him because he has exercised the right of every citizen.**
>
> **However, if a defendant elects to defend himself, the law prevents him from cross-examining any witness who is a "protected witness". (**Name of witness**) is a protected witness. That (**name of witness**) is a protected witness does not, by that fact alone, add to or detract from the witness's reliability and credibility.**
>
> **A lawyer has represented the defendant for one purpose: to cross-examine (**name of protected witness**). You might think that (**name of lawyer**) was at somewhat of a disadvantage in that he has not been involved in the whole trial. However the law provides for such a procedure in the trial of an unrepresented defendant who chooses otherwise not to have a lawyer represent him.**
>
> **[The evidence of (**name of protected witness**) is, you might think, essential to the prosecution case. Indeed, you will probably conclude that the prosecution case stands or falls on your assessment of her reliability and truthfulness. Keep in mind that you cannot convict unless satisfied beyond reasonable doubt that the evidence upon which the prosecution relies to support (**the counts**) is both truthful and reliable.]**
>
> **You must not draw any adverse inference against the defendant because he is required to have a lawyer for the purpose of cross-examining (**name of protected witness**).**

If the defendant elects not to have a lawyer to cross-examine the protected witness

In the presence of the empanelled jury, say to the defendant:

---

[1] If a witness is a "protected witness" under s 21M of the *Evidence Act* 1977, the defendant may not personally cross-examine the witness: s 21N. In such cases, if he is unrepresented, the Court is obliged to inform him of the procedure provided for in s 21O(2).

If the defendant does not have a legal representative other than for the cross-examination of a protected witness, or does not have a legal representative for the cross-examination of a protected witness, the court must give the jury any warning necessary to ensure the defendant is not prejudiced by any inference that might be drawn from the fact that he has been prevented from cross-examining the protected witness in person: s 21R.

(Name of defendant**) you have elected to represent yourself. As you are aware, (**name of protected witness**) is a protected witness who will give evidence on behalf of the prosecution. As you also know, you are therefore prevented from personally cross-examining that witness. You are entitled to have a lawyer, either to represent you generally at the trial or only to cross-examine (**name of protected witness**). Legal Aid is available free of charge. It is your choice.**

You have informed the Court before today that you wish to represent yourself and that you do not require a lawyer to cross-examine (name of protected witness**). Before the trial gets under way, I wish to give you a further opportunity to have a lawyer to represent you for the entire trial or else solely to cross-examine (**name of protected witness**). Do you want a lawyer?**

At the time the witness is called, and repeated in the summing up

The same as the above direction (where lawyer cross-examines witness), except that for the second and third paragraphs substitute:

The defendant has chosen not to have a lawyer to cross-examine (name of protected witness**). So (**name of protected witness**) will not be [**was not**] cross-examined, because the defendant is not permitted to cross-examine her. Cross-examination tests whether a witness is truthful and reliable. It is often an important aid to a jury's assessment of where the truth lies. As (**name of protected witness**) has not been cross-examined, you will have to assess the accuracy of her evidence without the assistance cross-examination might have provided.**

And, instead of the last sentence in the first direction above:

You must not draw any adverse inference against the defendant because he has chosen not to have a lawyer, as a result of which the evidence of (name of protected witness**) has not been tested by cross-examination.**

Protected Witnesses: s 5 *Criminal Law (Sexual Offences) Act* 1978

Where application is made pursuant to ss 5(1)(e), (f), (g) or (h) for a person to be present:

> **I order that during the evidence of (**name of complainant**), all persons other than [those referred to in s 5(1) of the *Criminal Law (Sexual Offences) Act* 1978] and (**full name or names of additional persons**) be excluded from the courtroom.**[1]

[1] Where a complainant is also a special witness within s 21A *Evidence Act* 1977, whether expressly declared to be so or not, the jury must be directed in accordance with s 21A(8). However if orders are made solely on the basis of s 5 *Criminal Law (Sexual Offenders) Act* 1978 no such directions are necessary. Nevertheless, the interests of justice in the circumstances of the case may warrant a warning to the jury: *R v Samson* [2011] QCA 112 at [39]-[41].

Evidence of Affected Children[1]

Section 21AA *Evidence Act* 1977 describes the purposes of Division 4A as to preserve, to the greatest extent practicable, the integrity of an affected child's evidence and to require, wherever practicable, that an affected child's evidence be taken in an environment that limits the distress and trauma that might otherwise be experienced by the child when giving evidence. The Division establishes a system of pre-recording an affected child's evidence and limits the evidence to be given on committal. The pre-recorded evidence is then played to the jury on the trial.

"Affected child" is defined in s 21AC as a child who is a witness in a relevant proceeding and who is not a defendant in the proceeding. A child in a criminal proceeding is a person who is under 16 when the defendant is arrested, a complaint is made in relation to the defendant or a notice to appear is served on the defendant (s 21AD(1)). The definition of a child is extended to include a person who is 16 or 17 when the first of the things mentioned above happened and the person is a special witness (s 21AD (1) (a) (ii)).

A "relevant proceeding" means a criminal proceeding for a "relevant offence" or a civil proceeding arising from the commission of a "relevant offence". A "relevant offence" means an offence of a sexual nature; or an offence involving violence if there is a prescribed relationship between the child witness and a defendant. "Prescribed relationship" is defined to include parents, grandparents, siblings and other relationships within the family. It also includes a relationship arising because a defendant lived in the same household as the child or because the defendant had the care of, or exercised authority over, the child in a household on a regular basis.

The affected child's evidence must be taken and video-taped at a preliminary hearing presided over by a judicial officer (s 21AK). The video-taped recording must be presented to the court at the trial. The judicial officer may give various directions for taking an affected child's evidence (s 21AL). The video-taped recording is as admissible as if the evidence were given orally (s 21AM). Section 21AU requires the exclusion of members of the public from the room while an affected child gives evidence and whilst a recording of that evidence is being played. An affected child is entitled to have a support person present when giving evidence (s 21AV).

Pursuant to s 21 AW(2), if an affected child's evidence is taken by pre-recording2 or by using an audio visual link or a screen blocking the defendant from the witness's view or if a person is excluded under s 21AU or if a support person3 is present, the jury must be instructed that:

(a) The measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilt from it; and

(b) The probative value of the evidence is not increased or decreased because of the measure; and

(c) The evidence is not to be given any greater or lesser weight because of the measure.

---

1 Division 4A *Evidence Act* 1977. For directions for Special Witnesses see No 11.2.

2 In some circumstances, directions may need to be given in respect of a 93A Statement. See *R v H* [1999] 2 Qd R 283; *R v KAH* [2012] QCA 154. See Direction No 11A.

3 The term "adult person" does not mean the same as "support person", and it is not appropriate to use alternate language that does not convey the purpose of the person's presence: see *R v Carter* (2014) 241 A Crim R 522; [2014] QCA 120 at [71].

'Probative' means 'affording proof or evidence'. To say that the probative value of evidence is not increased or decreased because it is pre-recorded and played to you means it is not better evidence, or worse evidence, than evidence given by a witness in the presence of a jury.[4]

On the trial where the pre-recorded evidence is played to the jury, the video tape should be marked for identification rather than as an exhibit in the trial: *Gately v The Queen* (2007) 232 CLR 208; [2007] HCA 55. The video tape should be marked with a letter and should not be given into the possession of the jury for the purpose of their deliberations: *R v Nijamuddin* [2012] QCA 124 at [44]-[47].

Where the jury request the replaying of the video tape this, if permitted, should occur in the reconvened court: *Gately*. Hayne J (with whom Gleeson CJ, Heydon and Crennan JJ agreed) stated at [96],

> *"The purpose of reading or replaying for a jury considering its verdict some part of the evidence that has been given at the trial is only to remind the jury of what was said. The jury is required to consider the whole of the evidence. Of course the jury as a whole, or individual jurors, may attach determinative significance to only some of the evidence that has been given. And if that is the case, the jury, or those jurors, will focus upon that evidence in their deliberations. While a jury's request to be reminded of evidence that has been given in the trial should very seldom be refused, the overriding consideration is fairness of the trial. If a jury asks to be reminded of the evidence of an affected child that was pre-recorded under subdiv 3 of Div 4A of the Evidence Act and played to the jury as the evidence of that child, that request should ordinarily be met by replaying the evidence in court in the presence of the trial judge, counsel, and the accused. Depending upon the particular circumstances of the case, 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. It may be desirable, in some cases necessary, to repeat the instructions required by s 21AW. Seldom, if ever, will it be appropriate to allow the jury unsupervised access to the record of that evidence."*

Where video evidence is replayed, failure to give a direction that the jury not give the complainant's evidence undue weight by virtue of its repetition or to remind the jury of other evidence may result in a miscarriage of justice: *R v FAE* [2014] QCA 69; *R v SCG* (2014) 241 A Crim R 508; *R v MCC* [2014] QCA 253.

Suggested Direction – Re: Measures used to take and present an Affected Child's evidence

1. **The evidence of […] which was just played to you was taken on […].**

2. **At the time the child gave evidence, she was in a room remote (separate) from the Courtroom.**

---

[4] See *R v Hellwig* [2007] 1 Qd R 17 where the court noted the importance of the directions specified in s 21AW in dispelling speculation and conjecture that might arise as a result of the markedly different procedure adopted when evidence is given pursuant to Division 4A. The Court of Appeal has emphasised on a number of occasions the necessity of directing in accordance with s 21AW(2). Failure to give the required directions may result in a retrial: see *R v SAW* [2006] QCA 378; *R v DM* [2006] QCA 79; *R v HAB* [2006] QCA 80; *R v MBE* (2008) 191 A Crim R 264; *R v Horvarth* [2013] QCA 196.

3. The evidence was given by use of an audio visual link between the room in which the child was seated and the Courtroom.

4. At the time the child gave evidence there was a support person sitting in the room with her, and no other person.

5. Whilst the child gave evidence, all non-essential persons were excluded from the Courtroom.

6. At the time, the defendant was present in the Courtroom but was so positioned that the child could not see the defendant on the monitor, or at all.

7. The child's evidence was recorded as it was given and that is the recording that has just been played to you.

8. The Courtroom was closed and all non-essential persons were excluded while the pre-recorded evidence of the child was played.

Now, I instruct you as follows:

(a) All of the measures which I have just outlined, used for the taking and showing of the child's evidence, are the routine practices of the court for taking and showing evidence of children such as …

And you must not draw any inference as to the defendant's guilt because these measures were used.

(b) The probative value of the evidence is not increased or decreased because these measures were used.[5]

[To say that the probative value of the evidence is not increased or decreased because these measures were used, means it is not better evidence, or worse evidence, than if the evidence had been given before you from the witness box.]

(c) The evidence is not to be given any greater or lesser weight because these routine measures were used.

[N.B. 1. Of course, a support person is not always used. Ascertain whether there is a support person by looking at the screen, checking the order on the file, checking endorsements on the indictment and/or asking counsel.

2. If an audio visual link is used, an alternative measure is to have the defendant in a room separate from the Courtroom (s 21AQ(2)(b) *Evidence Act* 1977 (Qld)).

3. If there is no audio visual link available, an alternative measure is to have the child give evidence in the Courtroom with a "screen, one-way glass or other thing" blocking the child's view of the defendant – (s 21AQ(5))].

Child Witnesses: 93A Statements

Most commonly, video and/or taped interviews with the child and a police officer are used for the purpose of the child's evidence in chief.[1]

Section 102 of the *Evidence Act* 1977 authorises, in appropriate cases, directions to a jury on circumstances relevant to the weight to be given to a s 93A statement.[2] It provides:

> *"102. Weight to be attached to evidence*
>
> *In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including –*
>
> *(a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and*
>
> *(b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts."*

Suggested 93A Statement direction[3]

As you know, part of the complainant's evidence is comprised of her conversations with police at the … police station on …

These conversations were recorded and the recording has been played to you.

The presenting of the child's evidence in this way comprises the routine practice of the Court. This measure is adopted in every case involving children such as …

---

1 Statements admissible under s 93A are subject to exclusion as a matter of discretion under s 98. The judicial discretion under ss 98 and 130 should not, however, be exercised to frustrate the policy of s 93A: *R v FAR* [1996] 2 Qd R 49; *R v Morris; ex parte A-G* [1996] 2 Qd R 68.

2 See *R v TQ* (2007) 173 A Crim R 385. Whether or not particular circumstances and references adverted to in s 102 must be called to the jury's attention by a trial judge depends on the circumstances of the particular case: see *R v Flynn* [2010] QCA 254 at [53]-[65]. A direction to the jury in terms of s 102(b) should not be given where no such issue arises on the evidence. A direction in those circumstances is unnecessary and unhelpful because it would distract the jury from focusing on the real issues: *R v HBN* [2016] QCA 341 at [23]-[30].

3 Where a direction to the jury in accordance with s 21AW(2) *Evidence Act* 1977 in relation to the pre-recorded evidence of an affected child witness is given, there is no need for a similar direction in relation to the evidence admitted pursuant to s 93A: *R v Lovell* [2016] QCA 151 at [139]-[140].

Although tendered as an exhibit, a statement admitted pursuant to s 93A should not, in ordinary circumstances, go into the jury room, for the jury may give undue weight to it as against other evidence.[4]

If the s 93A statement does go into the jury room, (for example by consent), the following direction may be given in the summing-up:

> **The video recording of the child's evidence [and the transcript] will be with you when you consider your verdict.**
>
> **Ordinarily, these documents remain in the courtroom, and are available for you to hear and view in the courtroom during your deliberations.[5] But both counsel in this case wish you to have access to the exhibit [and the transcript] while you are deliberating in the jury room.**
>
> **Keep in mind what I said earlier about the transcript. It is someone else's impression of what was said during the recorded interview. The transcript is not evidence and was made available to you as an aid only. It is what you hear on the recording that matters, not what is in the transcript.[6]**
>
> **As you will not have any other witnesses' evidence with you in recorded or written form, be careful not to place undue weight on the child's evidence because you are able to hear and read it on a number of occasions.**

A finding that a child witness is not competent to give evidence in a proceeding precludes the admission of an earlier out of court statement by the child witness under section 93A of the Evidence Act 1977. However, a finding that a child witness is not competent to give evidence in a proceeding of itself does not preclude the admission of earlier out of court representations by that child witness under section 93B of the *Evidence Act* 1977.[7]

---

4 For example, that of the defendant which is not in written form: *R v H* [1999] 2 Qd R 283. See also *R v BAH* (2002) 135 A Crim R 150; *R v GAO* [2012] QCA 54; *R v KAH* [2012] QCA 154.

5 See *R v H* [1999] 2 Qd R 283; *R v KAH* [2012] QCA 154.

6 See Direction on "Tape Recordings and Transcripts".

7 *R v SCJ; Ex parte Attorney General of Queensland* [2015] QCA 123.

Special Witnesses[1]

If the evidence of a special witness is given under an order or direction in s 21A(2)(a) to (f) *Evidence Act* 1977, the jury must be instructed in accordance with s 21A(8) that –

(a) they should not draw any inference as to the defendant's guilt from the order or direction; and

(b) the probative value of the evidence is not increased or decreased because of the order or direction; and

(c) the evidence is not to be given any greater or lesser weight because of the order or direction.[2]

The orders or directions that can be made under s 21A(2) include:

(a) that the defendant be obscured from the view of the special witness;

(b) that non-essential persons be excluded from the courtroom;

(c) that the special witness give evidence from a remote witness room from which all persons other than those specified by the court are excluded;

(d) that a person approved by the court be present to provide emotional support to the special witness;

---

[1] s 21A(1) of the *Evidence Act* 1977.

special witness *means –*

(a) a child under 16 years; or

(b) a person who, in the court's opinion—

(i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or

(ii) would be likely to suffer severe emotional trauma; or

(iii) would be likely to be so intimidated as to be disadvantaged as a witness;

if required to give evidence in accordance with the usual rules and practice of the court; or

(c) a person who is to give evidence about the commission of a serious criminal offence committed by a criminal organisation or a member of a criminal organisation; or

(d) a person—

(i) against whom domestic violence has been or is alleged to have been committed by another person; and

(ii) who is to give evidence about the commission of an offence by the other person.

(e) a person—

(i) against whom a sexual offence has been, or is alleged to have been, committed by another person; and

(ii) who is to give evidence about the commission of an offence by the other person.

Where a special witness is to give or is giving evidence, the court may, of its own motion, or upon application made by a party to the proceeding, make or give 1 or more of the orders or directions in s 21A(2).

[2] The failure to comply with the mandatory requirements of s 21A(8) is an error of law: *R v Bisht* [2013] QCA 238 at [49]; *R v Little* [2013] QCA 223 at [24]. The directions to the jury must include all orders made under s 21A(2) including an order under s 21A(2)(d) that a person approved by the court be present to provide emotional support to the special witness.

(e) that the evidence of the special witness be video-taped and played at the trial instead of direct testimony; and

(f) another order or direction considered to be appropriate such as a direction that questions be kept simple or be limited by time.

Directions

1. **The evidence of [….] was taken on [….]**

2. **An order of the court permitted her evidence to be taken in the way it was. It is not uncommon for evidence to be given in this way.**

3. **[….] was in a room separate from the courtroom. Her evidence was given by the use of an audio-visual link between the room in which she was seated and the courtroom.**

4. **Her evidence was recorded as it was given, and that is the recording that was played to you.**

5. **When [….] gave her evidence, there was a support person sitting in the room with her, and no other person.**

6. **All non-essential persons were excluded from the courtroom itself.**

7. **The defendant was present in the courtroom, but he was positioned in such a way that [the witness] could not see him on the monitor or at all while she gave her evidence.**

8. **The procedure I have just outlined for taking [the witness' evidence] conformed with the court order.**

9. **In these circumstances:**

    - **You must not draw any inference as to the defendant's guilt from the order.**

    - **The probative value of the evidence [the witness] gave is not increased or decreased because of the order.**

    - **[To say that the probative value of the evidence is not increased or decreased because of the order, means it is not better evidence, or worse evidence, than if the evidence had been given before you from the witness box.]**

- **That evidence is not to be given any greater or lesser weight because of the order.**

Competency of Witnesses, Including Children[1]

Competency

Every person, including a child, is presumed to be competent to give evidence in a proceeding and competent to give evidence in a proceeding on oath: s 9 Evidence Act 1977.

"Child" is not defined in the Evidence Act, but is defined in the Acts Interpretation Act 1954 (Qld) as "… an individual who is under 18": s 36.

The starting point is the presumption of competence, but an issue may be raised by a party to the proceeding or by the court in respect of either or both of two distinct questions: whether the person is competent to give evidence at all (dealt with in s 9A of the Evidence Act) and whether, if competent to give evidence, the person is competent to give it on oath or affirmation (s 9B).

If such an issue is raised, competence is decided by the judge alone. There will be various sources of information, such as questioning of the person on the voir dire, the section 93A tapes, and expert evidence. Expert evidence is admissible about the person's level of intelligence, including their powers of perception, memory and expression, or other matters relevant to competence or ability to give reliable evidence: s 9C Evidence Act.[2]

Competence to give evidence: s 9A

Where an issue is raised as to a person's competence to give evidence, the statutory test is whether in the court's opinion, the person is "able to give an intelligible account of events which he or she has observed or experienced" (regardless of the fact that the evidence is not given on oath).

The phrase "the person is able to give an intelligible account of events" probably means no more than that the person's account of events is capable of being understood, rather than that it is necessarily truthful or accurate.

Competence to give sworn evidence: s 9B

If an issue is raised as to whether the person is competent to give sworn evidence, the statutory test is whether, in the court's opinion, the person understands that the giving of evidence is a serious matter and that in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

That test has nothing to do with belief in God or divine sanctions: *R v BBR* [2010] 1 Qd R 546. It derives from the test in *R v Hayes* [1977] 1 WLR 234, which focussed on "whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct."

It is a fundamental error of law to permit a witness to give unsworn testimony without determining the question of their competence to give sworn evidence under s 9B: *R v BBR* [2010] 1 Qd R 546; *R v MBT* [2012] QCA 343.

---

1 See "Protected Witnesses" (No 8), "Special Witnesses" (No 11) and "Evidence of Affected Children" (No 10).

2 See the discussion of admissibility of opinion evidence in *R v D* (2003) 141 A Crim R 471.

4 Section 632(3); *A* [2000] QCA 520 at [142]; *Robinson v The Queen* (1999) 197 CLR 162.

The court forms its opinion as to the witness's understanding in any manner in which it sees fit. In practice the age of the witness and the submissions of counsel will bear upon the court's opinion. The following are suggestions, but not a template, for questions which might be asked in assessing whether a person is competent to give evidence on oath:

(a) Do you understand you are here in court today to answer questions about something involving [the defendant]?

(b) Do you understand that answering questions in court is very serious? Why do you think that is?

(c) Do you know what the difference is between telling the truth and telling a lie? Can you tell me?

(d) If I were to say there was a tiger in the room where you are, would that be the truth or a lie?

(e) Do you understand that it is even more important than usual to tell the truth when you answer questions in court?

(f) Why do you think it would be particularly important that you tell the truth here in court?

(g) Do you understand that if you don't tell the truth, you could get into trouble and you might hurt other people?

If the witness objects to being sworn but the conditions of s 9B are met, he or she can give evidence on solemn affirmation: s 17 Oaths Act 1867.

If the witness is competent to give evidence in the proceeding but is not competent to give the evidence on oath (or, it would follow, on affirmation), the evidence may be given unsworn (and unaffirmed). In that event, the court must explain to the person the duty of speaking the truth: s 9B(3) Evidence Act. Failure to give the explanation renders improper the receipt of the evidence which follows, vitiating the trial: *R v BBR* [2010] 1 Qd R 546; *R v MBT* [2012] QCA 343.

See also *R v Chalmers* [2013] 2 Qd R 175 where the trial judge raised the issue as to the complainant's competency to give sworn evidence. McMurdo P and Cullinane J decided that the trial judge should have proceeded under s 9B(2) to determine whether the complainant was competent to give evidence on oath as defined in that subsection, rather than simply assuming the complainant was not (so competent).

If evidence is admitted on the basis that the witness is competent under s 9A but it is not given on oath, the jury should be directed that the probative value of the evidence is not decreased only because the evidence is not given on oath (or affirmation): s 9D Evidence Act.

A finding that a child witness is not competent to give evidence in a proceeding precludes the admission of an earlier out of court statement by the child witness under section 93A of the *Evidence Act* 1977. However, a finding that a child witness is not competent to give evidence in a proceeding of itself does not preclude the admission of earlier out of court representations by that child witness under section 93B of the *Evidence Act* 1977.[3]

[3] *R v SCJ; Ex parte Attorney General of Queensland* [2015] QCA 123.

The principles for dealing with a child witness are set out in s 9E of the *Evidence Act* 1977. These are that:

> *"(1) Because a child tends to be vulnerable in dealings with a person in authority, it is the Parliament's intention that a child who is a witness in a proceeding should be given the benefit of special measures when giving the child's evidence.*
>
> *(2) The following general principles apply when dealing with a child witness in a proceeding –*
>
> *(a) the child is to be treated with dignity, respect and compassion;*
>
> *(b) measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence;*
>
> *(c) the child should not be intimidated in cross-examination;*
>
> *(d) the proceeding should be resolved as quickly as possible.*
>
> *(3) In this section –*
>
> ***"**Child**"** means a child under 16 years."*

Privilege against self-incrimination

Witnesses are entitled to the privilege against self-incrimination.

A witness (but not a defendant) may refuse to answer a question on the ground that to do so would incriminate him or her.

An answer which may "incriminate" is one which would tend to prove that the witness had committed a criminal offence, or was liable to pay a penalty.

This issue may arise during the cross examination of a witness as to the facts or as to their credit, when they might be asked about, for example, their drug use, previous violence, social security fraud, tax evasion.

If the trial judge is concerned that an answer to a question asked of a witness might tend to incriminate the witness, the witness must be informed that they do not need to answer the question.

Sometimes, the party questioning the witness may raise the issue with the trial judge before asking the question.

> **Before you answer that question, I must inform you that you are entitled to the privilege against self-incrimination. What that means is that you are not obliged to answer a question if the answer to the question tends to prove that you were guilty of a criminal offence or liable to pay a penalty. You may only refuse to answer the question on that ground. You *may* answer the question – even though the answer tends to show that you have been guilty of a criminal offence or liable to penalty – but you do not have to.**
>
> **If you wish to claim the privilege, it is for me to decide whether you may validly claim it.**

If a witness is permitted to refuse to answer a question on the ground that the answer would tend to incriminate him or her, then the trial judge must warn the jury that they are to draw no adverse inference against the witness because they have claimed the privilege.

Hostile Witnesses

A judge has a common law power to declare a witness hostile (or "adverse"[1]) and to allow cross-examination by the party who called him. In addition, s 17 of the *Evidence Act* 1977 enables the party calling the witness whom the court considers hostile to seek leave to prove any prior inconsistent statement[2] by the witness.

The judge may form an opinion that a witness is hostile without any inquiry on the voir dire,[3] but the more usual course of events is as follows:

- Counsel who called the witness seeks leave, in the absence of the jury, to cross-examine the witness on the voir dire. The purpose of doing so is to demonstrate hostility, providing a basis for applications for leave to cross-examine the witness in the presence of the jury and leave to prove any inconsistent statement. The extent of the explanation needed to warrant a grant of leave to cross-examine on the voir dire will vary. Sometimes the difficulties the witness is presenting will already be obvious from his demeanour and responses; more often, counsel will raise areas of apparent inconsistency with earlier statements.
- If granted leave to proceed on the voir dire, counsel will cross-examine in order to establish the witness' hostility. He will identify any prior inconsistent statement to the witness, and seek to obtain admissions of authorship and of the truth of its contents.[4] Usually the witness will admit the statement is his; if not, counsel will seek leave to call evidence on the point, for example from the police officer who took the statement. The opposing party will also cross-examine, with a view to establishing that the witness is not hostile and providing him an opportunity to explain any inconsistencies. After cross-examination, both counsel will make submissions as to why the declaration should or should not be made and whether leave to cross-examine and/or prove earlier statements should be given.
- The judge must rule as to whether the witness is hostile. A hostile, or adverse, witness is one who demonstrates an unwillingness to tell the truth, in relation to matters important in the trial, "for the advancement of justice".[5] Mere forgetfulness, lack of enthusiasm for the role of witness or dislike for the party calling him are not sufficient. If previous inconsistent statements are relied on, it will be necessary, firstly, to consider whether any discrepancies are significant as to extent and subject matter and, secondly, to assess whether they are explained by genuine loss of memory or stupidity, or should be regarded as the product of reluctance to tell the truth. The fact that the witness' present evidence is inconsistent with an earlier account is material but not necessarily conclusive.[6]
- If the declaration of hostility is made, there remain separate discretions to be exercised as to whether to allow cross-examination of the witness before the jury and whether to give leave to prove previous inconsistent statements (although the first would usually follow from the conclusion of hostility, and the second from that conclusion and the

---

1 The terms "hostile" and "adverse" may be regarded as synonymous.

2 "Statement" is defined in the *Evidence Act* 1977 as including "any representation of fact", however made.

3 *R v Hadlow* [1992] 2 Qd R 440 at 448.

4 Quite often, the witness on being shown his statement begins to respond in a way more satisfactory to the party calling him and the application is abandoned.

5 *R v Hayden and Slattery* [1959] VR 102 at 103; see also *R v Lawrie* [1986] 2 Qd R 502 at 514 and *R v Hadlow* [1992] 2 Qd R 440 at 448.

6 *McLellan v Bowyer* (1961) 106 CLR 95 at 103.

demonstration of inconsistency). The declaration of hostility and each grant of leave should be distinct so as to reflect the different exercises involved.[7]

- Leave may be granted to cross-examine the witness at large (as is usually the case) or to a more limited extent. Counsel granted such leave retains the right of re-examination after the opposing party has also cross-examined.
- Where leave is given to prove an earlier statement, s 17 requires, before the statement is proved, that details of the circumstances of the statement's making sufficient to identify it be put to the witness and he be asked whether he made it. That process will usually have taken place on the voir dire, but counsel will ask similar questions before the jury. If the witness admits to making the previous statement, counsel will have succeeded in proving it.[8] (If its content has already been put clearly before the court in the course of questioning, there may be no need to adduce any further evidence of it in written form.) If the witness does not admit making it, counsel is entitled to call evidence to prove that he did. Leave under s 17(1) allows proof of the actual statement which is inconsistent with the witness' evidence, not the tender of the entirety of any document containing it.[9] Section 101 of the *Evidence Act* makes the statement thus proved evidence of the facts stated in it where they would have been admissible had the witness given the same evidence orally.[10]
- If the statement is admitted, a direction should be given as to the weight to be attached to the statement: see 46.1. For possible circumstances relevant to the evaluation see *Bradley* [2013] QCA 163.
- An application for a declaration of hostility and for leave to cross-examine and/or prove a previous statement which has been refused may be renewed as the evidence progresses.

---

7 *Lawrie* at 513.

8 It is unnecessary to have recourse to s 18 of the *Evidence Act* for proof of an inconsistent statement where leave has been given under s 17: *R v Baira* [2009] QCA 332 at [29].

9 *R v Baira* at [32].

10 See direction at 44.1 for Previous Inconsistent Statements

Directed Verdict

At the close of the prosecution case, I was called upon to decide as a matter of law whether there is evidence on which you could return a verdict of guilty of (insert offence**).**

I concluded that there is no evidence on which you could find beyond reasonable doubt that (insert fact**).**

This means you will not be retiring to consider your verdict. Instead, I am directing you that you must return a verdict of not guilty of (insert offence**). The verdict must come from you, but you have no choice in the matter.**

My associate will ask you whether you find the defendant guilty or not guilty of (insert offence**). Through your speaker, you must answer not guilty.**

Judge to associate:	***Take the verdict from the jury.***
Associate:	*Members of the jury, do you find the defendant guilty or not guilty of (insert offence)?*
Speaker:	*Not guilty.*
Associate to Jury:	*So says your speaker, so say you all?*
Jury:	*Yes*
Associate to Judge:	*Not guilty, Your Honour.*
Judge:	***You have been found not guilty of the charge. You are discharged.***

Jury Questions[1]

When the lawyers have finished questioning a witness, you may submit to me, in writing, any question you wish the witness to answer. I will review each such question. I may discuss the matter with the lawyers before deciding whether the witness should be required to answer it. If the question is to be asked, I will put it to the witness. I may decide that the question is not proper under the rules of evidence. Even if it is proper, you may not get an immediate answer. For example, a later witness, or an exhibit you are yet to see, may be going to answer the point later on.

[1] This should only be said after a juror has sought to question a witness or inquired about the jury's entitlement to do so; *R v Lo Presti* [1992] 1 VR 696 at 702.

Evidence admitted[1] against one defendant only

More than one defendant is on trial. Each is entitled to have his case decided solely on the evidence admissible against him. Some of the evidence in this case cannot be considered against all.

The (testimony) (exhibit about which) you (are about to hear) (just heard), (describe testimony or exhibit**), can be considered only in the case against the defendant (**insert name**). You must not consider that evidence when you are deciding if the case has been proved against the other defendant(s).**

[1] This instruction may be adapted where the evidence is admissible only for a limited purpose.

Dismissal During the Trial of Some Charges Against Single Defendant

At the beginning, I told you that the defendant was accused of (insert number) different crimes: (briefly describe those offences**). Since then, however, (**insert number**) of these charges (has or have) been disposed of, namely the one(s) having to do with (**describe offence disposed of**). That charge (or those charges) is (are) no longer before you and has no relevance to your consideration of the case. The only crime that the defendant is now charged with is (**describe remaining offence**).**

Discharge of Defence Counsel During Trial

The defendant (insert name**) was at first represented by a lawyer, (**insert lawyer's name**). He has now decided to represent himself, and not to use the services of a lawyer. He has a right to do that. His decision to do so must have no effect on your consideration of the case.**

Disposition of Charge Against Co-Defendant

The case against co-defendant (insert name**) has been disposed of and is no longer before you. That should not influence your verdict(s) with reference to the remaining defendant(s).**

You must base your verdict(s) solely on the evidence that relates to the remaining defendant(s).[1]

[1] Any plea of guilty by a co-defendant ought to have been entered in the absence of the jury. Should the jury learn of that plea, the jury should be instructed, in effect, that the plea of guilty is to be disregarded. For example: **(**Insert name of defendant**) changed his plea to guilty of the charge of (insert charge). Do not let that affect your views about the other defendant(s). The position of each must be separately considered. So put aside the fact that (**insert name**) has pleaded guilty. Instead, consider the case against the remaining defendant(s) on the evidence relevant to him in deciding whether the prosecution has established its case against him.**

Tape Recordings, Transcripts and Exhibits

Commentary

Where tape recordings are admitted into evidence, the actual evidence consists of the sound produced by playing the tape rather than the tape itself. The transcript of such a recording is not, in the ordinary case, evidence but is rather an aid to listening, and the jury should be instructed accordingly.[1] (There is no requirement that the preparation of a transcript of a conversation in which English is spoken requires expertise. Nor is there support in the authorities for the view that comparing voices, through repeated playing of recorded conversations, requires expertise before evidence may be given that the same voice is heard on different occasions.[2])

A translation of a tape recording from a language other than English is in a somewhat different category. In that case, expert evidence may be given by an interpreter as to the content of a tape recording. In that event the length of the translation may make it appropriate to admit the document itself in evidence.[3]

An interesting question arises as to what approach should be taken in directing juries about a translation. May the jurors bring to bear their own knowledge of the language? The better approach would seem to be that a translation should be regarded as expert evidence and, in the absence of any challenge to it, ought not to be rejected. Consequently, the jury should be told to act upon the translation.[4]

Whether a transcript should be allowed into a jury room is a matter for exercise of discretion.[5] In *Watts*[6] the Court of Criminal Appeal concluded, in a case where the tape recordings were long (5 hours) and indistinct, that it was a proper exercise of discretion both to admit transcripts as evidence, and to allow them to go to the jury room. See also *R v Lake, Carstein and Geerlings*[7] where the Court of Appeal ruled that there were sound practical reasons for allowing the jury to retain the transcripts of conversations recorded by telephone intercept. There were numerous telephone conversations and it was not practicable to replay the tapes repeatedly. In *R v Le*[8] the Court of Appeal considered the exercise of discretion where the jury had requested to be provided with the transcripts during their deliberations. Considerations relevant to the exercise of discretion include the length of the tapes, the quality of the recording and the extent to which there are passages that are difficult to hear or understand without replaying the passages repeatedly.

In the matter of *R v Peniamina* [2018] QSC 283, the question arose as to whether the jury should have access to the audio and video recordings, and their accompanying transcripts,

---

1 *Butera v Director of Pubic Prosecutions* (1987) 164 CLR 180 at 188. See also the discussion in *R v Soloman* (2005) 92 SASR 331 at 349 - 352.

2 *Soloman* at 350.

3 *Butera* at 191.

4 The US Court of Appeal's Fifth Judicial Circuit Pattern Jury Instructions direction, where a transcript contains a translation, is similar to that to be given for any transcript; that is, to the effect that the jury are free to disregard any part of the transcript they consider incorrect or unreliable. The Ninth Judicial Circuit Instructions, however, tell the jury that it must accept the English translation as contained in the transcript, because of the need for all jurors to consider the same evidence.

5 *Butera* at 190.

6 [1992] 1 Qd R 214.

7 (2007) 174 A Crim R 491.

8 (2007) 173 A Crim R 450.

while deliberating in circumstances where the accused did not give evidence, but relied upon the content of his recorded statement to police and upon other parts of the evidence to support his plea that he had acted under sudden provocation and in the heat of passion. Sofronoff P directed that the jury should have access to the transcripts, emphasising in particular the length of the audio recordings which contained long silences, that the accused was softly spoken, and that he had a foreign accent. His Honour also remarked that the jury had been annotating the transcripts as they listened to the evidence, and that it would be "difficult to justify refusing to allow a juror to take into the jury room a transcript of a recording which the juror has used and annotated to assist understanding".[9]

In the course of his Honour's reasons, Sofronoff P made the following observations on access to tape recordings:

- The courts have generally been sensitive to permitting juries to have access to recordings while deliberating.
- Many of the cases that deal with the use of recordings by juries concern evidence of child complainants in sexual offence cases, which raise special problems.
- When it is the complainant's evidence alone that is in issue, or largely in issue, the strong trend of authority is that there could be a real danger that the jury might place too much emphasis upon a recording of a complainant's evidence if that evidence is available for the jury's repeated review while deliberating while the evidence of other witnesses is not available.
- Concerns expressed by judges in older cases about the forensic problems may not be concerns that are so relevant today. This may be due to:
    - The increasing use of technology by investigating police where the use of concealed microphones results in recordings with background noise.
    - That jurors make extensive notes on the transcripts given to them.
    - Defence counsel often consent to the admission of transcripts into evidence.

A direction as to the use which may be made of the transcript should be given immediately prior to the provision of transcripts to the jury. If they are to be permitted to keep the transcript in the jury room, it may be as well to repeat the direction in the course of summing-up.[10]

Sample Direction

> **You are about to hear a tape recording of a conversation said to have been had between the defendant and the interviewing officer, and transcripts will be provided for your assistance. However, it is important for you to remember that it is the sounds you hear from the tape recording that constitute the evidence. The transcript itself is not evidence; it is merely an aid to your understanding. It is really someone else's opinion as to what the conversation on the tape is. It is what**

[9] At [18], citing *R v Watts* [1992] 1 Qd R 214 at 225.

[10] It may be useful to obtain counsel's consent to the taking of the transcript into the jury room when the transcript is first made available to the jury.

you hear that matters; so if you hear something different from what appears in the transcript you should act on what you have heard, not on the transcript.[11]

Where the transcript is an expert translation:

You have heard the evidence of (X), an expert who translated the tape recording which you are about to hear. a transcript of his translation has been produced. It may be that some of you are familiar with the language which is contained in the tape recording but it is important that you all act on the same evidence. You should, therefore, accept the English translation contained in the transcript and act upon it rather than embark on your own translation.

Where a tape recording has been edited so as to excise inadmissible material, care should be taken to ensure that any transcript of that recording which is provided to the jury has also been edited: *R v Khaled* [2014] QCA 349. Where it is obvious from the recording that it has been edited, it may be necessary to give a direction along these lines:

You may notice as you listen to the recording that it has been edited in some respects. That has been done to remove parts of the recording that are irrelevant to the issues you must decide. It is very common for recordings to require editing in this way before they are used in a trial. I direct you that you are not to speculate about the parts that have been edited out. I also direct you not to draw any inference adverse to the defendant merely because irrelevant material has not been placed before you. To do so would not only be wrong, it would be utterly unfair.

Such a direction should not be given in every case where a recording has been edited. It should only be considered where the editing is so obvious that there is a real risk the jury might speculate about the nature of the edited portions.

For the special need for caution in relation to the tape recordings and transcripts of an affected child witness, see Evidence of Affected Children 10.1.

Exhibits

Any video recordings played during the course of the trial and any transcripts should be marked for identification to ensure they are part of the record.

[11] If a video, refer to the evidence as being what can be seen and heard.

Interpreters and Translators

The relevant Australian accreditation authority for interpreters and translators is the National Accreditation Authority for Translators and Interpreters (NAATI). NAATI accreditation is the only officially accepted qualification for translators and interpreters in Australia.[1]

Interpreting and translating are distinct qualifications and skills although a person may be accredited as both. NAATI defines interpreting as "*the oral transfer of the meaning of the spoken word from one language...to another*". Translation is defined as "*the written conversion of a text from one language…into another language*". An interpreter could be employed to interpret court proceedings to a witness, party or defendant. A translator should be used to translate texts, for example a record of conversation or a contract.[2]

The NAATI Concise Guide for Working with Translators and Interpreters in Australia[3] notes that a professional interpreter may employ any one for the following techniques when interpreting a conversation:

> *"**Dialogue interpreting** involves interpretation of conversations and interviews between two people. The interpreter listens first to short segments before interpreting them. The interpreter may take notes.*
>
> ***Consecutive interpreting** is when the interpreter listens to larger segments, taking notes while listening, and then interprets while the speaker pauses.*
>
> ***Simultaneous interpreting** is the technique of interpreting into the target language while listening to the source language, i.e. speaking while listening to the ongoing statement. Thus the interpretation lags a few seconds behind the speaker. …In settings such as business negotiations and court cases, whispered simultaneous interpreting or chuchotage is practiced to keep one party informed of proceedings.*
>
> ***Sign language interpreting** is a form of simultaneous interpreting between deaf and hearing people which does not require any special equipment. It involves signing while listening to the source language or speaking while reading signs."*

The Equal Treatment Benchbook notes:[4]

> *"In a criminal trial the assistance of an interpreter may be required in two situations: to interpret the evidence of a witness who is not fluent on English to the Court (which may include the defendant, if he or she testifies), or to interpret the Court proceedings to an accused person who is not capable of following the proceedings in English. In Queensland, there cannot be said to be a right to the assistance of an interpreter in either of these situations, either at common law or pursuant to legislation. Instead, the trial Judge retains a discretion regarding whether an interpreter may be used.*
>
> *The factors which should govern the exercise of this discretion relating to a witness were discussed by the Queensland Court of Criminal Appeal in R v*

---

1 Equal Treatment Benchbook, Supreme Court of Queensland, 2005, p 62.

2 Ibid.

3 NAATI Ltd, 2003, p 2 (http://www.naati.com.au.)

4 Page 68.

> *Johnson.*[5] *All Judges agreed that usually it would be obvious when a witness required an interpreter, and that "Ultimately the decision whether or not a witness should have an interpreter will be answered in the light of the fundamental proposition that the accused must have a fair trial". In this regard two needs should be considered: "the need of the jury to hear and understand a witness's evidence and the need of an accused person to hear and understand a witness's evidence". Generally, witnesses in criminal trials are allowed to give evidence via interpreters if they think this is required, and the Crown bears the costs associated with providing such interpreters".*

A Court does have power in criminal cases to order that the State provide an interpreter, pursuant to s 131A of the *Evidence Act* 1977 (Qld), provided that the Court is satisfied that it is in the interests of justice.

Interpreters in a criminal trial should be sworn pursuant to s 28 – s 30 *Oaths Act* 1867. Section 28 apples on the arraignment of an accused person. Section 29 applies when interpreting between a witness or the defendant when giving evidence in the Court. Section 30 applies where the witness and the defendant speak different languages, and two interpreters are required to interpret between the witness and the defendant and then into English.

The Equal Treatment Benchbook notes:[6]

> *"Judges should be prepared for an interpreter to ask questions to clarify meaning. This may be necessary in certain situations, as there may be significant differences between the two languages being used…the goal must be to convey the accurate meaning of the questions and answers, not necessarily the exact words used".*

It may be a good idea to check with the interpreter what requirements they have with respect to such things as the speed and amount of speech to be interpreted at any one time.

Regular breaks should be taken as interpreting requires a high level of concentration. Signers, in particular, need frequent breaks.

In directing questions to the person being interpreted, the questioner should frame questions directly to the person NOT to the interpreter. The judge should ensure counsel's questioning follows that format. For example "What did you do next" and not "*What did he do next*" or "*Ask him what he did next*". The interpreter should also respond in direct speech. That is "*I did that*" and not "*He did that*".

These general rules of interpreting should also be explained (interpreted) to the witness so that the witness also responds directly.

The judge should ensure that questioning is in simple direct English and is slow and short enough for the interpreter to do their job as well as possible.

This may require intervention to stop excessively long questions or to require rephrasing.

Interpreters should not be expected to undertake the role of an expert in cultural matters. Such matters exceed an interpreter's expertise. Those matters should be addressed by counsel and may require expert evidence.

---

5 (1987) 25 A Crim R 433.

6 Pages 66-67.

Where two interpreters are being used (one for a witness and one for an accused) disputes may arise in a matter of interpretation. These should be dealt with in the absence of the jury with perhaps the necessity of evidence on voir dire being heard.

It may also be appropriate to explain to the jury that it is in the interests of justice for a non-English speaking person to have their evidence interpreted and to beware of any prejudice this may occasion such as the witness/accused is "*hiding behind*" language difficulties.

> **Direction to Jury (BEFORE THE EVIDENCE)**
>
> **Languages other then English may be used during the trial. The evidence you are to consider is that provided through the Court appointed interpreter/translator. Although some of you may know the non-English language used, all jurors should consider the same evidence. Therefore, you must base your decision on the evidence presented in the interpretation/translation. Disregard any other meaning of the non-English words.**[7]
>
> **The interpreter here is (introduce the interpreter by name). He/she is an accredited interpreter in the (specify) language/dialect. The role of the interpreter is to interpret the language of the witness into English so that it can be understood in the courtroom.**
>
> **You should not make any assumptions about a witness or a party based solely on the use of an interpreter to assist the witness or party. (Particularly, in relation to an accused giving evidence through an interpreter, you should not allow any prejudice because of the use of an interpreter to intrude upon your deliberations about the matter.)**
>
> **The process will be that questions will be put directly to the witness through the interpreter and the responses will also be given in direct speech. The questions and answers will not be framed in the third person. For example, the question would be "What did you do next" and not "What did he do next". The response from the interpreter would be "I did this" not "He did this".**

On occasions it may be necessary for a tape recording of a conversation in a language other than English to be played to the jury with a transcript in English being provided. The usual warning about the conversation being the evidence and not the transcript then becomes meaningless. A suggested direction would be

> **"You are about to listen to a recording in a language other than English. Each of you has been provided with a transcript of the recording, which has been**

[7] CF *US v Franco* 136 F3d 622, 626 (9th Cir 1998).

admitted into evidence. The transcript is a translation of the foreign language recording.

Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore you must accept the English translation contained in the transcript and disregard any different meaning of the non-English words".

Retrial Warnings

You may have come to appreciate that there was an earlier trial of these charges. You should not speculate about what might have happened at that trial, or why there is a re-trial. Trials can be stopped because of an error, or because of something quite unforeseen. Whatever the reason, it has no continuing relevance. You are to consider the case upon the evidence placed [and to be placed] before you in this courtroom.

General Summing Up Directions

Charge

The defendant is charged with the following offence(s) [read from indictment].

He says he is not guilty. Your role is to determine on the evidence whether he is guilty or not guilty.

Summing-up

I must now sum-up the case to you. You will then retire to consider your verdict(s).

Functions of judge and jury

Our functions are different. My task is to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies. You must accept the law from me and apply all directions I give you on matters of law.[1]

You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your verdict(s).

I may comment[2] **on the evidence if I think it will assist you in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent view. You are the sole judges of the facts.**

---

1 See *R v Knight & Ors* [2010] QCA 372 at [324]: In complex, lengthy trials, it may be advisable to prepare a draft summing up, provide it to the parties and invite submissions upon it.

2 A comment is to be distinguished from a warning (e.g. against following impermissible paths of reasoning, and where care is needed in assessing some types of evidence such as identification evidence or the testimony of prison informers): *Crampton v The Queen* (2000) 75 ALJR 133 at [39]-[40], [125]-[126], [142]. Where the observation is only comment, the jury should be told that they may ignore it: *Azzopardi v The Queen* (2001) 205 CLR 50, 69-70, at [49]-[50]. The trial judge is not bound to comment on the facts. The preferable course will often be to make no comment on the facts beyond reminding the jury of the arguments of counsel: *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3 at [42]. The exercise of the discretion to comment on the facts requires a degree of judicial circumspection. Because of the risk of unfairness to either side, a comment on the evidence should not go so far as to suggest how a disputed question of fact should be resolved: *McKell v The Queen* (2019) 264 CLR 307, 323 at [46].

Unanimous verdict

In respect of each charge you must [try to (where a majority verdict is permitted)[3]] reach a unanimous verdict: that is, a verdict on which you all agree, whether guilty or not guilty.

[3] There are differing approaches in other jurisdictions where majority verdicts are allowed as to whether mention ought to be made of them at the stage of the summing up to the jury. In some jurisdictions, model directions make mention of the existence of majority verdicts when summing up on the issue of a unanimous verdict. See for example the *Crown Court Benchbook: Specimen Directions* (at 56) published by the Judicial Studies Board for England and Wales, found at <http://www.jsboard.co.uk> and the *Criminal Trial Courts Benchbook*, a publication of the Judicial Commission of New South Wales, where the model direction at [7-020], after stating that a jury's verdict ought to be unanimous, suggests the following: "*As you may know, the law permits me, in certain circumstances, to accept a verdict which is not the verdict of you all. Those circumstances may not arise at all, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a verdict which is not unanimous, I will give you a further direction*." In *Ngati v R* (2008) 180 A Crim R 384 the Court of Appeal noted a divergence of opinion at trial level as to the appropriateness of reference to the existence of majority verdicts when the jury first retire [25], but declined to determine whether making such a reference could lead to miscarriage of justice, finding it inappropriate to do so, partly because the verdict returned in that case was unanimous: [26].

The position in Victoria is similar to that in NSW see Chapter 3.9.2.2 in the *Victorian Criminal Charge Book* published by the Judicial College of Victoria and available at www.judicialcollege.vic.edu.au; see also *R v Muto & Eastey* [1996] 1 VR 336 where it was noted (at 399) that the advantages of giving such a direction is that it is frank with the jury yet makes it clear that their verdict should be unanimous and encourages them to put the possibility of a majority verdict out of their minds. But see *Doklu v R* (2010) 208 A Crim R 333 at [79].

As to the Northern Territory, in *CEV v The Queen* [2005] NTCCA 10 at [16], the NT Court of Criminal Appeal reiterated previous statements of that court that trial judges should not tell the jury anything about majority verdicts when they first retire, emphasising that an impression should not be created before the time when a majority verdict may be accepted, that if jurors were unable to reach a unanimous verdict, the view of the majority will ultimately prevail. However, the court also held at [17] that if a jury asks what the procedure is for majority verdicts before the time such a verdict is permitted, they should be directed as follows, "*Parliament has introduced a provision which in certain circumstances allows a court to take a majority verdict. Those circumstances have not yet arisen and, until they do, you should consider your verdict must be unanimous*."

In Western Australia, the usual approach is not to advise the jury at the outset of the existence of majority verdicts and in *Pearmine v The Queen* [1988] WAR 315, the Criminal Court of Appeal indicated a preference for such an approach, since at that stage a unanimous verdict is required by law. It found no error arose in not explaining the (eventual) possibility of a majority verdict at the outset. Kennedy J, referring to the WA legislation allowing for majority verdicts, said at 321:"[J]uries should be encouraged to reach a unanimous verdict if they are able to do so, because that is the entitlement of an accused before s 41 operates. That is more likely to be achieved by refraining from telling them at some time in the future, if they have not reached a unanimous verdict, a verdict of not less than ten may be accepted."

Conflicting views have been expressed by judges of the SA Court of Criminal Appeal. In *R v Harrison* (1997) 68 SASR 304, Cox CJ at 306 (with William J concurring and Olsson J reserving his position) considered it an undesirable practice to draw the jury's attention to the existence of majority verdicts at a stage when their thoughts should be directed to the desirability of reaching a unanimous verdict. In *R v K* (1997) 68 SASR 405, Doyle CJ at 413-414 expressed agreement with the Victorian approach.

In *R v BCG* [2012] QCA 167 the Court of Appeal held that it was not inappropriate for the trial judge to inform the jury of the possibility of returning a majority verdict and the circumstances where that could occur before the prescribed period had elapsed.

As to a suggested direction in respect of the returning of a majority verdict, see Direction No 52A.

What evidence is

You must reach your verdict on the evidence, and only on the evidence.[4]

The evidence is what the witnesses said from the witness box, the documents [or photos etc] and other things received as exhibits [and the admission(s) made[5]]. The exhibits will be with you in the jury room; [and you will have facilities for playing the electronically recorded material].

What is not evidence

If you have heard, or read, or otherwise learned anything about this case outside this courtroom, you must exclude that information from your consideration. Have regard only to the testimony and the exhibits put before you [and the admission(s) made] in this courtroom since this trial began. Ensure that no external influence plays a part in your deliberations[6]**.**

A few things you have heard are not evidence. This summing-up is not evidence. And statements, arguments, questions[7] **and comments by the lawyers are not evidence either. The purpose of the opening of the case by the prosecutor was to outline the nature of the evidence intended to be put before you. [The same is true of the opening of defence counsel]. Nor were the lawyers' final addresses evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.**

How do you use the testimony and the exhibits?

Primary facts and inferences

Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. The [documents,

---

4 Where defence evidence is called, add: **It does not matter whether that evidence was called for the prosecution or the defence.**

5 Where facts are admitted, the jury might also be informed that **the prosecution and the defence have agreed that (**here set out admitted facts**). You must therefore treat those facts as proved.**

6 This requires further emphasis where adverse pre-trial publicity matters: cf *R v Glennon* (1992) 173 CLR 592 at 603-604, 616, 624.

7 Sometimes it may be appropriate to add:

A thing suggested by a lawyer during a witness's cross-examination is not evidence of the fact suggested unless the witness accepted the suggestion as true. That is, the lawyer's question is not evidence. Let me give you an example. Imagine a lawyer asking a witness, "The sky was grey, wasn't it?" The lawyer's statement in the question that the sky was grey is not evidence that the sky was grey. The evidence is instead to be found in the answer of the witness.

photographs and other] things put into evidence as exhibits may also tend directly to prove facts. But in addition to facts directly proved by the evidence, you may also draw inferences – that is, deductions or conclusions – from facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else occurred. That will be the process of drawing an inference from facts. For example, suppose that when you went to sleep it had not been raining, and when you woke up you saw rainwater around. The inference – the deduction, the conclusion – would be that it had rained while you were asleep. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by the evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.[8]

Burden of proof

The burden rests on the prosecution to prove the guilt of the defendant.[9] **There is no burden on a defendant to establish [any fact, let alone] his innocence.**[10] **The defendant is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged [or some other offence of which he may be convicted on the indictment: You will be directed later on as to this].**

---

[8] In a circumstantial case, consider adding, for example: **Importantly, if there is an inference reasonably open which is adverse to the defendant (i.e. one pointing to his guilt) and an inference in his favour (i.e. one consistent with innocence), you may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds.** cf *Wedd* (2000) 115 A Crim R 205 at 214; see also Direction as to "Circumstantial Evidence" at No 46.

Further, where a particular intent is an element of the offence or otherwise indispensable to a conclusion of guilt, and there are no admissions of it, the jury might be told that: **The defendant's intent is a central issue. No one can look inside his head. So you will need to examine the evidence and ask yourselves whether it is proved beyond reasonable doubt that the defendant intended to (**describe**).** See also Intention.

[9] In a case where the outcome of the trial depends on the resolution by the jury of a conflict between Crown witnesses, the evidence of one pointing to innocence and the evidence of the other pointing to guilt, the jury should be directed that if they are in doubt as to which version is correct, they should acquit: *R v Johnson & Honeysett* [2013] QCA 91 at [19]-[21].

[10] This will require modification where the onus is borne by the defendant: eg. insanity, diminished responsibility, and s 57(c) of the *Drugs Misuse Act* 1986. In such instances, the jury might be directed that: **Where the burden of proof of an issue rests on a defendant as with (**describe issue**), he is not required to establish it beyond reasonable doubt. The standard of proof required of him is lower. Where he is required to prove something, he need only satisfy you that what he contends for is more probable than not.**

Standard of proof

For the prosecution to discharge its burden of proving the guilt of the defendant, it is required to prove beyond reasonable doubt that he is guilty.[11] **This means that in order to convict you must be satisfied beyond reasonable doubt of every element that goes to make up the offence charged. I will explain these elements later. [The prosecution must also satisfy you beyond reasonable doubt of any other matter which I indicate you must be satisfied about in order to find the defendant guilty].**[12]

It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence [and the other matters of which you must be satisfied in order to find the defendant guilty]. If you are left with a reasonable doubt about guilt, your duty is to acquit: that is, to find the defendant not guilty. If you are not left with any such doubt, your duty is to convict: that is, to find the defendant guilty.[13]

Proof beyond reasonable doubt is the highest standard of proof known to the law. It can be contrasted with the lower standard of proof that is required in a civil case where matters need only be proved on what is called the "balance of probabilities." That is, the case must be proved to be more likely than not.

In a criminal trial, the standard of satisfaction is much higher; the prosecution must prove the guilt of the defendant beyond reasonable doubt.[14]

---

[11] A trial judge should not expand on the meaning of "reasonable doubt" or attempt to define the concept any further, unless asked to do so by the jury. In the latter case, reference should be made to the suggested direction on "reasonable doubt", direction number 57.1. Attempts to explain or define the concept has been disapproved in *Green v The Queen* (1972) 126 CLR 28 (where it was held a misdirection to suggest a reasonable doubt was confined to a "rational doubt" or a "doubt founded on reason"); in *R v Punj* (2002) 132 A Crim R 595, where it was held a misdirection to explain "beyond a reasonable doubt" as meaning "feeling sure" or being "really sure"; and in both *R v Kidd* [2002] QCA 433 and in *R v Irlam*; *ex-parte Attorney-General* [2002] QCA 235, the Court of Appeal advised against trial judges speaking about community standards when describing the standard of proof. In *Irlam* the court referred with approval to the model directions at No 24.5 and noted the direction at No 57.1 of the Benchbook.

[12] As, eg, excluding self-defence, accident, or provocation.

[13] In an essentially circumstantial case, add the appropriate Circumstantial Case Direction.

[14] In *R v Dookhea* (2017) 91 ALJR 960; [2017] HCA 36 at [41], the High Court said that although it is, general speaking, unwise for a trial judge to attempt any explication of the concept of reasonable doubt, trial judges should be encouraged to contrast the standard for proof beyond reasonable doubt and the lower civil standard of proof on the balance of probabilities. Therefore the direction is included here although, for the time being, it appears also in Direction No 60.

(Where the locality of the offence is in issue, the standard of proof is on the balance of probabilities.)[15]

No sympathy or prejudice influential

You should dismiss all feelings of sympathy or prejudice, whether it be sympathy for or prejudice against the defendant or anyone else. No such emotion has any part to play in your decision. [Nor should you allow public opinion to influence you.] You must approach your duty dispassionately, deciding the facts upon the whole of the evidence.

Evidence may be accepted in whole or in part

Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence.[16] It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.

Testimony accuracy indicators

Many factors may be considered in deciding what evidence you accept. I will mention some general considerations that may assist you.

You have seen how the witnesses presented in the witness box when answering questions. Bear in mind that many witnesses are not used to giving evidence and may find the different environment distracting. Consider also the likelihood of the witness's account. Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory?

---

[15] In *Thompson v The Queen* (1989) 169 CLR 1, Mason CJ and Dawson J said, "Proof of jurisdiction is a prerequisite of guilt but otherwise it is not an element in proof of the commission of the offence except in those cases in which the offence is so defined that commission of it in a place or locality is made an element of the offence charged." (at 12). Gaudron J said, "Locality, in this sense, may be contrasted with locality as an element of the offence charged, as, for example, in the case of an offence which is constituted by acts or omissions in a public place. In the latter case, locality is an essential element of the offence and as such may be decisive of criminality: In the former case, locality is decisive only of the operation of the law and of the jurisdiction of the courts charged with administering that law to enter judgment." (at 39); *R v WAF & SBN* [2010] 1 Qd R 370, [2009] QCA 144.

[16] The jury might also be informed: **Credibility concerns honesty. Reliability may be different. A witness may be honest enough, but have a poor memory or otherwise be mistaken.**

You may also consider the ability, and the opportunity, the witness had to see, hear, or know the things that the witness testified about. Another point may be: Has the witness said something different at an earlier time?[17] **These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.**[18]

Body of the summing-up

Here give those directions appropriate to assisting the jury to apply the law to the facts and which are otherwise necessary to avoid a perceptible risk of a miscarriage of justice.[19]

Rival contentions

This brings me to a summary of the rival contentions.[20]

Further assistance

If you find that you need further direction on the law, please send a written message through the bailiff. Likewise, if you wish to be reminded of evidence, let the bailiff know, and make a note of what you want. When you return to the courtroom, I will provide such further assistance on the law as I can or arrange for the relevant part of the transcript to be read out to you. As I mentioned at the start

---

[17] Where a prior inconsistent statement assumes importance, elaboration may be helpful: eg, **a matter to be considered in assessing testimony is whether it differs from what has been said by the witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question. In weighing the effect of such an inconsistency or discrepancy, consider whether there is satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence.** As to the evidentiary value of a prior inconsistent statement, see J R S Forbes, *Evidence Law in Queensland*, 3rd ed (1999), pp 247-250; and as to warnings required where a jury might be inclined to treat the prior statement as reliably stating the true facts, see *R v Nguyen* [1989] 2 Qd R 72 at 77-78.

[18] Where warnings are required to avoid a perceptible risk of a miscarriage of justice (cf *Bromley v The Queen* (1986) 161 CLR 315 at 319; *Robinson v The Queen* (1999) 197 CLR 162) as, for example, (though subject to s 632 of the *Criminal Code*) with accomplices, prison informers, indemnified witnesses, and identification evidence, add, **I will, however, be mentioning some special warnings that you must take into account in assessing particular parts of the evidence.**

[19] The Judge's duty to instruct the jury as to the law applicable to the case requires an identification of the real issues in the case, the facts that are relevant to these issues and an explanation as to how the facts are relevant to them: see *Fingleton v The Queen* (2005) 227 CLR 166 at 196-197 [77]-[80]; *R v Baker* [2014] QCA 5 at [9], [86]-[89].

[20] See *RPS v The Queen* (2000) 199 CLR 620 at 637-8; *R* v *Hytch* (2000) 114 A Crim R 573 at [10].

As to inviting the jury to consider alternatives, see the Alternative Charges Direction. And as to the judge's responsibility to leave a possible defence for the jury's consideration even against the wishes of defence, see *Van Den Hoek* (1986) 161 CLR 158 at 161-162, 169; *R v Murphy* (1988) 52 SASR 186 at 195-197; *Hawkins v The Queen* (1994) 179 CLR 500 at 517.

of the trial, you must not disclose in any communication to me the voting numbers.[21]

Delivering the verdict[22]

General direction

When you return after having reached your verdict(s), my associate will ask:

"Have you agreed upon a verdict?"

You will all then say, "*Yes*" to show that you have.

My associate will then ask: "*Do you find the defendant (naming him/her), guilty or not guilty of (specifying the offence)?*"

Your speaker will then state your verdict: That is, whether guilty or not guilty.

My associate will then ask you all: "*So says your speaker, so say you all?"* -which is the time-honoured method for inviting the whole jury to signify that the verdict announced by the speaker is indeed the verdict of all. So you will collectively confirm that the verdict is unanimous by saying "*yes*".[23]

This procedure is repeated for each offence.

I ask you to retire now to consider your verdict(s).

Alternative verdict

If the verdict on the offence of [*specifying offence*] is guilty, no further verdict will be taken. However, if the verdict is not guilty, my associate will then ask*, "How do you find the defendant, guilty or not guilty of [the alternative offence]?"* Your speaker will answer. Then you will again collectively confirm that the verdict is unanimous in the manner just mentioned.

---

[21] *Smith v The Queen* (2015) 89 ALJR 698; (2015) 255 CLR 161; [2015] HCA 27 at [32] and [53].

[22] As to the taking of a verdict associates should be referred to the Associates' Manual.

[23] Where a circumstance of aggravation is charged, it is usually convenient initially to take a single verdict in respect of both the offence and that circumstance. If the jury is not satisfied that the circumstance of aggravation has been proved to the requisite standard, a verdict can then be taken in respect of the offence simpliciter, without mention of the circumstance of aggravation.

Majority Verdict[24]

In respect of a charge where a judge has given directions to the jury that a majority verdict may be returned, the speaker, after indicating that a verdict has been reached, should be asked whether the verdict is unanimous or not. The remainder of the jury should be asked to confirm what the speaker has stated.[25] Disclosure of the jury's interim votes is irrelevant to the discretion to take a majority verdict under s 59A(2) of the *Jury Act*.[26]

Discharge of reserve jurors

> **Now, the following remarks are directed to the reserve jurors. As I mentioned at the start of the trial, because there has been no need to replace any member of the jury your participation in this trial is no longer required and I discharge you from further participation. However, I thank you for your careful attention throughout the trial, and for the dedication with which you have approached your task. I understand that you may feel disappointed that you are to play no further part in this trial and I again acknowledge the very considerable service that you have performed over the last weeks. You are free to leave or to stay at the back of the Court as you wish.**

[24] As to majority verdicts: see Direction No 52A.

[25] For a suggested procedure for the taking of a verdict where a majority verdict direction has been given: see Direction No 52A.

[26] *Smith* at [32] and [53].

Views and Demonstrations

Earlier we attended the location where the [collision or other event] occurred. I gave you some instructions before we went to the scene, and I will repeat those: what you saw at [the roadside] was not evidence. It can be used by you to assist in understanding and applying the evidence you have heard; but it is not itself evidence. The witnesses have described the scene to you, and photographs were tendered with any differences of detail between the time of accident and the time of their taking specified. That is the evidence you should act on, and you should not substitute what you saw when you went to the scene for it; instead you should use that view to assist your understanding of the evidence.

In contrast, by agreement, the witness, (X) showed you while we were at the scene [where he was standing at the time he says he saw the collision]. What he demonstrated is part of the evidence. So there is a difference; seeing the location is an aid to you in understanding the evidence, but what (X) as a witness actually did and said at the scene is as much a part of the evidence as what he said here in the courtroom.

Section 52 *Jury Act* 1995 permits a trial judge to direct that the jury have a view of a particular place or object if considered desirable.[1] The question of a view is a matter for the exercise of the judge's discretion.[2] While s 52(1) gives the judge power to make "the necessary directions", that power is limited by the proper purposes of a view or demonstration. The directions cannot ignore the adversarial process of the criminal trial. They can not be used to frame orders for an investigation and demonstration outside the proceedings. That is particularly so when one of the parties objects. [3]

Procedure

The inspection must be handled with caution. There must be no conversation between jurors and witnesses, between jurors and an accompanying police officer or bailiff, or between jurors and legal representatives. The better practice is to ensure that witnesses, especially for the prosecution, do not accompany the jury at the view. That practice will prevent the risk of the defendant being affected by unsworn statements out of court[4]. While s 52(2) does not compel the presence of the defendant, the defendant's presence is important. The defendant might be able to point out something about which his or her legal advisers are

---

1 The view must be held in the presence of the judge. The parties and their lawyers are entitled to be present.

2 *R v Boxshall* [1956] QWN 45; *R v Lawless* [1974] VR 398; *R v Alexander* [1979] VR 615; *R v Delon* (1992) 29 NSWLR 29 at 34 and *Denver v Cosgrove* [1972] 3 SASR 130. The discretion is a wide one. The decision of the Full Court of Victoria in *Alexander* shows the matters that should be taken into account. Is the request for a mere view, or a demonstration? Is it shown that conditions are the same? - if not, the exercise might be unhelpful, or misleading. If there is to be a demonstration, reconstruction or experiment, can care be taken to ensure that the jurors do not become detectives?

3 See *Knowles v Haritos* (Supreme Court of Victoria, Hampel J, 6734 of 1997, 29/4/98, unreported).

4 *R v Ashton* (1944) 61 WN (NSW) 134.

unaware, or note that others are mistaken about something.[5] If on a trial, there is a view, the accused is entitled to be present but does not have to be.[6]

The usual rule is that no view is allowed after the retirement of the jury. However, justice may require exceptions to that usual approach. [7] Even if a mere view is not evidence, all the jury must attend together.[8] There is a distinction between a mere view and a demonstration.[9] That distinction affects the use that the judge or jury may make of that which is seen.[10]

A demonstration or reconstruction is real evidence. The judge, or jury, can only consider it as real evidence if the parties specifically admit that it should be treated as a reproduction, or if it is proved by evidence to the satisfaction of the tribunal, that it really did reproduce what the witnesses had attempted to describe.[11]

There may be a difficulty if the jury attempts an experiment in the jury room after seeing a demonstration in the courtroom. The jury can handle the objects which are exhibits for example, to note the weight of a club, or the sharpness of a knife or the pressure needed to pull the trigger of a pistol. The jury can prefer the evidence of the material object to the oral evidence. However, when the experiments conducted by the jury go beyond a mere examination and testing of the evidence and become a means of supplying new evidence, they are impermissible.[12]

---

5 *R v Ely Justices, ex parte Burgess* [1992] Crim LR 888; *Milat* SC (NSW) Hunt CJ at CL 12-4-96 (unreported).

6 *R v Crossman* [2011] 2 Qd R 435.

7 See *R v Lawrence* (1968) 52 Cr App R 163; *R v Nixon* (1968) 52 Cr App R 218; *Dryburgh v The Queen* (1961) 105 CLR 532; *R v Hamitov* (1979) 21 SASR 596; *R v Paul* [1942] QWN 41.

8 *R v Gurney* [1976] Crim LR 567; *Way v Way: Heazelwood* (1928) 28 SR(NSW) 345.

9 *Cross* [1295]; *Lawless*, 421.

10 The nature of a mere view is explained by the High Court in *Scott v Numurkah Corporation* (1954) 91 CLR 300. The distinction between a view and a demonstration is summarised in *Alexander*, 631 (in a passage said by Wilson J in *Kozul v The Queen* (1981) 147 CLR 221 at 242 to afford appropriate guidance in the use of demonstrations or experiments).

11 See Fullagar J in *Scott; Quinn & Bloom* [1962] 2 QB 245 at 257; and *Cross* [1290]. A demonstration was allowed in *R v Fernandes* (1996) 133 FLR 477.

12 *Kozul.*

Evidence of Defendant in Respect of a Co-Defendant

What the defendant (insert name**) has said while giving evidence may be used not only for or against him but also for or against the other defendant(s).**[1]

However, to the extent to which that evidence implicates (name of other(s)**) in the (**describe offences**), scrutinize it carefully. There is a danger that, in implicating (**name of other(s)**), (**defendant witness**) may have been concerned to shift the blame.**[2]

This warning is restricted to those parts of the evidence of (defendant witness) which inculpate (name of other(s)**) in the offence: it does not apply to the evidence as it relates to (**name of witness**)'s own case.**

Warning: do not give the direction in the second paragraph without giving the direction in the third.

---

1 *R v Nessel* (1980) 5 A Crim R 374 at 383.

2 There are difficulties in formulating a direction where an accomplice testifies in the defence case. It is contrary to *Robinson v The Queen* (1991) 180 CLR 531 to direct that a defendant's evidence may be subjected to particular scrutiny because of his interest in the outcome. To do so is to undermine the presumption of innocence. Accordingly, when a defendant who gives evidence implicates a co-defendant, the nature and extent of an accomplice warning, *if any*, cannot be answered without reference to the circumstances of the particular case: *Webb v The Queen* (1994) 181 CLR 41 at 65-66, 92-95. But if some warning is to be given, the judge must not permit the jury to believe that it might attach to the defendant's evidence in his own case: *Webb & Hay*, 165. See also *R v Skaf, Ghanem, and Hajeid* [2004] NSWCCA 74 at [159] – [168]; *R v Johnston* [2004] NSWCCA 58 at [141]; *R v Lewis & Baira* [1996] QCA 405; *R & G v The Queen* (1995) 63 SASR 417; and *R v Rezk* [1994] 2 Qd R 321 at 330.

Defendant Giving Evidence

I have already said that the defendant does not have to give evidence, or call other people to give evidence on his behalf, or otherwise produce evidence. That he has done so does not mean that he assumed a responsibility of proving his innocence. The burden of proof has not shifted to him. His evidence [and that of the other witnesses called for the defence] is added to the evidence called for the prosecution. As I have said, the prosecution has the burden of proving each of the elements of the offence beyond reasonable doubt, and it is upon the whole of the evidence that you must be satisfied beyond reasonable doubt that the prosecution has proved the case before the defendant may be convicted.

Often enough cases are described as ones of "word against word". You should understand that in a criminal trial it is not a question of your making a choice between the evidence of the prosecution's principal witness or witnesses, and the evidence of the defendant(s) (and/or his/their witnesses). The proper approach is to understand that the prosecution case depends upon you the jury accepting that the evidence of the prosecution's principal witness (or witnesses) was true and accurate beyond reasonable doubt, despite the (sworn) evidence by the defendant (and/or his witnesses); so you do not have to believe that the defendant is telling the truth before he is entitled to be found not guilty. [1]

Where, as here, there is defence evidence, usually one of three possible results will follow:

1. **you may think the defence evidence is credible and reliable, and that it provides a satisfying answer to the prosecution's case. If so, your verdict would be not guilty;**

   or

2. **you may think that, although the defence evidence was not convincing, it leaves you in a state of reasonable doubt as to what the true position was. If so, your verdict will be not guilty;**

   or[2]

---

1 This paragraph is taken from the judgment of Hunt CJ in *R v E* (1995) 89 A Crim R 325 at 330.

2 cf *Middleton* (2000) 114 A Crim R 141 at 145, [13].

3. **you may think that the defence evidence should not be accepted. However, if that is your view, be careful not to jump from that view to an automatic conclusion of guilt. If you find the defence evidence unconvincing, set it to one side, go back to the rest of the evidence, and ask yourself whether, on a consideration of such evidence as you do accept, you are satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question.** [3];[4]

Where the defendant calls but does not give evidence, an *Azzopardi* direction is required.[5]

3 The Supreme Court of Canada considers that a direction drawing attention to the need to acquit if defence evidence does no more than raise innocence as a reasonable possibility ought to be given routinely: *R v Avetysan* [2000] 2 SCR 745. As to the dangers of conveying to the jury the impression that it is for them "to decide where the truth lies" where there are opposing bodies of evidence on central matters, see *R v Calides* (1983) 34 SASR 355 at 358; *R v G* [1994] 1 Qd R 540 at 543; cf *E* at 330.

4 This suggested direction as to the effect of the evidence a defendant gave was referred to with approval by the Court of Appeal in *R v Armstrong* [2006] QCA 158 and in *R v McBride* [2008] QCA 412.

5 *Azzopardi v The Queen* (2001) 205 CLR 50. See also *R v Hartfiel* [2014] QCA 132.

Defendant Not Giving Evidence, where no adverse inference

The defendant has not given [or called] evidence. That is his right. He is not bound to give [or to call] evidence. The defendant is entitled to insist that the prosecution prove the case against him, if it can. The prosecution bears the burden of proving the guilt of the defendant beyond a reasonable doubt, and the fact that the defendant did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill any gaps in the evidence led by the prosecution. It proves nothing at all, and you must not assume that because he did not give evidence that adds in some way to the case against him. It cannot be considered at all when deciding whether the prosecution has proved its case beyond a reasonable doubt, and most certainly does not make the task confronting the prosecution any easier. It cannot change the fact that the prosecution retains the responsibility to prove guilt of the defendant beyond reasonable doubt.[1]

No specific formula is mandated.

In *R v DAH* (2004) 150 A Crim R 14; [2004] QCA 419 White J wrote at [86], in a passage approved by Cullinane J and supported by McPherson JA, that 'so long as the essential elements which must be conveyed to a jury, that is, that no adverse inference may be drawn from the defendant's failure to give evidence, that the onus of proof lies upon the prosecution, that the defendant is presumed innocent until the prosecution adduces sufficient evidence to reach a conclusion of guilt beyond reasonable doubt and that the failure to give evidence does not strengthen the prosecution case or supply additional proof against a defendant or fill gaps in the evidence, then there is no error.'

See too *R v Nicholson ex parte DPP* (Cth) [2004] QCA 393.

Where the defendant calls but does not give evidence, an Azzopardi direction is required.[2]

---

1 *Azzopardi* (2001) 205 CLR 50 at [34], [51] and [67]. The majority decision held at [51] and [67] that a direction containing most of what is here suggested will "almost always be desirable".

2 See *R v Hartfiel* [2014] QCA 132.

Defendant Not Giving Evidence, where an adverse inference may follow from that[1]

The defendant has not given [or called**] evidence. That is his right. He is not bound or obliged to give [**or to call**] evidence. The defendant is entitled to insist that the prosecution prove the case against him, if it can. The prosecution bears the burden of proving the guilt of the defendant beyond a reasonable doubt, and the fact that the defendant did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill gaps in the evidence led by the prosecution.[2] It proves nothing at all, and you must not assume that because he did not give evidence that adds in some way to the case against him. It cannot be considered at all when deciding whether the prosecution has proved its case beyond a reasonable doubt, and most certainly does not make that task confronting the prosecution any easier.[3] It cannot change the fact that the prosecution retains the responsibility to prove the guilt of the defendant beyond reasonable doubt.**

What I have said is subject to this qualification. The prosecution asks you to conclude that the defendant is guilty from the circumstances which it says are established by the following facts which it claims to have proved. I remind you that those facts are as follows:

---

[1] After *Azzopardi v The Queen* (2001) 205 CLR 50 (*"Azzopardi"*) the circumstances in which such a comment might be appropriate are "both rare and exceptional" (at [68]).
In *R v Doyle* [2018] QCA 303, the President explained, at [20] and [21]:

> "The problem is not that a jury might regard an accused's failure to give evidence as strengthening the Crown case. They are entitled to do so…The problem is the possibility that the jury may use the accused's decision not to give evidence as proving too much. In a case in which such reasoning is permissible, it is important for a trial judge to explain to the jury the limited use that can be made of an accused's decision not to offer an explanation. The jury should be told that the accused is not bound to give evidence. The jury should be told that the onus remains on the prosecution to prove guilt beyond a reasonable doubt even if the accused does not give evidence. The jury should be given to understand that the accused's decision not to offer an explanation does not of itself prove anything.
>
> The jury should be told specifically the limited use to which they can put the absence of an explanation from an accused. It is that in circumstances in which the jury might expect that, if there was an innocent explanation for the facts that give rise to an incriminating inference, then the accused would know what that explanation might be and would offer it and so the accused's failure to offer any explanation strengthens the inference urged by the prosecution [*Weissensteiner v The Queen* (1993) 178 CLR 217].

[2] Each of these directions is mandated by *Azzopardi* at [67] and [51].
[3] See note 2.

[List the significant facts relied on and said by the prosecution to call for an explanation].[4]

The prosecution argues that those facts prove that the defendant is guilty as charged. You may think that if there are any additional facts that would explain that evidence against the defendant, or contradict the conclusion of guilt which the prosecution asks you draw, those additional facts, if they exist, would be additional facts known only to the defendant, and could not be the subject of evidence from any other person or source.[5]

Those facts would be additional to evidence given by the witnesses who have been called; and mere contradiction would not be evidence of any *additional* fact. By mere contradiction, I mean the defendant simply giving evidence and denying he was guilty. That mere contradiction by the defendant of evidence already given would not be evidence of any *additional* fact.[6]

The consequence of the defendant electing to call no evidence is that you have no evidence of additional facts from him to explain the evidence put forward by the prosecution. The conclusion of guilt the prosecution argues for may be more safely drawn from the proven facts when a defendant elects not to give evidence of relevant additional facts which, if they exist, must be within his knowledge.[7]

You are not allowed to resolve doubts about the reliability of witnesses, or the conclusion to be drawn from the evidence simply because the defendant has not contradicted evidence already given. Remember also that the defendant has already contradicted the general allegation against him by the plea of not guilty.[8] You may only ask yourselves if the prosecution case for the conclusion of guilt is strengthened[9] by the decision of the defendant not to offer any explanation in evidence where, if there are additional facts that would explain the evidence led by the prosecution, or contradict the conclusion of guilt that the prosecution asks

---

[4] This requirement is mandated too by *Azzopardi* (at [67]).
[5] *Azzopardi* at [61].
[6] These directions come from *Azzopardi* at [64] with the inclusion of the example of a contradiction which would not be evidence of anything "additional".
[7] This is the (modified) direction which was actually given in *Weissensteiner v The Queen* (1993) 178 CLR 217 at 223-224 ("*Weissensteiner"*). In *Azzopardi*, the majority held the directions to be given should not go beyond that. See *Azzopardi* at para [67].
[8] An observation to this effect is in *Azzopardi* at [62].
[9] *Weissensteiner* at 228 approves reference to "strengthening" the prosecution case, and at 237 to "strengthening" the inference of guilt. The term "conclusion" may be understood better by jurors than "inference".

you to draw, those additional facts, if they exist, would be peculiarly within the knowledge of the defendant;[10] who has not given evidence of them.

You should keep in mind that a person charged may have a number of reasons for not giving evidence, other than that his evidence would not assist his case.[11] Reasons might include timidity; a concern that cross examination might confuse the person charged; the fact that the person charged has already given an explanation to the police; a possible memory loss; fear of retribution from other persons; or a belief that weaknesses in the prosecution case will leave you in any event with a reasonable doubt as to guilt. These are just some possibilities. You must bear all those things in mind when considering whether it is safe to accept and act upon the evidence led by the prosecution, and to draw beyond reasonable doubt the conclusion of guilt it asks you to draw.=

For an example of a direction about the limited use a jury might make of an accused's failure to offer an explanation see *R v Doyle* [2018] QCA 303 at [10] in which the trial judge said, after reminding the jury about the onus of proof, the presumption of innocence and that the accused was not obliged to give evidence:

> "Because the accused chose not to call evidence, you do not have additional facts from him to explain the evidence led by the prosecution. The conclusion of guilt contended for by the prosecution may be more safely drawn from the proven facts when an accused person elects not to give evidence of any additional facts which, if they existed, must have been within the knowledge of that … accused. That is as far as this exception goes. The failure of the accused to call evidence or give evidence does not help you. You are not allowed to resolve doubts about the reliability of witnesses or conclusions to be drawn from the evidence simply because [the accused did not give evidence]. The plea of not guilty is his denial, and in that way, he has contradicted the prosecution case in a general way.
>
> … [I]f the evidence presented raises an inference that the accused was the driver and the man with the sword, that inference that it was him may be strengthened by the accused's decision not to offer any evidence as an explanation. And it may strengthen it but only if any additional facts that could offer an innocent explanation for the use of his car at that time and his later presence in the street would, if those facts existed, be peculiarly within the knowledge of the accused. It is in those circumstances that the absence of an explanation from [the accused] may strengthen the case against [him]. It does not automatically mean that he is guilty, but it is something that you may consider."

---

10 "Peculiarly" may not be easy for all jurors; but that is the term used in *Azzopardi* at [64].

11 *Weissensteiner* at 228.

Defendant's Right to Silence[1]

Some reference has been made to the defendant's being silent when being asked by the police about things. His silence is not evidence against him. Indeed, the warning given by the police to the defendant expressly advised him that he was entitled to remain silent. So it would be quite wrong to reason that because he was silent or refused to answer questions that he must have something to hide or be guilty of some offence. Therefore, you cannot use against him the fact that he took notice of the police caution and chose to remain silent.

[1] *Petty v The Queen* (1991) 173 CLR 95 at 97; *R v Coyne* [1996] 1 Qd R 512 at 519; cf *R v Vannatter* [1999] QCA 104.

Co-offender Who Has Pleaded Guilty

You have heard the evidence that witness (name**) has pleaded guilty to a crime which arose out of the same events for which the defendant is on trial here. You must not consider that guilty plea as any evidence of this defendant's guilt. You may consider that witness's guilty plea only for the limited purpose of determining how much, if at all, to rely upon that witness's testimony.**

The Rule in *Jones v Dunkel*

Failure by defence/prosecution to call a material witness:

> **It may appear to you that witnesses other than those who have given evidence might have been able to give some relevant evidence (**on some aspect of the case**). You may not speculate about what others who were not called might have said if they had been called. You should act on the basis of the evidence that has been called and only that evidence.**

In *Dyers v The Queen*[1] the High Court restricted the application of *Jones v Dunkel*.[2] It is no longer appropriate for a *Jones v Dunkel* type direction to be given in relation to the failure of the defence to call witnesses, except in the rare exceptions referred to in *Azzopardi v The Queen*; [3] save in those circumstances, the direction set out above, modelled on what was said in *Jones v Dunkel* should be given. It is also usually inappropriate to give one in relation to the failure of the prosecution to call witnesses.[4]

In *Dyers*, Gaudron and Hayne JJ[5] (with whom Kirby J agreed on this point) said:

> *"As a general rule a trial judge should not direct the jury in a criminal trial that the accused would be expected to give evidence or call others to give evidence. Exceptions to that general rule will be rare. They are referred to in Azzopardi. As a general rule, then, a trial judge should not direct the jury that they are entitled to infer that evidence which the accused could have given, or which others, called by the accused, could have given, would not assist the accused. If it is possible that the jury might think that evidence could have been, but was not, given or called by the accused, they should be instructed not to speculate about what might have been said in that evidence."*

In *Azzopardi,* Gaudron, Gummow, Kirby and Hayne JJ[6] said:

> *"There may be cases involving circumstances such that the reasoning in Weissensteiner will justify some comment. However, that will be so only if there is a basis for concluding that, if there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused, that a comment on the accused's failure to provide evidence of those facts may be made, The facts which it is suggested could have been, but were not, revealed must be additional to those already given in evidence by the witnesses who were called. The fact that the accused could have contradicted evidence already given will not suffice. Mere contradiction would not be evidence of any additional fact. In an accusatorial trial, an accused is not required to explain or contradict matters which are already the subject of evidence at trial. These*

---

1 (2002) 210 CLR 285.

2 (1959) 101 CLR 298.

3 (2001) 205 CLR 50 at 74.

4 See also the direction below which is an alternative direction for use where the prosecution fails to call a material witness.

5 (2002) 210 CLR 285 at [5].

6 (2001) 205 CLR 50 at 74.

matters must be assessed by the jury against the requisite standard of proof, without regard to the fact that the accused did not give evidence."

The reasoning which underpins the decisions in *Azzopardi* and *RPS v The Queen*[7] is not confined to the defendant failing to give evidence personally, but applies with equal force to the defendant's failure to call other persons to give evidence.

(See in relation to directions in cases where the defendant does not give evidence the discussion of the *Azzopardi/Weissensteiner* direction in "Defendant Not Giving Evidence, where no adverse inference" No 28A and "Defendant Not Giving Evidence, where an adverse inference may follow from that" No28B)

Failure by prosecution to call material witness:[8]

You heard reference to (X) who was present when (insert description of act**) occurred. The prosecution could have called (X) to give evidence, but it did not do so. Since there is no explanation of his absence, you may infer that nothing he could have said would have assisted the prosecution case. You cannot infer that he would have given evidence damaging to the prosecution case, but you may consider that it affects your readiness to accept the evidence of (**insert name of witness**) for the prosecution. You may find that you can accept more readily the evidence given by (**insert name of witness**) for the defence since it is not contradicted by anything (X) might have said.**

In *Dyers*, Gaudron and Hayne JJ[9] said:

"Further, as a general rule, a trial judge should not direct the jury in a criminal trial that the prosecution would be expected to have called person to give evidence other than those it did call as witnesses. It follows that, as a general rule, the judge should not direct the jury that they are entitled to infer that the evidence of those who were not called would not have assisted the prosecution. A direction not to speculate about what the person might have said should be given. Again, exceptions to these general rules will be rare and will arise only in cases where it is shown that the prosecution's failure to call the person in question was in breach of the prosecution's duty to call all material witnesses."

In *RPS*, Gaudron A-CJ, Gummow, Kirby and Hayne JJ[10] said:

"… if the question concerns the failure of the prosecution to call a witness whom it might have been expected to call, the issue is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, the jury should entertain a reasonable doubt about the guilt of the accused."

---

7 (2000) 199 CLR 620.

8 A case where the Court of Appeal considered it appropriate to give such a direction is *R v Palmer* (1998) 103 A Crim R 299, which entailed the failure by the prosecution to call a corroborating police officer in respect of disputed, unrecorded admissions allegedly made by the defendant; see also *MFA v The Queen* (2002) 213 CLR 606, judgment published 14 November 2002.

9 (2002) 210 CLR 285 at [6].

10 (2000) 199 CLR 620 at 633.

The trial judge may, but is not obliged to, question the prosecution in order to discover its reasons for declining to call a particular person, but the trial judge is not called upon to adjudicate the sufficiency of the reasons that the prosecution offers. Only if the trial judge has made such an inquiry and has been given answers considered by the judge to be unsatisfactory, would it seem that there would be any sufficient basis for a judge to tell the jury that it would have been reasonable to expect that the prosecution would call an identified person. There would then be real questions about whether, and how, the jury should be given the information put before the judge and then a further question about what directions the jury should be given in deciding for itself whether the prosecution could reasonably have been expected to call the person. Only when those questions have been answered would further directions of the kind contemplated by *Jones v Dunkel* be open.[11]

In *MFA v The Queen,*[12] the High Court approved a full *Jones v Dunkel* direction, adverse to the Crown, given in that case, where the prosecution had not called relevant witnesses because they were considered to be "in the camp of the accused." The Court held that did not *ipso facto* entitle the Crown to regard that evidence as unreliable.

[11] *Dyers*, per Gaudron and Hayne JJ at [17] (Kirby J agreeing).

[12] (2002) 213 CLR 606 at [20], [36], [81].

The Rule in *Browne v Dunn*

The High Court has emphasised the need for care on the part of a trial judge in directing a jury to attribute significance to the failure of counsel to put an aspect of his client's case to a witness on the other side, especially where it is otherwise apparent that the proposition which is not put is in issue.[1]

> **The defendant gave evidence that [the complainant's injury was the result of a fall rather than having been inflicted by him]. That proposition was not put to the complainant. In other words, she was not asked to comment on whether that was the case. The result is that she has not had the opportunity to respond to the suggestion [she injured herself in a fall], and you do not have the benefit of the evidence she might have given had she been asked.**

Where further direction warranted.[2:]

> **It is a rule of practice in both civil and criminal trials that if one party is going to assert a different version of events from the other, witnesses for the opposing party who are in a position to comment on that version should be given, by the cross-examiner, the opportunity to do so. That has not occurred. The failure to ask the complainant questions about [the fall] which the defendant says occurred may be used by you to draw an inference that he did not give that account of events to his counsel. That in turn may have a bearing on whether you accept what the defendant said on the point. However, before you draw such an inference you should consider other possible explanations for the failure of counsel to put questions about [a fall] to the complainant.**
>
> **In preparation for trial, usually counsel would be given his client's instructions: that is, what his client has to say about the matter in written form taken by his solicitor, or in oral form by what his client says when they meet, or both. Counsel then uses that information from his client to ask questions of the opposing side's witnesses. However, communication between individuals is seldom perfect; misunderstandings may occur. The solicitor or the barrister may miss something of what their client is telling them. In the pressures of a trial, counsel may simply forget to put questions on an important matter. You should consider whether there are other reasonable explanations for the failure to ask the complainant**

---

1 *MWJ v The Queen* (2005) 80 ALJR 329; *R v MAP* [2006] QCA 220.

2 *R v Foley* [2000] 1 Qd R 290 suggests that the basic direction as to the absence of evidence, and the direction as to inferences, are to be given only in exceptional cases: *Burns* (1999) 107 A Crim R 330, a recent application of *Foley*.

[whether there was such a fall]. You should not draw any inference adverse to the defendant's credibility unless there is no other reasonable explanation for that failure.

The rule concerns the failure of a cross-examiner to challenge the evidence of a witness on some point, followed by the attempted making of assertions or calling of evidence to show that the witness should not be believed.[3] Considerable caution is required in applying it in criminal trials, since there may be any number of reasons for oversight, including counsel's error.[4] The rule applies against the prosecution.[5] Rebuttal evidence may be permitted.[6]

---

[3] *Browne v Dunn* (1893) 6 R 67 at 70, 76. See also *Cross On Evidence*, Aust ed. [17435] ff.

[4] *R v Birks* (1990) 19 NSWLR 677; *R v Manunta* (1989) 54 SASR 17. Caution should also be exercised in deciding whether to give a direction where the party who called the witness who was not cross-examined does not complain: *McDowell* [1997] 1 VR 473.

[5] *Hart* (1932) 23 Cr App R 202 shows the prosecution stands to be embarrassed by the rule in *Browne v Dunn* as much as the defendant. At 206, the Court of Appeal commented on a "remarkable feature of the case", that three defence alibi witnesses were not cross-examined.

[6] In particular, the witness treated unfairly may be recalled and given the opportunity to make appropriate comment. In *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NSWLR 551 at 556 Clarke JA said that the trial judge "may, for example, require the relevant witness to be recalled for further cross-examination before allowing the contradictory evidence to be given or he may decline to allow the party in default to address upon a particular subject upon which the opposing party was not cross-examined."

Alternative Charges[1]

Commentary

In *R v Bickell* [2020] QCA 37, Morrison JA (in dissent as to the outcome, but alone in considering this ground) summarised the principles relevant to leaving alternative charges to the jury as follows –

a) the duty of a trial judge with respect to alternative verdicts does not require an alternative verdict to be left to a jury in every case; rather, the question is whether an instruction on an alternative verdict is necessary to secure the fair trial of the accused, according to the circumstances of the particular case;[2]

b) the rationale for directing a jury about alternative verdicts comes from a broader perspective than a consideration of the interests of the accused; public interest in the administration of justice is best served if a trial judge leaves to the jury, subject to any appropriate caution or warning, that irrespective of the wishes of trial Counsel, any obvious alternative offence which there is evidence to support;[3]

c) the conduct of a fair trial may require an alternative verdict to be left although it is not requested by Counsel for the accused;[4]

d) it would not be conducive to a fair trial to leave an alternative verdict where the defence case may have been differently conducted had the possibility of that verdict been one which was raised at the outset of the trial;[5]

e) the need to advise a jury about an alternative lesser offence comes from the risk, in the particular case, that a defendant who has committed only the lesser offence will either be wrongly convicted of the more serious offence or acquitted altogether;[6] and

---

1 As to the obligation to direct on lesser offences open on the evidence, see *R v MBX* [2014] 1 Qd R 438; *R v Chan* [2001] 2 Qd R 662; *Gilbert v The Queen* (2000) 201 CLR 414; *R v Willersdorf* [2001] QCA 183 at [17]-[20]; *R v Le Doan* (2001) 3 VR 349 at 355-361; *R v Kane* (2001) 3 VR 542; *Harwood v The Queen* (2002) 188 ALR 296; [2002] HCA 20 at [17]- [19] but see *R v Stevens* [2004] QCA 99 at [79], [99],those paragraphs being a useful caution against complicating a summing-up unnecessarily by directing on alternatives that are not realistically indicated by the evidence; *R v Perdikoyiannis* (2003) 86 SASR 262 at 268.

2 *James v The Queen* (2014) 253 CLR 475; [2014] HCA 6, at 491 [38]

3 *James v The Queen* at 487 [27], adopting *R v Coutts* [2006] 1 WLR 2154, 2167 at [23]

4 *James v The Queen* at 491 [38].

5 *R v Holzinger* [2016] QCA 160 at [31].

6 *R v Holzinger* at [31].

f) the facts and circumstances of the particular case need to be considered and the essential inquiry is on the fairness of the trial.[7]

Sample direction where alternative charges are before the jury

> **Charges 1 and 2 (**shortly describing them**) are alternatives. You may not therefore find the defendant guilty of both.**
>
> **You may consider the possible verdicts in whatever order you wish but keep in mind that when you finish your deliberations you will be required to give your verdict first on the count of (**describe more serious charge**). It will be only if you reach a verdict of not guilty of that count that you will be asked to return another verdict.**[8]
>
> **I suggest that you may first wish to consider (**describe more serious charge**), which is the more serious. If you find the defendant guilty of that offence, you do not need to consider the other(s). But, if you find the defendant not guilty of (**describe more serious offence**), then consider the alternative charge of (**describe it**). If your verdict is guilty of (**describe more serious charge**), you will not be asked to return a verdict in respect to the other charge. If, however, your verdict in respect of (**the more serious event**) is not guilty, then proceed to consider the other charge. Any verdict, whatever it is on any count, must be unanimous.**[9]

Special direction where the alternative counts are stealing and receiving[10]

> **If you are not satisfied beyond reasonable doubt that the defendant is guilty of stealing, and are not satisfied beyond reasonable doubt that the defendant is guilty of receiving, but are satisfied beyond reasonable doubt that the defendant either stole the property or received it knowing it to be stolen, you should return as your verdict: guilty of stealing or receiving the property [or part of it] but unable to say which.**[11]

---

7 *R v Holzinger* at [29].

8 See *Stanton v R* (2003) 198 ALR 41 at [38], [69]. A judge may make a suggestion as to what the jury might find a convenient approach to their deliberations, but must not mandate the order in which to deliberate on the charges.

9 See *Stanton v R* (2003) 198 ALR 41 at [22] – [25] – '…if the jury were unable to agree…on…a verdict of not guilty of …murder, the proper course was to discharge the jury' – *Stanton* at [22].

10 When such a verdict is returned, the judge is required by s 568(8) to enter a conviction for the offence for which the least or lesser punishment is provided.

11 See *Williams* (2000) 116 A Crim R 552; *Gilson v The Queen* (1991) 172 CLR 353; *R v Marijancevic* (2001) 3 VR 611. For an alternative formulation: **You are entitled to deliver any one of the following verdicts:**

1. **Not guilty; or**
2. **Guilty of stealing; or**
3. **Guilty of receiving; or**
4. **Guilty of stealing or receiving but we are unable to say which.**

Separate Consideration of Charges – Single Defendant

Separate charges are preferred. You must consider each charge separately, evaluating the evidence relating to that particular charge to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved its essential elements. You will return separate verdicts for each charge.[1]

The evidence in relation to the separate offences is different, and so your verdicts need not be the same.

Where the elements of the offences are different, add or substitute for this last sentence:

The elements of the offences are different, and so your verdicts need not be the same.

Markuleski direction

A *Markuleski* direction addresses the risk of unfairness that the accused will be denied the chance of acquittal on all counts, if given the state of the evidence, such a result ought reasonably to follow if the jury were to reject as unreliable any part of the complainant's evidence.[2] Where an acquittal on one count would appear to require an acquittal on another (as, e.g., where the acquittal necessarily reflects adversely on the reliability of a complainant whose evidence is central to the other count), the jury should be told so.[3] Particularly in sexual cases, it will often be crucial to tell the jury that any doubt with respect to the complainant's evidence in connection with one count should be considered when assessing her overall credibility and, therefore, when deciding whether her evidence is reliable in relation to other counts. A *Markuleski* direction is not always necessary.[4] Whether such a direction is necessary depends on the circumstances of the case. For example, the Court of Appeal has held that no prejudice arose from the absence of a *Markuleski* direction where there were two incidents that occurred over a short space of time.[5] An appropriate warning may well be along these lines:

---

1 In *R v Doolan* [2014] QCA 246 the Court of Appeal held that:

> *Almost invariably whenever charges are joined, it is incumbent on the trial judge to direct the jury to consider each charge separately and evaluate the evidence on that charge to decide whether each juror is satisfied beyond reasonable doubt that the prosecution has proved the elements of the charge. The jury should also be directed that the evidence in relation to each charge is different so the verdict need not be the same.*
>
> (McMurdo P at [39], Gotterson JA and Atkinson J agreeing).

Where there are separate charges involving different complainants and the evidence is not cross-admissible, the jury must be specifically directed that the evidence relating to one complainant cannot be used in support of the case in relation to the other complainant: *R v CBM* [2014] QCA 212.

2 *R v Ford* [2006] QCA 142 at [124]-[125].

3 *Scott* (1996) 131 FLR 137, 148; *Patton* [1998] 1 VR 7, 24-25.

4 *R v Ford* [2006] QCA 142 at [124]-[125]; *R v GAW* [2015] QCA 166.

5 *Ashley* [2005] QCA 293 at [40]; see also *WAA* [2008] QCA 87 at [35]-[37]; *LAC* [2013] QCA 101 at [97]; *Johnston* [2013] QCA 171 at [32]; *R v GAW* [2015] QCA 166.

If you have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more counts, whether by reference to her demeanour or for any other reasons, that *must* be taken into account in assessing the truthfulness or reliability of her evidence generally.[6]

The *Markuleski* direction draws attention to the point that the credibility of the complainant is a separate question from that of whether or not the defendant should be convicted on each separate count. Finding that the complainant is a credible witness generally should only lead to conviction if the evidence given by that complainant is sufficient to allow the jury to find beyond reasonable doubt that each offence was committed. It may be, that while a witness is regarded as generally credible, there are features of the totality of the evidence on a particular count which could rationally lead to a rejection of the witness' evidence on that count. It may also be possible, for example, for a jury to find that a complainant was a credible witness but also come to the view that the account given of a particular incident, while honest, did not amount to reliable evidence that the offence charged had actually been committed. One way in which considerations of this kind might be communicated to a jury is as follows:[7]

Your general assessment of the complainant as a witness will be relevant to all counts, but you will have to consider her evidence in respect of each count when considering that count.

Now, it may occur in respect of one of the counts, that for some reason you are not sufficiently confident of her evidence to convict in respect of that count. A situation may arise where, in relation to a particular count, you get to the point where, although you're inclined to think she's probably right, you have some reasonable doubt about an element or elements of that particular offence.

Now, if that occurs, of course, you find the defendant not guilty in relation to that count. That does not necessarily mean you cannot convict of any other count. You have to consider why you have some reasonable doubt about that part of her evidence and consider whether it affects the way you assess the rest of her evidence, that is whether your doubt about that aspect of her evidence causes you also to have a reasonable doubt about the part of her evidence relevant to any other count.

Evidence of each charged act as circumstantial evidence of other charged acts

In *R v Bauer (a pseudonym)* (2018) 92 ALJR 846; [2018] HCA 40, the High Court said at [50]:

Since proof of an accused's commission of a sexual offence against a complainant on one occasion makes it more likely that the accused may have committed another, generally similar sexual offence against the complainant on another

[6] *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290; cf *Doggett v The Queen* (2001) 208 CLR 343; [2001] HCA 46 at [55]; *R v M* [2001] QCA 458 at [17]-[22]; *R v S* (2002) 129 A Crim R 339 at [8], [29].

[7] See *R v LR* [2006] 1 Qd R 435 at [67]; *R v JK* [2005] QCA 307 at [19], [28], also *R v JL* [2007] QCA 131.

occasion, at least where the two are not too far separated in point of time, where an accused is charged with a number of counts of generally similar sexual offences against a single complainant the several counts may ordinarily be joined in a single indictment and so tried together. In such cases, evidence of each charged act is admissible as circumstantial evidence in proof of each other charged act and, for the same reason, evidence of each uncharged act is admissible in proof of each charged act.

See also *R v M* [1996] QCA 230 at pages 8-9.

Where it is appropriate, the following direction may be given:

As I have mentioned, the defendant is charged only with the … offences in the indictment.

The Crown relies on the evidence of each charged act as evidence that the defendant had a sexual interest in the complainant and was willing to give effect to that interest.

If you are satisfied beyond reasonable doubt of a particular offence, that finding may make it more likely that the defendant committed other offences charged in the indictment.

If you are satisfied beyond reasonable doubt that the defendant committed a particular offence, then you must consider whether you can conclude that the defendant had a sexual interest in the complainant.

If you are so satisfied, you may use that finding in considering whether the defendant committed the other offences charged.

The evidence of each charged act must not be used in any other way. It would be completely wrong to reason that, because the defendant committed one offence, he/she is generally a person of bad character, and for that reason, must have committed the other offences.

If based upon a conclusion that the defendant is guilty of a particular offence, you are satisfied that the defendant had a sexual interest in the complainant, it does not inevitably follow that you would find him/her guilty of other counts on the indictment. You must always decide whether, having regard to the evidence relevant to a particular count, the offence charged has been established beyond reasonable doubt.

Separate Consideration of Charges – Multiple Defendants Confronting Multiple Charges

Although the defendants are being tried together, you must give the cases against, and for, each of them separate consideration. Separately consider the evidence admitted in relation to that defendant [whether adduced against him or in his favour].[1]

In respect of each charge, each defendant is entitled to have the case decided on the evidence, and on the law, that applies to him, and as it relates to each particular charge. [2]

[Outline the evidence that is admissible against each defendant where necessary. In particular, where evidence is admitted against one defendant only, that must be explained to the jury.**]**

And so you must return separate verdicts in respect of each defendant; and separate verdicts on each charge.[3]

---

1 Note that Benchbook direction No. 36A (Hearsay Confessions by another Exculpating the Defendant) has been removed in view of the judgment of the High Court in *Baker v The Queen* (2012) 245 CLR 632; [2012] HCA 27.

2 See *R v Vecchio & Tredrea* [2016] QCA 71; *R v SCO & SCP* [2016] QCA 248 at [166]-[172].

3 Where appropriate, add: Of course, as the evidence is different [in the separate cases and] in respect of the different offences, your verdicts need not be the same, whether in respect of the charges or the defendants.

Out-of-Court Confessional Statements

The prosecution relies on answers said to have been given by the defendant in an interview with police as supporting its case against him. In order to rely on that evidence, you must be satisfied that he did give the answers that are attributed to him, and that they were true.

1. Whether the confession was made:

   Where the circumstances of a disputed, unrecorded, oral admission call for a warning.[1]

   The police officers say that (insert defendant's name**) made an admission of guilt to them; he denies that he did so. The alleged admission was not recorded by videotape or audio tape, nor was the defendant given any opportunity to read or sign any written record of it. There is no independent confirmation by any witness apart from the police officers as to what was said.[2] It is the fact, of course, that sometimes people who make confessions repudiate them later; they regret having made the admission which points to their guilt, and seek to avoid the consequences of it by denying ever having made it. But in circumstances such as these, where it is said that an admission, which is not in any way recorded, was made while the defendant was in the custody of the police, you should treat it with great caution. A person in that position is at a very grave disadvantage; he can only deny what the police say, and there is no independent means available of establishing what happened. Bear in mind that it is easy for a police officer or indeed police officers to claim that a defendant has said something to indicate his guilt, and very difficult for the defendant (X) to refute such a claim.**

   In assessing the evidence of the police officers as to the alleged making of the admission, keep in mind that they have the advantage of being relatively experienced witnesses, accustomed to giving evidence. Have regard to these matters: why did the officers, knowing in advance that they would be speaking to (X) make no arrangements to ensure that the conversation could be recorded? As you have heard, it is now standard procedure in this State to record electronically all interviews with suspects; and the police officers' own evidence in this case

---

1 *Black v The Queen* (1993) 179 CLR 44; *R v Lawson* [1996] 2 Qd R 587; *R v Van Wirdum* [1994] QCA 476; *R v Williams* [2001] 1 Qd R 212.

2 See *Police Powers and Responsibilities Act* 2000; s 418 as to the right to have a friend or relative present, s 435 and s 436 as to the requirement for electronic recording where practicable and s 437 as to the requirements for a written record.

confirms that they did regard him as a suspect. Did you find the officers' explanations as to why they were unable to do so in this case convincing? You may consider that there were certain deficiencies and inconsistencies in their evidence on this point, for example … Why did they not at the least prepare a note of what he is alleged to have said to them and offer it to him to read, and if he accepted it as a true account of what he had said, to sign it as correct? Given those difficulties, you will have to scrutinise their evidence very carefully to decide whether you can accept it and act upon the admission as having been made by the defendant.

Where a confession in police custody is the only or substantially the only evidence indicating guilt:

In a case such as this, where the alleged admission is really the only basis on which you could find guilt beyond reasonable doubt, you should consider whether there is any independent evidence which would satisfy you that the admissions were made. [You may think that …provides some independent evidence of the making of the admissions][3]. It would be dangerous to convict acting on this evidence alone. However, you may act on it if, having regard to that warning, and having scrutinised it carefully, you are satisfied of its truth and accuracy.

Confession to a prison informer

The prosecution relies on the evidence of (Y) , a former cellmate of (X), who says that (X) confessed the offence to him while they were in custody together. Before you act on the evidence of (Y), you should consider whether you are satisfied of his reliability, accuracy and honesty. You should take into account the fact that while it would be easy enough for (Y) to concoct that evidence, it is very difficult for someone in (X)'s position to refute it. [There is no independent evidence available either way.] You should also take into account the prospect that (Y) may have been motivated to fabricate his evidence, thinking that he will derive some benefit in terms of sentence, treatment or release on parole.

[3] The occasion for giving the warning was identified in *McKinney* (1991) 171 CLR 468 as the absence of reliable corroboration for the making of the confession. Any corroboration direction should therefore addressed the need to look for independent evidence of the confession's making, rather than other evidence implicating the accused in the crime. See also the comments on this issue in *Pollitt* (1992) 174 CLR 558 at 588, 601, 606.

You would have regard to (Y)'s record of convictions for dishonesty, and you would have regard to what he stood to gain, or thought he stood to gain, by giving evidence against the defendant. It would be dangerous to act on the evidence of (Y), if there were no independent evidence confirming it. [However you should consider whether the following evidence does provide confirmation of what (Y) says about (X)'s having admitted the offence to him: … [4]].

Where evidence confirmatory of making of admissions comes from another prisoner:

It is unlikely however that the evidence of (prisoner) (Z) can assist you in this regard, because the same concerns that I have explained to you as to the possible unreliability of (Y) apply equally to him[5] (detail any additional concerns re Z). You should act on it only if after very careful scrutiny, and having regard to my warning and the matters I have identified to you, you are convinced of the truth and accuracy of his evidence.

Electronically Recorded Interview

The evidence of (X)'s admissions is in the form of a videotape which you have seen played, and are entitled to have played again as often as you wish. During the course of the trial you were given transcripts to look at while the tape was played. Remember that those transcripts are really nothing more than someone else's opinion of what was said by the police officers and (X), and although they might have been of some help, it is for you to determine what you heard and saw. If your view of any part of the conversation differs from what the transcript shows, it is your view which must prevail.[6]

2. Whether the confession is true and accurate

If you are satisfied that the statement was indeed made by (X), the second aspect you must consider is whether those parts that the prosecution relies on as indicating guilt are true and accurate. It is up to you to decide whether you are satisfied that those things said by the defendant which would tend to indicate that

---

4 Such evidence should be addressed to the making of the alleged confession; see above at f.2 re *Pollitt.*

5 See *Clough* (1992) 28 NSWLR 396.

6 See Direction No 20 on "Tape Recordings and Transcripts".

he is guilty of the offence were true; because if you are not satisfied, you cannot rely on them as going to prove his guilt. [7]

3. Use of the interview

During the course of the interview a number of questions were asked by the police officers of (X). The same reasoning applies here as you were told about in relation to questions by counsel of a witness. If (X) did not agree to or in some way accept the contents of a question asked of him, the question cannot become any evidence against him. So, for example, the proposition was put to him that … He denied it, and clearly, then there is no evidence from this interview that the proposition was correct. On the other hand, he answered the question … "Yes", and there is therefore evidence that he …

In the course of the interview, it is said, (X) made statements which the prosecution relies on as pointing to his guilt. If you accept them as having been made by (X) and as true, it is up to you to decide what weight you give them, and what you think they prove. He also gave answers which you might view as indicating his innocence.[8] You are entitled to have regard to those answers if you accept them, and to give them whatever weight you think appropriate, bearing in mind that they have not been tested by cross-examination.[9] In relation to both the answers which the prosecution relies on as indicating guilt, and those which point to innocence, it is entirely up to you what use you make of them and what weight you give them.

The jury should be instructed that, before acting on any confessional statement, they must be satisfied, firstly, that the alleged admissions were in fact made and secondly, that they were truthful and accurate.[10]

---

[7] Whether the jury is entitled in considering that issue, to look, not just at the confession itself, but at all the evidence, in order to reach a conclusion as to whether it is true or not will depend on all the circumstances of the case, including what was known to the questioner at the time of interview: *Burns v The Queen* (1975) 132 CLR 258.

[8] *R v Aziz* [1996] AC 41; cf *Callaghan v The Queen* [1994] 2 Qd R 300; *Griffiths v The Queen* (1994) 125 ALR 545; 69 ALJR 77 at 81.

[9] cf *Aziz* 49 at 50; *Wedd v The Queen* (2000) 115 A Crim R 205 at 207; *R v Lace* [2001] QCA 255. See also *Mule v The Queen* (2005) 79 ALJR 1573 and *R v Cox* [1986] 2 Qd R 55 at 65 and *R v Bagley* [2014] QCA 271 at [41].

[10] *Burns*.

They should also be told that statements by police during the course of a record of interview in which allegations are put to the defendant are not evidence unless accepted by the defendant.[11]

In *McKinney*, the majority laid down a "rule of practice of general application" in respect of uncorroborated and disputed police evidence of confessional statements allegedly made by a defendant in police custody. The majority judgment sets out the required contents of such a direction[12] and emphasises that it should not include any suggestion that the jury is required to decide whether there has in fact been perjury and/or conspiracy by the police officers involved or that there is any need to form a judgment about their conduct at all.[13]

In *Derbas*[14] Hunt CJ suggests that it is proper to add an indication to the jury that the direction is necessary in every case in which the police evidence is substantially the only evidence establishing guilt, and is not the result of any particular view of the trial judge. However, s 632(3) *Code* precludes any direction or suggestion as to the unreliability of a class of witnesses, so that it would seem that the direction in Queensland must be confined to the circumstances of the particular case.

In *Williams*[15] the Court of Appeal, while concluding in that instance that there was no need for a general warning as to the danger of acting on disputed and unrecorded oral admissions where they formed only one part of a substantial circumstantial case, foreshadowed a possible need to give *McKinney* style directions if police officers persisted in failing to record conversations.

In *Black*[16] the High Court noted a number of circumstances requiring that the jury should have been told to scrutinise closely the police evidence of an interview. In that case the confession was oral, disputed and uncorroborated. It was made in the course of an interview at a police station where the detectives held strong suspicions as to the defendant's guilt. No note was made until after the interview and no attempt made to obtain the appellant's signature to the note, while unconvincing reasons were given for that course of conduct. The answers supposedly given by the defendant were improbable. The alleged confession was critical to the prosecution case and the defendant was at a disadvantage because the police evidence was not challenged by other defendants.[17]

A warning may be required, depending on the circumstances,[18] as to the danger of acting on the uncorroborated evidence of a prison informer giving evidence of a confessional statement by a fellow prisoner.[19] Any direction must, as a result of the October 2000 amendment to the *Criminal Code*[20] avoid reference to the class of prison informers at large, and should instead be directed to the circumstances and motivation of the particular witness.

Any warning should be directed to the issue of whether there exists corroboration of the making of the confession rather than whether there is independent evidence implicating the defendant

---

11 *Ugle v The Queen* (1989) 167 CLR 647 at 651.

12 Page 476.

13 Page 477.

14 *R v Derbas* (1993) 66 A Crim R 327 at 336.

15 *Williams* at 216-21.

16 *Black v The Queen* (1993) 179 CLR 44 at 54.

17 See also *Lawson*.

18 See s 632(2) *Code;* but see also *Robinson v The Queen* (1999) 197 CLR 162.

19 *Pollitt*.

20 *The Criminal Law Amendment Act* 2000.

in the crime itself.[21] That is because prison informer evidence is almost always given in circumstances where there already exists other evidence of the defendant's involvement in the crime, so the fact of such independent evidence is unlikely to make the informer's evidence any less suspect. To direct a jury on corroboration in traditional terms would risk their taking an unjustified comfort in such evidence as supporting the informer's account.

Corroboration is unlikely to be provided by a fellow prisoner, to whom the same concerns as to unreliability will almost always be applicable.[22]

[21] *Pollitt* at 558, 588, 601, 606; *Clough* at 405.

[22] *Clough* at 406.

Hearsay Confessions by another Exculpating the Defendant

This direction has been removed from the Benchbook in light of the judgment of the High Court in *Baker v The Queen*.[1]

[1] (2012) 245 CLR 632; [2012] HCA 27.

Accomplices

I should now discuss an important matter that has been referred to by counsel in the addresses - the question of the evidence of (alleged accomplice). It is suggested that (name of witness) was involved (with the defendant) in the offence.

OR

In this case (name of witness) admits to being involved in the commission of the offence.

OR

(Name of witness**) has been convicted of the offence.**

You should approach your assessment of the evidence of [the witness] with caution. A person who has been involved in an offence may have reasons of self-interest to lie or to falsely implicate another in the commission of the offence. You should scrutinise [the witness'] evidence carefully before acting on it. [The witness], having been involved in [the offence] is likely to be a person of bad character. For this reason, his evidence may be unreliable and untrustworthy. Moreover [the witness] may have sought to justify his conduct, or at least to minimise his involvement, by shifting the blame, wholly or partly, to others.

Perhaps [the witness] has sought to implicate the defendant and to give untruthful evidence because he apprehends that he has something to gain by doing so. [He has pleaded guilty and indicated that he is prepared to give evidence against his co-accused, the defendant in this case.] You may consider that he has an expectation of being dealt with more leniently as a result of his co-operation with the authorities. [If witness has an indemnity or has been sentenced pursuant to s 13A of the *Penalties and Sentences Act* 1992 see Direction No 60**].**

Whilst it is possible to identify some reasons which he may have for giving false evidence, there may be other reasons for giving false evidence which are known only to him.

(The witness's) evidence, if not truthful, has an inherent danger. If it is false in implicating the defendant, it will nevertheless have a seeming plausibility about it, because he will have familiarity with at least some of the details of the crime.

[The defence points to this evidence (briefly describe evidence**) in support of its argument to you that (the witness) is not telling the truth. On the other hand, the prosecution submits to you that (the witness) is a truthful and reliable witness and relies on (**briefly describe evidence**).]**

Other matters which you may think bear upon the reliability of the evidence of (the witness**) are (**briefly describe evidence**).**

In view of the matters I have touched upon, it would be dangerous to convict the defendant on the evidence of (the witness) unless you find that his evidence is supported in a material way by independent evidence implicating the defendant in the offence.

[There is evidence coming from an independent source which is capable of supporting the evidence of (the witness) in a material way. It is a matter for you as to whether you accept that evidence. If you do accept it, it is a matter for you whether you think it does support (the witness's) evidence in this way. The evidence is (briefly describe evidence**).**

OR

There is no other evidence that supports (the witness's) evidence in a significant way].

By the *Criminal Law Amendment Act* 2000 operational 27 October 2000, s 632 now provides:

> *"(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.*
>
> *On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.*
>
> *Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."*

In *Robinson* (1999) 197 CLR 162 at 168-9, the Court said:

> *"Sub-section (2) negates a requirement, either generally or in relation to particular classes of case, to warn a jury 'that it is unsafe to convict the accused on the uncorroborated testimony of one witness'. That does not mean, however, that in a particular case there may not be matters personal to the uncorroborated witness upon whom the Crown relies, or matter relating to the circumstances which bring into operation the general requirement considered in Longman. Moreover, the very*

nature of the prosecution's onus of proof may require a judge to advert to the absence of corroboration."

The requirement in *Longman* (1989) 168 CLR 79 is that since a defendant could be convicted on the evidence of one witness only, the law was required to address the problem of unreliability. Such unreliability could arise from matters personal to the witness, or from the circumstances of a particular case. The law requires a warning to be given "whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case" (86).

The 2000 amendment to sub-section (3) seems to prevent the trial judge from giving an unreliability warning in relation to "any class of persons" which must include accomplices. The amendment was a result of the Women's Task Force recommendations; and was designed to overcome the anomaly as between child witnesses and child complainants identified in *Robinson* (1998) 102 A Crim R 89, 91.

Where the accomplice is also a co-accused on a joint trial, the directions given should accord with those at 26.1

Lies Told By The Defendant (Consciousness of Guilt)

Commentary

As a general rule an *Edwards* direction should only be given if the prosecution contends that a lie is evidence of guilt, in the sense that it was told because "the accused knew that the truth would implicate him in (the commission) of the offence".[1]

In *R v Nash* [2020] QCA 127, Boddice J (with whom Sofronoff P and Ryan J agreed) clarified that a lie can only be used as evidence of the accused's guilt if it would be open to the jury to find that it "related to a material issue and that the [accused] told the lie because he knew that the truth of the matter… would implicate him in the offence". Boddice J went on to cite McMurdo JA's observations in *R v SCL; Ex parte Attorney-General (Qld)* [2017] 2 Qd R 401 at [61] that:

> "It was what (if anything) the lie itself revealed about the appellant's mind which was critical. Did the lie reveal a consciousness by the appellant of his guilt? It could do so only if it revealed a knowledge of the offence or some aspect of it and a fear that the truth of the matter would implicate him. As Callaway JA (with the agreement of the other members of the court) said in *R v Kondstandopoulos*: "It is the combination of knowledge and fear that evinces guilt" (citations omitted)".

Courts of Appeal have warned of the need for circumspection and care in the use of this direction.[2] See *R v Chang* (2003) 7 VR 236 as to the circumstances in which an *Edwards* direction should be given concerning post offence conduct, particularly flight and concealment, where that conduct is relied upon by the prosecution as evidence of guilt or is likely to be used by the jury as such.[3]

An *Edwards* direction may be required if there is a risk of misunderstanding on the part of the jury as to the use of lies notwithstanding that the prosecution has not relied on the lie as showing a consciousness of guilt.[4] If there is a risk of confusion as to the way the prosecution puts its case, the trial Judge should inquire of the prosecutor as to the way the case is being

---

1 *R v Edwards* (1993) 178 CLR 193) at 211, 363, as explained in *Zoneff v The Queen* (2000) 200 CLR 234 at [17]. See also *R* v *Hennig* [2010] QCA 244 and *R* v *Sheppard* [2010] QCA 342.

2 *Brennan* [1999] 2 Qd R 529, 531; *R v Walton and Harman* [2001] QCA 309 at [61]; *R v Dykstra* [2011] QCA 175 [13]

3 See Direction No. 48.

4 *Zoneff* at 244 [16].

put.[5] However, an *Edwards* direction will only be required in these circumstances where there is a real danger that the jury will wrongly conclude that the lie is evidence of guilt.[6]

Alternative charges

The jury may only use a defendant's lie as evidence of consciousness of guilt if they are satisfied that the lie was told because the defendant knew that the truth of the matter would implicate him in the commission of *the* offence, and *not of some lesser offence*.

See the case of *Meko* (2004) 146 A Crim R 131 in which the WA Court of Criminal Appeal discussed possible directions where a lie reveals consciousness of guilt in respect of only one of the number of alternative charges.

See also *R v Mitchell* [2008] 2 Qd R 142; [2007] QCA 267 per Keane JA at [48], [50] and the comments of Williams JA at [31]:

> "where, as here, murder is the offence charged and manslaughter is available as an alternative verdict, it is incumbent upon the trial judge, if an *Edwards* direction is given, to indicate the element of the offence that is said to be admitted by the telling of the lie in question. If that element is merely the implication of the accused in the killing then the jury should be instructed that the admission is so limited. If the admission is said to establish the element of intent then the jury should be so instructed and they should be warned that they ought not simply infer from the fact that the accused was implicated in the killing that he had the requisite intention."

Sample Direction

> **The prosecution relies on what it says are lies told by the defendant as showing that he is guilty of the offence.**
>
> [Here identify precisely the lies relied upon by the prosecution together with the basis on which they are said to be capable of implicating the defendant in the commission of the offence charged and not of some lesser offence[7]].[8]

---

5 *Zoneff* at 244 [17], *R* v *Frank* [2010] QCA 150 at [41]

6 *Dhanhoa* v *The Queen* (2003) 217 CLR 1.

7 *R v Richens* [1993] 4 All ER 877 at 886.

8 *Osland v The Queen* (1998) 197 CLR 316, *Zoneff* at [17]

Before you can use this evidence against the defendant, you must be satisfied of a number of matters. Unless you are satisfied of all these matters, then you cannot use the evidence against the defendant.

First, you must be satisfied that the defendant has told a deliberate untruth. There is a difference between the mere rejection of a person's account of events and a finding that the person has lied. In many cases, where there appears to be a departure from the truth, it may not be possible to say that a deliberate lie has been told. The defendant may have been confused; or there may be other reasons which would prevent you from finding that he has deliberately told an untruth.

Secondly, you must be satisfied that the lie is concerned with some circumstance or event connected with the offence. You can only use a lie against the defendant if you are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it.

Thirdly, you must be satisfied that the lie was told because the defendant knew that the truth of the matter would implicate him in the commission of the offence [and not of some lesser offence]. The defendant must be lying because he is conscious that the truth could convict him. There may be reasons for the lie apart from a realisation of guilt. People sometimes have an innocent explanation for lying.

[The judge should direct attention to any innocent explanation that may account for the telling of a lie. For example; a lie may be told in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal embarrassing or disgraceful behaviour. A lie may be told out of panic, or confusion, or to escape an unjust accusation; to protect some other person or to avoid a consequence extraneous to the offence.

If a lesser offence is open or charged then the judge should tell the jury that the lie cannot be used as consciousness of guilt of the offence if the lie was told to conceal involvement in the lesser offence.][9]

If you accept that a reason of this kind is the explanation for the lie, then you cannot use it against the defendant. You can only use it against the defendant if you are satisfied that he lied out of a realisation that the truth would implicate him in the offence.

[If the lie is relied upon to materially support (corroborate) the evidence of a particular witness, e.g. an accomplice, a prison informant etc., the jury should be directed that the

[9] *R v Box & Martin* [2001] QCA 272 at [8]; *R v Wehlow* (2001) 122 A Crim R 63; [2001] QCA 193 at [5], [33].

statement must be clearly shown to be a lie by evidence other than that of the evidence to be corroborated.[10] In such an eventuality the judge should precisely identify the evidence (independent of the witness whose evidence is said to be supported by the lie) which shows that the defendant has lied.]

Where the alleged lie is the only evidence against the defendant, or is a critical fact

[If the lie relied upon by the prosecution is the only evidence against the defendant, or is an indispensable link in a chain of evidence necessary to prove guilt then the following direction must be given.][11]

Finally, in this case the alleged lie is the only evidence against the defendant [or is a critical fact in the prosecution's circumstantial case against him]. Before you can use the lie against the defendant, you must be satisfied beyond reasonable doubt not only that he lied but also that he lied because he realised that the truth would implicate him in the offence.

[10] *Edwards* at 211, 363.

[11] *Edwards* at 210, 362.

Lies Told By The Defendant (Going only to credit)[1]

You have heard questions [or have heard submissions from the prosecution] **which attribute lies to the defendant.**[2] **You will make up your own mind about whether he was telling lies and, if so, whether he was doing that deliberately.**

If you conclude that the defendant deliberately told lies, that is relevant only to his credibility. It is for you to decide whether those suggested lies affect his credibility.

However, you should bear in mind this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt.[3]

[The mere fact that the defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons, for example: to bolster a true defence, to protect someone else, to conceal disgraceful conduct of his, short of the commission of the offence, or out of panic or confusion. If you think that there is, or may be, some innocent explanation for his lies, then you should take no notice of them.[4]]

---

1 This direction is appropriate to avoid the risk of the jury engaging in an inappropriate process of reasoning in relation to lies by the accused. The direction is not appropriate in relation to lies by a complainant: *OKS v Western Australia* [2019] HCA 10 at [19].

2 If the prosecution has submitted to the jury that the lies are relevant to guilt, an *Edwards* direction (No. 38.1) is required: *R* v *Sheppard* [2010] QCA 342; cf *R v Lacey & Lacey* [2011] QCA 386 at [81], [83] and [153].

3 The direction is an adaptation of the suggested direction in *Zoneff v The Queen* (2000) 200 CLR 234 at 245 [23]. The direction has been modified to take into account the observations of the Court of Appeal in *R* v *Sheppard* [2010] QCA 342. The words, "It is for you to decide what significance those suggested lies have in relation to the issues in the case…" have been deleted to avoid the possibility that the lies will be used impermissibly. See also *Dhanhoa v The Queen* (2003) 217 CLR 1. For an example of a direction suggested by the Court of Appeal where the appellant was intoxicated at the time of the subject event, see *R* v *Frank* [2010] QCA 150 at [43]. See also *R v Scott* [2011] QCA 343.

4 *Chevathen & Dorrick v The Queen* (2001) 122 A Crim R 441 at [28]-[32].

Alibi[1]

The defence is that the defendant was not at the place of the crime when it was allegedly committed but was instead somewhere else. As it is for the prosecution to prove the guilt of the defendant, it is for the prosecution[2] to prove, beyond reasonable doubt, that the defendant was present at the time and place when the offence was committed.[3]

---

1 Alibi is a word with a potentially pejorative connotation and is best avoided. Where the word is used during the trial by lawyers, it may be necessary to add a direction to the effect that: **You should be careful to avoid any prejudice that might subconsciously attach to the word 'alibi'. It would be wrong to that that describing a defendant's claim that he was not present when the offence was committed as an 'alibi' carries with it any suggestion that the claim is deserving of special scrutiny.** cf *R v Conder*, CA No 39 of 1999, 20 July 1999, per Thomas JA [28].

2 The prosecution may tender the notice of alibi in the Crown case. See *R v Rossborough* (1985) 81 Cr App R 139. In *R v Heuston* (1996) 90 A Crim R 213, Gleeson CJ noted at 217 that the actions of the prosecutor in tendering a notice of alibi as part of the Crown case was neither unusual nor irregular. See also *Watts v R* (1980) 71 Cr App R 136 which cautions that the prosecutor should carefully consider that course of action before embarking on it.

3 This instruction is concerned with circumstances where the defendant's presence is an essential ingredient of the offence charged. Where the jury might use their rejection of an alibi either as an implied admission of guilt, or as corroborating the complainant's testimony, the jury should be given a direction in conformity with *Edwards v The Queen* (1993) 178 CLR 193: see *R v J (No 2)* [1998] 3 VR 602 at 631; *Graham* (2000) 116 A Crim R 108. See Benchbook 48.1. In *Dyers v The Queen* (2002) 210 CLR 285 the High Court held it would be a misdirection to give a *Jones v Dunkel* direction in an alibi case if the defendant failed to call witnesses in support of that alibi.

Good Character/ Bad Character

Suggested direction where evidence of good character has been led.

[Refer to evidence] This evidence is part of the evidence to be taken into account in deciding whether you are satisfied beyond reasonable doubt of his guilt. The influence that this evidence has on you is a matter for you. It is relevant in two respects.

The first is in considering whether a person with the kind of reputation sworn to by the witnesses would do the acts alleged by the prosecution.

The second is in considering the credibility of the defendant's evidence [and/or any exculpatory statements made out of court which are in evidence]. When considering his evidence, do you think that his general reputation adds weight to it?

Evidence of general reputation, like any other evidence, is simply part of the framework within which you reach your decision. You consider it in the context of the other evidence. How much weight you give it, in that context and using it for the purposes I have told you about, is a matter for you.

Suggested direction where evidence has been given of the defendant's good character, evidence in rebuttal has been given by the prosecution, and bad character is not relevant (see directions on Bad Character)

The defendant has called evidence to establish that he is a person of good character. Witnesses have attested that he is a person of unblemished character. [Refer to evidence]

The prosecution has, however, led evidence that the defendant has [prior convictions or other evidence as to character]. The prosecutor submits that having regard to this evidence you would not accept him as a person of good character, while counsel for the defendant maintains that you would nonetheless do so.

It is necessary therefore to consider the totality of the evidence as to the defendant's character and determine whether you accept that he is a person of good character.

If you accept that he is a person of good character, you may take that evidence into account in his favour in the following ways: [continue with good character direction].

If, on the other hand, you do not accept that the defendant is a person of good character, evidence of bad character must not be used to strengthen the prosecution case against him. You are not entitled to say "Because of the defendant's bad character we think he is a person who is likely to have committed the crime."

Indeed, if you do not accept that the defendant is a person of good character, the law requires you to put all consideration of character out of your minds in determining whether you are satisfied beyond reasonable doubt that the defendant is guilty of the crime charged.

It is not inevitable that a trial judge must give a direction as to the use to be made of good character evidence adduced for the defendant in any case in which it is raised.[1] It is a matter for assessment in each case whether the evidence is relevant to either the defendant's credibility or the unlikelihood of his having committed the offence in question or both. The suggested directions should be read in that light. A defendant's lack of previous convictions does not necessitate a good character direction.[2]

[1] *Melbourne v The Queen* (1999) 198 CLR 1, *R v Jurcik* [2001] QCA 390, *R v Hinschen* [2008] QCA 145, *R v TZ* (2011) 214 A Crim R 316.

[2] *R v Soloman* [2006] QCA 244.

Bad Character/Previous Convictions of Witness

Evidence has been given that [X], who gave evidence for the prosecution (or defendant), has previous convictions. That is something you can take into account when considering his credibility and the weight to be given to his evidence.

The fact that someone has previous convictions does not necessarily mean his evidence has to be rejected out of hand. It is a matter for you what weight you give to the fact that he has been previously convicted.

In deciding that, you look at the rest of the evidence, including any evidence that supports his evidence independently, and weigh his evidence and the fact that he has convictions in that context.

If after you have done that, you are satisfied that he is a truthful and accurate witness you can act on his evidence notwithstanding that he has previous convictions

[Where explicit warning as to dangers warranted**]: The fact that someone has a history of criminal behaviour does not necessarily mean he is lying on this occasion. But because of the extent of his criminal record, and the kind of offences for which he has been convicted, you should keep in mind the dangers in accepting him as a truthful witness. You have to exercise caution before you act on his evidence. [**Refer to any independent evidence supporting his evidence**]**

But, if you are satisfied he is a truthful witness after having seen him give evidence and having considered his evidence in conjunction with the other evidence and given due weight to the dangers about acting on his evidence, you can act on the version of facts he has given.

There is no general rule that a warning should be given of the dangers of convicting on the uncorroborated evidence of witnesses possessing bad character or a criminal record. It is a question to be considered in any case as to whether the witness' record or the circumstances of the case are such as to make an explicit warning necessary. [1]

[1] *R v Sinclair and Dinh* (1997) 191 LSJS 53.

Bad Character/Previous Convictions of Defendant[2]

1. Evidence as to the defendant's previous convictions or bad character where he has made an issue of his own character or that of prosecution witnesses.

   Evidence has been given that the defendant has convictions for .....

   That fact must not be used by you to say that because he has committed offences before, therefore he must be guilty of the present offence.

   Its use is more limited than that. It is this. The manner in which the defence has been conducted has involved a challenge to the truthfulness of prosecution witnesses. In evaluating the defendant's evidence and determining what impact it has on your assessment of the truthfulness of the prosecution witnesses, you are entitled to take into consideration that the defendant is a person who has convictions for offences of [.....].

   A finding that you reject his evidence and accept that of the prosecution witnesses may lead you to find him guilty if the challenged evidence proves or helps to prove the elements of the offence. But you must come to any finding of guilt by that process, not by assuming that because of his criminal record he must have committed the offence for which he is now on trial.

   The jury should be given a clear statement of the limited purpose of permitting evidence of previous convictions or bad character to be adduced by cross-examination under s 15(2)(c) (that is, to deny the defendant the benefit of a false claim as to good character, or to discredit him where he is in conflict with prosecution witnesses whose character he has attacked, but not, per se, as tending to his guilt of the offence charged.)[3] That is so whether counsel requests such a direction or not.[4]

2. Evidence directed to showing that the defendant is guilty of the offence charged.

   You have heard in this trial this evidence (identify evidence given by prosecution witnesses or defendant in cross-examination**). It is relevant to the prosecution case in this way and this way only. It goes, if you accept it, to showing that [**explain

---

[2] Section 15(2) *Evidence Act* 1977 deals with the asking of questions tending to show that a defendant is of bad character or has committed offences. The four circumstances in which a defendant may be cross-examined under s 15(2) are: where the defendant has sought to establish his own good character or has cast imputations on the character of prosecution witnesses; where the matter is probative of guilt of the offence charged; where the questions are directed to showing that another defendant is not guilty of the offence with which they have been charged; and where the defendant has given evidence against a co-defendant. In the first three instances, leave is required. It can be seen that the evidence in the second and third instances will be relevant to the issues in the case, and thus may also be the subject of questions put to witnesses other than the defendant, whereas in the first and fourth it may merely affect credibility.

[3] *Donnini v The Queen* (1972) 128 CLR 114.

[4] *BRS v The Queen* (1997) 191 CLR 275.

relevance**]. That is the specific purpose for which the prosecution has been allowed to lead the evidence and you must not use it for any other purpose. You may not seek to draw some inference from it that because the defendant has [**been charged with or committed other offences or been said to have been involved in undesirable conduct, as the case may be**] that he is therefore more likely to have committed the offence you are considering. In other words, it would be quite wrong for you to say, having heard that evidence, that the defendant is the sort of person likely to have committed the offence.**

If you accept this evidence you may use it only to consider whether it assists the prosecution, in the way I have described, to prove its case against the defendant.

Evidence may emerge on the prosecution case or through cross-examination of the defendant himself[5] which indicates that he has been charged with or convicted of other offences, or is otherwise adverse to his character. Such evidence is, of course, admissible if it is directly probative of the offence before the court.[6] In such an instance it is necessary to explain the relevance of the evidence while making it clear that no inference of disposition or propensity can be drawn.

3. Evidence directed to showing that a co-defendant is not guilty.

(a) Where evidence goes to show that co-defendant is not guilty of an offence with which the defendant is not charged -

You have heard in this trial this evidence (identify evidence given by witnesses or defendant in cross-examination**). [Mr X], counsel for [**the co-defendant**] has asked these questions and led this evidence to show that it was [the defendant] who committed the offence of …… and not [the co-defendant]. It goes, if you accept it, to showing that [**explain relevance**].**

You may use it in these ways only: It can be used, if accepted by you, as going to the proof of the prosecution case against [the co-defendant] on this charge, and also as detracting from the prosecution case against [the co-defendant].]

(b) Where evidence goes to show that co-defendant is not guilty of an offence with which both are charged:

---

5 With leave under s 15(2)(a) *Evidence Act.*

6 See for example *R v Aston-Brien* [2000] QCA 211 in which the alleged provision of amphetamines immediately after a rape was described as "an integral part of the prosecution case"; *R v Ettles* (1997) 27 MVR 265 in which the defendant's ingestion of cannabis was relevant to his manner of driving on a dangerous driving charge; *R v OGD* (No 2) (2000) 50 NSWLR 433 in which an admission of having done "these things" to the complainant (i.e. sexual assault) was made during the course of a similar assault on a witness; and *R v Grosser* (1999) 73 SASR 584 in which a history of the defendant's prior arrest on fraud and firearms charges was relevant to charges of attempted murder arising out of a police siege of the defendant's farmhouse. See also direction on Similar Facts.

[A], counsel for [the co-defendant**] cross-examined [**the defendant**]/led evidence from a number of witnesses to the following effect [**set out evidence**]. It goes, if you accept it, to showing that it was [**the defendant**] who committed the offence of …… and not [**the co-defendant**] [**explain relevance**]. You must consider it for that purpose only; that is insofar as it concerns the case against [co-defendant]. It forms no part of the evidence against [defendant] on the charge of ….. It cannot advance the prosecution case against him in any way. In particular it is not permissible for you to say, if you were to accept that evidence, that because [defendant] may have committed that offence he is therefore likely to have committed the offence with which he has been charged. The evidence has no relevance to the charge against [**defendant]. **Its only relevance is to the charge against [**co-defendant**].**

Evidence may be adduced from witnesses or from a defendant in cross-examination[7] which is adverse to his character, but has a purpose in showing that a co-defendant is not guilty of an offence of which he has been charged. Such evidence must go to the issues, either in the Prosecution's case against the co-defendant or the co-defendant's defence; merely showing that the defendant was of bad character would not, of itself, advance the co-defendant.

There is a distinction to be drawn between the situation in which the defendant and co-defendant are both charged with the offence on which the co-defendant wishes to adduce the evidence; and that in which the co-defendant only is charged (as might occur for example, where there is a joint indictment involving a series of offences with a factual nexus but not all defendants are charged with every offence).

In the former situation it would seem to follow that the evidence would both tend to exculpate the co-defendant and inculpate the defendant of an offence with which he was charged and a direction in terms of 2 above should be given.

In the second case the evidence, while relevant to the issues against the co-defendant, could only be impermissible bad character evidence as against the defendant and the jury should be directed to consider it only in the co-defendant's case.

4. Where the defendant has given evidence against a co-defendant.

[A**], counsel for [**co-defendant**] cross-examined [**defendant**] as to [**prior convictions/bad character**]. His answers may be taken into account by you in assessing the credibility of the evidence [**defendant**] has given against [**co-defendant**] and considering whether you think he has been truthful in that regard. The evidence of his previous convictions/bad character may not be used by you however, to say that because he has admitted to having done such things in the**

[7] The situation contemplated by s 15(2)(b) *Evidence Act.*

past he is somehow more likely to be guilty of the crime with which he is charged. It would be wrong to proceed in that way.

Cross-examination of the defendant attempting to show his commission of other offences or bad character is permissible[8] where a defendant gives evidence against a co-defendant. That situation arises where the defendant gives evidence which "supports the prosecution case against the co-defendant in a material respect or undermines the defence of the co-defendant"[9]. Cross-examination in this instance may be designed to show that the co-defendant is the perpetrator of the crime, in which case the considerations set out at 3 above will apply and a direction in whichever of the forms is appropriate should be given.

Alternatively the questioning may be designed to attack the credit of the defendant. In that event a direction in the terms above is suggested.

5. Where the defendant's convictions are inadvertently raised in the course of the trial.

You heard evidence that the defendant has in the past been convicted of an offence [or has been in custody]. That evidence is irrelevant. It would be unfair to speculate about it, and you must not use it in any way. I direct you that you should put it entirely out of your minds.

8 By virtue of s 15(2)(d), without leave of the Court.

9 *R v Crawford* [1997] 1 WLR 1329 at 1333, applying *Murdoch v Taylor* [1965] AC 574 at 592.

Cross-Examination as to Complainant's Motive to Lie

In cross-examination, the complainant was asked questions concerning a motive for her to lie in her account concerning the conduct of the defendant [and the defendant in his testimony suggested that her motive was (insert description)].

If you reject the motive to lie put forward on behalf of the defence, that does not mean that the complainant is telling the truth.

Remember it is for the prosecution to satisfy you that the complainant is telling the truth; for it is the prosecution's burden to satisfy you beyond reasonable doubt of the guilt of the defendant.

Generally, the defendant should not be asked in cross-examination whether he can suggest a motive for the complainant to concoct the allegations against him, the question generally being irrelevant to any issue.[1]

Where, however, a defendant (through cross-examination of the complainant or by testimony) suggests that the complainant (or another witness) has a motive to lie, in many cases it will be appropriate for the jury to be directed along the lines mentioned.[2] In some cases, the jury should be instructed that even if they find no evidence of any motive to lie, this does not establish that such a motive did not exist; if there was a motive the appellant may not know of it; there may be many reasons why a person may make a false complaint; if they find no evidence of a motive to lie, this does not necessarily mean the complainant was truthful; it remains necessary to satisfy themselves that the complainant was truthful. See *R v Coss* [2016] QCA 44 at [22].

1 *Palmer v The Queen* **(1998) 193 CLR 1** at 9.

2 *R v PLK* **[1999] 3 VR 567** at 581. See also *R v Geary* **[2003] 1 Qd R 64** at [26]-[28].

Absence of Complainant's Motive to Lie

Commentary

The principles that must guide a trial judge about whether a direction must be given on the subject of a complainant's motive to fabricate an allegation were comprehensively summarised by Sofronoff P in *R v Bevinetto* [2018] QCA 219; [2019] 2 Qd R 320 as follows at [50] – [61] (footnotes omitted, emphasis added) –

> When a complainant alleges that an accused has committed a sexual offence it is natural for a jury to ask whether or not the complainant had any motive to make a false allegation. The law does not require that the jury be directed not to ask why a complainant would lie. Indeed, as Pincus JA said in *R v Taylor* a jury would, reasonably enough, regard such a direction as an impermissible intrusion into their function. The inquiry is permissible because the proven existence of a motive in a complainant to make a false allegation makes it more likely, but does not prove, that the allegation actually made is false. The corollary is that the proven lack of any motive in a complainant to make a false allegation against an accused renders the allegation more credible.
>
> However, the mere absence of evidence that a complainant has a motive to lie does not prove the non-existence of any motive to fabricate an allegation. The mere absence of proof will, therefore, usually be neutral on the question of the existence of a motive to lie, although one cannot foreclose the possibility that there may be cases in which the rejection of a particular suggested motive leaves no room to conclude that there might be any other motive. However, generally the complainant's credibility is neither enhanced nor reduced by a jury's rejection of a motive that is proffered by the defence.
>
> The raising of an issue whether a complainant, or another witness, has a motive to make and maintain a false allegation creates a potential for the jury to be misled into engaging in illogical reasoning in several ways.
>
> First, a jury's rejection of the suggested motive may lead it to conclude from that rejection alone, that there can be no motive to lie and that the complainant's credibility is thereby enhanced. That would be a mistake. Such a rejection will not establish the actual absence of any motive to fabricate the allegation but only the absence of the suggested motive.
>
> Second, an inquiry into a complainant's motive to lie might wrongly imply to a jury that, since it might be thought that the accused should be well placed to identify the complainant's motive to fabricate the allegation if one exists, the accused's failure to identify or prove such a motive tends, by itself, to prove that there is no motive. That would also be a mistake. An inquiry into a motive to make a false allegation is an inquiry into a person's state of mine. A person's state of mind will usually be proved by inference from facts. The accused may not be in a position to know any facts from which such a motive might be inferred. That an accused person does not know any reason why the complainant would make a false allegation proves nothing and it would be wrong for a jury to infer anything from such lack of knowledge.
>
> Third, the process of reasoning would involve the jury in unwittingly placing the burden of proving the absence of motive upon the accused contrary to the fundamental proposition that the onus of proof is always on the prosecution. Consequently, it is prone to distort the process of a fair trial.
>
> Nevertheless, motive to make a false allegation and, more rarely, the proved non-existence of a motive to make a false allegation, are matters that are relevant to the

assessment of a complainant's credibility. The defence and the prosecution are entitled to litigate that issue. However, such litigation must not be allowed to lead the jury, expressly or implicitly, to engage in the invalid processes of reasoning referred to above.

Consequently, any submission made by the prosecution upon the issue of proof of motive to make false allegations must be made in a way that does not lead the jury into such erroneous paths of reasoning and the trial judge must be alert to ensure that the way the issue had been dealt with by the parties does not lead to such errors. It is the trial judge's responsibility to determine whether a risk of error has arisen and to determine how to direct a jury so that the error does not crystallise.

It is not a judge's function to tell a jury how to reason to a conclusion but a judge has a duty to warn a jury appropriately how to avoid irrational or impermissible modes of reasoning. In appropriate cases, therefore, a judge will need to warn a jury against engaging in the kind of erroneous reasoning to which this issue is prone to give rise. That is not to say that it is necessary to burden the jury with such warnings if they are not necessary. *Alford v Magee* remains good law. The only law that is necessary for the jury to know is so much as to guide them to a decision on the real issues in the case and it is for the judge to decide what are the real issues in the case. Consequently, it will not be in every case that the issue of motive to lie will give rise to the risks to which I have referred.

The need to give a warning arose in *R v F* because the trial judge had informed the jury that "the central theme" of the trial was the complainant's motive to lie. It also did so in *Palmer v The Queen* and in *R v T* because the prosecutor had cross-examined the accused about whether he could offer any explanation for the complainant's making a false allegation against him. It also did so in *R v PLK* because the issue had "been made a significant issue by the unusual circumstances of the case, the cross-examination of the complainant and the entirely understandable emphasis placed on the issue by the prosecutor… [a]pproximately on quarter of the prosecutor's address to the jury was in fact devoted to this issue". *The Queen v Cupid* was another case in which a direction should have been given because the complainant's motive to make the allegation "had assumed more than the usual importance by the end of the trial".

In *R v W* and in *R v Taylor* it was held that the directions given were adequate to protect against the jury engaging in erroneous reasoning. In *R v W* the judge had directed the jury that it was open to ask what motive the complainant might have to fabricate the allegation against the accused, but having said that, the judge went on to warn the jury that they must not reason from a rejection of the proffered motive that there could be no motive at all. In *Taylor* the judge also raised the rhetorical question as to why the complainant might fabricate an allegation if there was no motive to do so. In each case, the trial judge did not regard it as necessary to warn the jury about other potential errors in reasoning by the Court of Appeal did not find any fault for that reason.

The principle that must guide a trial judge about whether a direction must be given on the subject of a complainant's motive to fabricate an allegation is that a direction is necessary if, having regard to the real issues in the case and having regard to how the parties have conducted their respective cases, there is a risk that the jury might:

a) **reason, from a rejection of the motive suggested by the defence, to a conclusion that there is in fact no motive, thereby wrongly enhancing the complainant's credit;**

b) reason, from such a rejection, that the accused's failure to offer a plausible motive is probative of the absence of motive and of the truth of the complainant's allegation.

In *R v Van Der Zyden* [2012] 2 Qd R 568 at [32] Muir JA (with whom the Chief Justice and Margaret Wilson AJA agreed) held that "… the prosecutor having elevated the absence of any motive to lie on the part of the complainants to a matter 'central' to the jury's assessment of the case and having positively asserted the absence of such a motive, it was appropriate that the trial judge" specifically direct the jury on the issue along certain "lines" which appear in the sample direction below.

Sample direction

The prosecution has submitted that the complainant does not have any motive to lie.

You must bear in mind that any failure or inability on the part of the defendant to prove a motive to lie does not establish that such a motive does not exist.

If such a motive existed, the defendant may not know of it.

There may be many reasons why a person may make a false complaint.

If you are not persuaded that any motive to lie on the part of the complainant has been established, it does not necessarily mean that the complainant is truthful. It remains necessary for you to satisfy yourselves that the complainant is truthful.

Prior Inconsistent Statements[1]
Evidence Act 1977: ss 17, 18, 19, 101, 102[2]

The prosecution relies on a statement by [A] to the police on (the event**) that (**describe statement**). The witness gave evidence on oath before you that the statement was made but was not true, and (**summarise evidence**).**

The previous statement made by the witness is evidence of any fact stated in it. It is a question for you whether you accept the evidence and, if so, what weight you attach to it.

In estimating the weight that can be attached to the statement, have regard to all the circumstances from which an inference can reasonably be drawn as to its accuracy or otherwise.[3]

You should consider whether the statement was made around about the same time as the occurrence of the facts to which it relates.

Bear in mind both that the statement was not given on oath (if applicable) and that you did not have the advantage of seeing and hearing the witness make the statement, as you do have when witnesses give their evidence before you.

In dealing with a statement such as this - made out of court and more damaging to the defendant than the evidence the witness gave here in court - greater care is needed. The statement is not in the same category as sworn evidence before you.

Consider also whether (A) had any incentive to conceal or misrepresent the facts.

Consider also any specific factors that may call the reliability of the prior statement into question.

You should take into account the reasons (A) gave for giving the statement in the first place and then for changing his version of events.

If you find that there are significant differences between the prior statement of the witness and the evidence the witness gave in this Court, and you find that no

---

1 This direction deals with statements admitted under s 17(1) (hostile witness). It may be adapted for prior inconsistent statements admitted under ss 18 and 19.

2 Sections 17, 18 and 19 set out circumstances in which, and the means by which, a prior inconsistent statement may be proved. Sections 101 and 102 deal with the use to which a prior inconsistent statement may be put and the weight to be attached to it.

3 The direction takes up the matters referred to in *R v Perera* [1986] 2 Qd R 431.

acceptable explanation has been provided for the inconsistency, it may cause you to be hesitant about the witness's accuracy, honesty, reliability and credibility generally.

OR: **(**Where Appropriate**)**

The only evidence against the defendant is (A)'s previous statement, which he has retracted in his evidence on oath before you. In those circumstances, you should only act on the statement if you are satisfied beyond reasonable doubt both that it was made and that its contents are true.[4]

[4] *R v Nguyen* [1989] 2 Qd R 72.

Privilege Against Self-Incrimination

A witness, (X), said that he did not wish to answer some questions put to him by counsel, because to do so might incriminate him.

The fact that he successfully made that claim for privilege cannot assist you in your deliberations. It is not evidence of anything. Nor were the questions which were asked of him evidence, and there are no answers to them which could constitute evidence.

You cannot infer anything, either as to evidence or (X)'s credibility, from the fact that a claim for privilege was made, and it would be wrong for you to speculate about why it was made.

Section 10 of the *Evidence Act* 1977 preserves the common law privilege against self-incrimination, subject to s 15(1), which removes any claim of privilege by a defendant in respect of questions relating to the charge presently before the Court.[1]

A defendant or a witness is accordingly protected by privilege against incriminating himself; that is to say, he cannot be required to answer questions where such answers might "lead to incrimination or to the discovery of real evidence of an incriminating character".[2,3] While it is not incumbent to advise a witness as to an entitlement to claim privilege, it may be appropriate to do so. If a claim for privilege is made, the Court must consider in deciding whether to uphold the claim whether there is "reasonable ground to apprehend danger of incrimination to the witness if he is compelled to answer".[4]

Where a claim for privilege is made by a witness or the defendant in the presence of the jury, it is necessary to consider whether it may assume significance in the mind of the jury and accordingly whether a direction should be given in respect of it. Although there is some support for the proposition that in certain circumstances a jury may be entitled to draw inferences from a claim of privilege[5], the general thrust of authority is to the effect that no adverse inference is available. [6] It is suggested, therefore, that in the usual case an appropriate direction will be to the effect of that set out above.

---

1 Section 15(1) applies to questions asked of a defendant on a voir dire: *R v Semyraha* [2001] 2 Qd R 208.

2 *Sorby v Commonwealth* (1983) 152 CLR 281 at 310.

3 The defendant has, in addition, the protection of s 15(2) *Evidence Act* which precludes questions tending to show the commission of other offences except in certain limited instances.

4 *Sorby* at 290.

5 *Thompson v Bella-Lewis* [1997] 1 Qd R 429 at 434, 437; *R v King* (unreported CA 66/98; 26/5/98).

6 See *Cross on Evidence*, Aust ed, [25040].

Circumstantial Evidence

Circumstantial evidence is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly: typically, when the witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered.[1]

To bring in a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances.

If there is any reasonable possibility consistent with innocence, it is your duty to find the defendant not guilty. This follows from the requirement that guilt must be established beyond reasonable doubt.

Commonly, three special directions are given in substantially circumstantial cases

1. as to drawing inferences;[2]
2. that "guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances";[3]
3. that if there is any reasonable hypothesis consistent with innocence, the jury's duty is to acquit.[4]

The second and third are but different ways of conveying, or emphasising, the meaning of "beyond reasonable doubt".[5] So while such directions may be helpful "in many, if not most, cases involving substantial circumstantial evidence", "there is no invariable rule of practice" that such directions "should be given in every case involving circumstantial evidence".[6]

---

1 A possible addition is: **It is not necessary that facts in dispute be proved by direct evidence. They may be proved by circumstantial evidence alone, by direct evidence alone, or by a combination of direct and circumstantial: that is, both direct and circumstantial evidence are acceptable proof of facts. So you should consider all the evidence, including circumstantial evidence.**

2 See Summing-up, General, Primary Facts and Inferences, especially footnote 7.

3 *Shepherd v The Queen* (1990) 170 CLR 573 at 578. See also *R v Goldsworthy, Goldsworthy & Hill* [2016] QSC 220 at [10], "where the Crown case rests either wholly or partly on circumstantial evidence, a no case submission is to be decided on the basis of such inferences that are reasonably open in support of the Crown case".

4 *R v Perera* [1986] 1 Qd R 211 at 217; *R v Owen* (1991) 56 SASR 397 at 406.

5 *R v Holman* [1997] 1 Qd R 373 at 380.

6 *Shepherd* at 578.

A jury will often be asked to infer guilt from a combination of several intermediate facts. Accordingly, it is not in every circumstantial case that particular items of evidence need be proved by the prosecution beyond reasonable doubt.

There will, however, be cases where it is necessary to isolate and identify for the jury "intermediate facts constituting indispensable links in a chain of reasoning towards an inference of guilt; if so it may well be appropriate to tell the jury that such facts must be proved by the prosecution beyond reasonable doubt. Where the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give the direction just mentioned".[7]

Where the case is not based entirely or substantially on circumstantial evidence, a modified direction in respect of circumstantial evidence may be appropriate when summing-up in respect of an element of the offence which is based entirely or substantially on circumstantial evidence.

[7] *R v Jones* [1993] 1 Qd R 676 at 680; cf JRS Forbes, *Evidence Law in Queensland*, 3rd ed (1999) at [A.106].

Motive[1]

1. **The prosecution relies on the evidence of [witness] as part of its [circumstantial] case. You have heard reference to the defendant's motive, and the prosecution relies on this evidence to prove that the defendant had a motive to [do the acts the subject of the charge]. I direct you that the motive by which a person is induced to do an act or form intent is immaterial to the question of criminal responsibility. If in fact you decide that the evidence is not evidence of motive, that does not necessarily mean that the prosecution has failed to prove guilt because of lack of motive. In that event, you would have to base your verdict on the evidence that you do accept. However, the existence of motive can be an important factual issue, particularly in a circumstantial case where the prosecution asks you to infer guilt (or infer that the defendant did the act intentionally). If there is motive then what might otherwise be inexplicable becomes explicable. You must bear in mind that the existence of motive without any more would not be sufficient to found a finding of guilt.**

2. **Positive evidence that the accused lacked motive is clearly a matter to be taken into account by a jury, particularly in a case based on circumstantial evidence.**[2]

---

1 See *R v Heath* [1991] 2 Qd R 182 at 188

2 *De Gruchy v The Queen* (2002) 211 CLR 85; 190 ALR 441 at [28] – [30]. See also discussion in *R v Reid* [2007] 1 Qd R 64. See also *R v Gaskell* [2016] QCA 302. This direction may not be appropriate in all cases. Some may require a direction such as that in *De Gruchy v The Queen* (2002) 190 ALR 441 at [57], "the jury may therefore need to be reminded that allowance should be made for the fact that having a motive, and even expressing it, does not, as such, constitute proof of involvement in a crime". Further, some cases may require a direction that "the suggested motive provided a relatively *unlikely* explanation of the offence," *R v Gaskell* [2016] QCA 302 [40].

Flight and other Post Offence Conduct as Demonstrating Consciousness of Guilt

The prosecution asks you to have regard to the fact that the defendant departed[1] after the events in question [during the trial]. However, before you could use that as indicative of guilt, you would first have to find that the defendant departed because he knew he was guilty of the offence charged, not for any other reason.

You must remember that people do not always act rationally and that conduct of this sort can often be explained in other ways - for example as the result of panic, fear or other reasons having nothing to do with the offence charged. You must have regard to what has been said to you by the defendant / his counsel as to other explanations for his departure [specify]. All of these matters must be considered by you in deciding whether you can safely draw any inference from the fact of his departure.

Moreover, before the evidence of the defendant's departure can assist the prosecution, you would have to find, not only that it was motivated by a consciousness of guilt on his part, but also that what was in his mind was guilt of the offence charged, not some other misconduct. If, and only if, you reach the conclusion that there is no other explanation for his departure, such as panic or fear of wrongful accusation, you are entitled to use that finding as a circumstance pointing to the guilt of the defendant, to be considered with all the other evidence in the case. Standing by itself it could not prove guilt.

Flight by a defendant, whether before or during trial[2], may be led as indicative of a consciousness of guilt,[3] with it being left to the jury to consider whether the inference of consciousness of guilt can be safely drawn. It is not essential that the jury be told in so many words that flight is not necessarily conclusive of guilt[4]. The fact that a credible explanation is advanced by the defendant, does not require the exclusion of the evidence[5]; although questions of admissibility having regard to the probative value and prejudicial effect of the evidence may arise.

In *Melrose*, Shepherdson J expressed the view that the jury should be told that they must be satisfied beyond reasonable doubt of the inference of consciousness of guilt before drawing

---

1 The relatively neutral word "departed" has been used. It may be a question of degree, depending on the evidence and whether issue is taken, as to whether stronger terms such as "absconded" or "fled" are warranted; and there may arise a question of fact about which the jury will have to be directed in the first instance as to whether there has been a flight at all.

2 For an example of the latter, see *Festa* (2000) 111 A Crim R 60.

3 *R v Melrose* [1989] 1 Qd R 572 at 574-575.

4 *R v El Adl* [1993] 2 Qd R 195 at 198.

5 *R v Power & Power* (1996) 87 A Crim R 407.

it.[6] His formulation was endorsed in *Power & Power.*[7] However, since the fact of flight could seldom, if ever, constitute "an indispensable link in a chain of evidence necessary to prove guilt", it follows that the reasoning applied by the majority in *Edwards* to the use of lies applies equally to flight: "The jury do not have to conclude that the defendant is guilty beyond reasonable doubt in order to accept that a lie told by him exhibits a consciousness of guilt. They may accept that evidence without applying any particular standard of proof and conclude that, when they consider it together with the other evidence, the defendant is or is not guilty beyond reasonable doubt".[8]

Post offence conduct (apart from lies) is sometimes capable of demonstrating consciousness of guilt. For example; flight, an assault on a policeman, the laying of a false trail, concealment of evidence, and raising a false alibi[9] may be such conduct. A trial judge in such cases is required to give an Edward's type direction moulded to the facts of the case in question.[10]

Whether post-offence conduct is capable of demonstrating consciousness of guilt of murder rather than manslaughter will turn on the nature of the evidence and its relevance to the real issue in dispute. There is no hard and fast rule that evidence of post-offence concealment and lies is always intractably neutral as between murder and manslaughter.[11] There may be cases where an accused goes to such lengths to conceal the death or to distance himself or herself from it as to provide a basis on which the jury might conclude that the accused had committed an extremely serious crime and so warrant a conclusion beyond reasonable doubt as to the responsibility of the accused for the death and the concurrent existence in the accused of the intent necessary for murder.[12] See also as stated in *R v Andres*:[13]

> *Whilst… matters, individually, may have been equally consistent with the death of the deceased not occurring with the requisite intent by the appellant, the jury was entitled to draw the necessary inference of intent from the circumstances as a whole. As was observed by Dawson J (with whom Toohey and Gaudron JJ agreed) in Shepherd v The Queen: 'Intent… apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence… the probative force of [which] may be cumulative.'*

It is impermissible to take a piecemeal approach to particular neutral post-offence conduct. Rather, all of the circumstances established by the evidence should be considered and weighed.[14]

---

6 *Melrose* at 579.

7 *Power & Power* at 409.

8 *Edwards v The Queen* (1992) 173 CLR 653; 107 ALR 190. It should be noted however, that the distinction between "indispensable links" and others is not always a clear one; see, for example *Gipp v The Queen* (1998) 194 CLR 106 and *Penney v The Queen* (1998) 155 ALR 605; 72 ALJR 1316.

9 See *Graham* (2000) 116 A Crim R 108 at 119.

10 *R v SBB* (2007) 175 A Crim R 449; *R v Lennox* [2007] QCA 383; *R v Chang* (2003) 7 VR 236. See footnote 1, No 28.1.

11 *R v Baden-Clay* (2016) 90 ALJR 1013 at [74].

12 *Baden-Clay* at [74], citing *R v Ciantar* (2006) 16 VR 26 at [38] – [40], [65] – [67]; *R v DAN* [2007] QCA 66 at [89], [99].

13 [2015] QCA 167 at [131]. But see *R v Oliver* [2016] QCA 27 at [55], [58], [63].

14 *Baden-Clay* at [77].

Identification

The issue of identification is one for you to decide as a question of fact.[1]

The case against the defendant depends to a significant degree on the correctness of one (or more) visual identification of the defendant, which the defendant alleges to be mistaken. I must therefore warn you of the special need for caution before convicting in reliance on the correctness of that identification.[2] **The reason for this is that it is quite possible for an honest witness to make a mistaken identification.**[3] **Notorious miscarriages of justice have sometimes occurred in such situations. A mistaken witness may nevertheless be convincing. Even a number of apparently convincing witnesses may all be mistaken.**[4]

You must examine carefully the circumstances in which the identification by the witness was made. How long did the witness have the person, said to be the defendant, under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the defendant before? If so, how often? If only occasionally, had the witness any special reason for remembering the defendant? What time elapsed between the original observation and the subsequent identification to the police?[5] **Was there any material discrepancy between the description given to the police by the witness when first seen and the evidence the witness has now given?**

The evidence of each individual witness, while important in itself, should not be regarded by you in isolation from the other evidence adduced at the trial. Other evidence tending to implicate the defendant may be highly relevant, and may

---

1 See *R v Donnini* [1973] VR 67.

2 *Domican v The Queen* (1992) 173 CLR 555.

3 In *Amore v The Queen* [1994] 1 WLR 547 at 553 the Privy Council spoke of:

> "The importance of warning juries … of the danger that an honest witness, who is convinced of the correctness of his identification and gives his evidence in an impressive manner, may yet be mistaken." See also *Pattinson & Exley* [1996] 1 Cr App R 51, especially 54-55; *Reid (Junior)* [1990] 1 AC 363; and *Sainsbury* [1993] 1 Qd R 305, 308.

4 A possible addition is: **In general, the powers of observation, and of recollection of observation, are fallible. And the risk of mistake is especially great with fleeting encounters.**

5 *Winmar v W.A.* (2007) 35 WAR 159 at [109].

justify a conviction, while the evidence of identification, if it stood alone, would be insufficient.[6]

Where evidence is given by a stranger to the defendant or a casual acquaintance, you should treat the evidence of identification with care. You should be cautious about concluding that identification has been established in such a case, and scrupulous to be satisfied first that the identifying witness is not only honest in his evidence, but also accurate.[7]

An identification by one witness may support evidence of identification by another, but you must bear in mind that even a number of honest witnesses may be mistaken about such a matter.[8]

The evidence capable of supporting the visual identification of the defendant is:[9]

(set out matters)

However, I must remind you of the following specific weaknesses which appeared in that identification evidence:[10]

(set out matters) …

I now isolate and identify for your benefit, the following additional matters of significance which might reasonably, depending of course on your own view, be regarded as undermining the reliability of the identification evidence:[11]

1. General Principles

The principles to be applied when directing in relation to evidence of visual identification are set out in *Domican*.[12] At 561, the majority emphasised the need for particular directions:

> *"… the seductive effect of identification evidence has so frequently led to proven miscarriages of justice that courts … have felt obliged to lay down special rules in relation to the directions which judges must give in criminal trials where identification is a significant issue."*

---

6 *R v Beble* [1979] Qd R 278, which was approved by the High Court in *Chamberlain* (1984) 153 CLR 521.

7 See *Sutton v The Queen* [1978] WAR 94 and *Domican*.

8 See *R v Weeder* (1980) 71 Cr App R 228 and *Chamberlain*.

9 See *Domican*.

10 See *Domican*.

11 See *Domican*.

12 This decision is now considered the leading case with respect to identification evidence, in place of *Turnbull*. It has been followed and applied several times by the Court of Appeal. For example, in *Renton* the Court of Appeal evaluated the adequacy of a trial judge's directions to the jury in relation to identification evidence according to the principles established by *Domican*. It referred to the "traditional factors" mentioned in *Turnbull*, but made clear that the directions must comply with *Domican*.

The relevant principles, sometimes called the "*Domican* requirements" (*Renton* [1997] QCA 441), may be summarised as follows:

1. "… where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed", the Court referring to *Turnbull* [1977] QB 224, 228 (*Domican*, 561).[13]

2. "The terms of the warning need not follow any particular formula … but it must be cogent and effective … it must be appropriate to the circumstances of the case" (*Domican,* 561-2).

3. "… the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'…" (*Domican*, 562).

4. "A warning in general terms is insufficient … The attention of the jury 'should be drawn to any weaknesses in the identification evidence' " (ibid).

5. "Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it" (ibid).

6. "… the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence" (ibid).[14]

7. "… the adequacy of a warning in an identification case must be evaluated … by reference to the identification evidence and not the other evidence in the case" (*Domican*, 565).

8. "… the adequacy of the warning has to be evaluated by reference to":

   (a) "the nature of the relationship between the witness and the person identified";[15]

   (b) "the opportunity to observe the person subsequently identified";[16]

---

[13] The majority of the Court of Appeal in *B* [1999] QCA 105 rejected submissions that a failure to adopt particular expressions used in *Domican*, such as "dangers" or "warning", renders a judge's summing-up inadequate. McPherson JA pointed out, [13], that the High Court in *Domican* "observed that the terms of the warning 'need not follow any particular formula'". His Honour then referred to *R v Zullo* [1993] 2 Qd R 572 where it was stated, 578, that *Domican*, "should not be applied as if what the High Court said were a statute"; cf *Pattinson & Exley* [1996] 1 Cr App R 51, 53, where similar observations were made about *Turnbull.*

[14] In *B*, the majority of the Court of Appeal found that, in the circumstances of the case, had the trial judge singled out particular matters that "may reasonably be regarded as undermining the reliability of the identification evidence" it would have been inappropriate, as it would have intruded on the "function of the jury in deciding whether [a particular witness] should be accepted as a witness of truth, and, if so, which parts of the identification evidence should be accepted as reliable rather than mistaken". In the circumstances, the majority held that a direction which isolated "the potential problems of reliable identification in the prosecution case, and then [stated] the rival contentions about them" was acceptable, [19].

[15] For example, where visual identification involves recognition of a person, the jury should be reminded that mistakes in the recognition, even of close relatives and friends, are sometimes made.

[16] For example, in *Weeder* it was emphasised that what mattered was the quality of the visual identification rather than its volume - that:

> "The identification can be poor, even though it is given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions. ... Where the quality of the identification evidence is such that the jury can be safely

(c) "the length of time between the incident and the identification";[17] and

(d) "the nature and circumstances of the first identification".[18]

9. "A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused" (ibid).

10. "The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence" (ibid).

On appeal, a miscarriage of justice will ordinarily be found and a new trial ordered if an adequate warning has not been given regarding identification evidence, even if there is other compelling evidence pointing to conviction. Only in exceptional circumstances, where "… the other evidence in the case [is] so compelling that a court of criminal appeal [would] conclude that the jury must have convicted on that evidence independently of the identification evidence …", might the verdict be left intact, the omission being classified a legal error, not a miscarriage of justice (ibid).

In *R v Rhaajesh Subramaniam* [1999] QCA 108 the Court of Appeal confirmed that, in accordance with *Domican*, a detailed warning with respect to identification evidence is not required where "… the identifications made by the various witnesses … could scarcely be considered a 'significant' part of the proof of the guilt of the appellant" (*Subramaniam* [15]).

2. Identification by Photographs or Photo Boards

In *Alexander v The Queen* (1981) 145 CLR 395, the High Court confirmed that evidence of identification by reference to photographs may be admitted. However, there are problems peculiar to this sort of identification, which were summarised by Stephen J in *Alexander*, 409:

> *"When identification is attempted with the aid of photographs, there are introduced peculiar difficulties, due to the various ways in which photographic representations differ from nature: their two dimensional and static quality, the fact that they are often in black and white and the clear and well lit picture of the subject which they usually provide."*

---

left to assess its value, even though there is no other evidence to support it, then the trial Judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the identification by another, *provided* that he warns them in clear terms that even a number of honest witnesses can all be mistaken" (*Weeder*, 231).

This principle was confirmed by the High Court in *Chamberlain* stating, 535 that "… the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness 'separately in, so as to speak, a hermetically sealed compartment'; they should consider the accumulation of the evidence".

[17] For example, in *R v Redshaw* [1997] QCA 483 the Court of Appeal considered whether a nine week delay between the offence and identification by photoboard was admissible. In those circumstances it was held open to the trial judge to have received the evidence as the witness had observed the defendant for "up to three to four minutes at close quarters". There were other issues because the identification was by police photographs, which are mentioned later, but in a case such as this very clear warnings need to be given to the jury.

[18] For example, in the case of visual identification, the danger is that the appearance of the person identified will alter the memory of the appearance of the subject, so that any subsequent identification will be based on the contaminated memory: *Davies & Cody v The King* (1937) 57 CLR 170 at 181-182. See also *R v Akgul* (2002) 5 VR 537, wherein there is discussion of the danger of the displacement effect, where a memory is contaminated by a later image.

Although such evidence is admissible, judges should bear the above matters in mind when directing the jury.

Judges also exercise their discretion to exclude identification evidence if, "… the strict rules of admissibility operate unfairly against the accused … in any case in which the judge [is of the] opinion that the evidence [has] little weight but [is] likely to be gravely prejudicial to the accused" (*Alexander*, 402-3); cf *Stott* (2000) 116 A Crim R 15 [17]-[18].

Redshaw (supra) provides an example. In that case there was a nine week delay between the commission of the offence and the identification by photo board. Whilst that may of itself suggest the evidence was prejudicial to the defendant, the fact that the witness had observed the defendant for "up to three to four minutes and at close quarters" meant that the evidence was "not evidence of little weight". The Court of Appeal, applying *Alexander*, accordingly did not interfere with the judge's decision not to exclude the evidence.

Evidence of identification through the use of photo boards involve additional considerations that may need to be brought to the jury's attention. Thus, where the composition of a photo board is capable of suggesting a particular identification, the jury should be warned that such evidence should be approached with particular caution: *R v Gould* (2014) 243 A Crim R 205; [2014] QCA 164 at [35]. Otherwise, the following observations from *Pitkin v The Queen* (1995) 130 ALR 35; 69 ALJR 612 at [12] should be considered in the formulation of any directions:

> *"The use of photographs of suspects by law enforcement agencies for the purpose of identifying an offender is a necessary and justifiable step in the course of efficient criminal investigation. Nonetheless, it is attended by some danger of consequential and unfair prejudice to an accused. One such danger is that identification through a photograph is likely to be less reliable than direct personal identification since differences in appearance between the offender and a suspect may be less noticeable when a photograph of the suspect is used. In that regard, once there has been purported identification through a photograph, any subsequent direct identification may be less reliable by reason of the subconscious effect of the photograph upon the witness's recollection of the actual appearance of the offender. Another such danger is that a witness who is shown photographs by investigating police will ordinarily be desirous of assisting the police and will be likely to assume that the photographs shown to her by the police are photographs of likely offenders. In that context, and in an environment where the ultimate accused will necessarily be absent and unrepresented, there may be subconscious pressure upon the witness to pick out any photograph of a 'suspect' who 'looks like' the offender notwithstanding that the witness cannot, and does not purport to, positively identify the subject of the photograph as the offender. Yet another danger from the point of view of an accused is that a witness's evidence that she identified a photograph of the accused which was in the possession of the police may suggest to the jury that the accused either has a criminal record involving the relevant kind of crime or is otherwise unfavourably known to the police as a person likely to commit that kind of crime. That danger of prejudice is likely to be increased in a case, such as the present, where the police have produced a number of different photographs of the accused taken at different times."*

3. Voice identification

As to the warnings required where the jury is asked to compare recordings of voices to decide whether or not the voice on one recording is the same as the voice on another with a view to concluding that the defendant is the speaker in both: see *Bulejcik v The Queen* (1996) 185 CLR 375, 384, 397; *D. Ormerod*, "Sounds Familiar? – Voice Identification Evidence", [2001] Crim L R 595, 619; *R v Soloman* (2005) 92 SASR 331, 344-349. The trial judge should isolate and identify for the benefit of the jury any particular matter that might undermine the reliability of a conclusion based on the comparison they are asked to make and any particular factors that call for consideration. Such factors could include the quality of the recordings, differences in acoustics, the different contexts and locations in which tapings took place, the difficulties involved in distinguishing two voices both speaking in a particular manner with which the jury were unfamiliar, the danger of confusing voices speaking in a foreign accent and the limited opportunity for the jury to become familiar with the recorded voice or voices in question: *R v Evan, Robu and Bivolaru* (2006) 175 A Crim R 1.

See *Neville v The Queen* (2004) 145 A Crim R 108 as to the admissibility of evidence of persons who have familiarity with the voice which is to be identified and the appropriateness of a direction that the jury must be informed that, although there was evidence to assist them on the issue, it remained ultimately their decision and a decision which they can make, having regard to their own views on the matter from the material available in the court, irrespective of the opinion or identification evidence which may have been adduced by the prosecution.

4. Identification of things

See *R v Clout* (1995) 41 NSWLR 312.

5. Dock Identification[19]

One (or more) witnesses have pointed to the defendant and said that he was the person who assaulted him.

I must caution you very strongly about the use of that form of identification. It is a dangerous form of identification and has very limited value.

Even total strangers to court proceedings quickly realise that the defendant, in the position he is seated in court, is the person alleged to have committed the offence or offences being tried.

When a witness identifies the defendant in court, consider whether the witness might have been influenced by seeing the defendant in that position, in this Court.[20]

In cases in which there is a dock identification, it is necessary for a trial judge to give directions of the kind identified in *Domican v The Queen*[21] (see 51.3).

---

[19] *R v Negus*, CA No 57 of 1997, 1 July 1997; *R v Tyler* [1994] 1 Qd R 675; *Pollitt* (1990) 51 A Crim R 227, 234; *Saxon* [1998] 1 VR 503, 513.

[20] Add, where appropriate, "or in the Magistrates Court during the committal hearings".

6. Circumstantial Evidence of Identification

The need for a trial judge to give a *Domican* direction where the identification evidence did not directly implicate the defendant as the person committing the crime was considered in *Festa v The Queen* (2001) 208 CLR 593. On occasions a *Domican* direction will be required. *Finlay v The Queen* (2007) 178 A Crim R 373 is an example of a case where the identification was of such a nature that the *Domican* direction was not required. See also *R v Main and Fauid* [2012] QCA 80. Where the case relies wholly or substantially on such evidence, a direction on circumstantial evidence will be necessary.

[21] *R v Franicevic* [2010] QCA 36.

A. Where the Crown seeks to establish the defendant's identity as the offender

You must first be satisfied that the defendant was responsible for the earlier acts. The evidence on which you may be so satisfied is …

If you are not so satisfied, you must completely disregard the evidence of the earlier acts.

If you are so satisfied, do you consider that the similarities between the earlier acts and the acts which are the subject of this indictment are so striking that you are satisfied beyond reasonable doubt that the same person was responsible on each occasion? In deciding that, ask yourselves whether the similarities are so striking that you are able to exclude coincidence beyond reasonable doubt.

It is certainly not enough that you consider that the defendant, having been responsible for the earlier acts, is the sort of person who might, or even would, commit the offence alleged in the indictment. You must go far beyond that and decide whether - to repeat the proper test - the similarities are so striking that you are able to exclude coincidence beyond reasonable doubt. Are the similarities so striking as to show that the defendant has put his stamp, his signature, upon the acts, and to lead you to conclude that he must have been the person responsible for both the earlier acts and the offence alleged?

These are the similarities identified by the prosecution …

These are the defence submissions to you in relation to the alleged similarities …

B. Where the Crown seeks to establish the defendant's modus operandi

First of all you would have to accept the evidence of the witnesses as to what happened [on the other occasions]. I will go through that evidence and what the Crown and the defence said about it shortly. If you don't accept that evidence you should disregard it entirely.

If you do accept that evidence, it can still be of no use to you unless you can be satisfied that there is so strong a pattern, that the conduct on each occasion is so strikingly similar, that as a matter of common sense, and standing back, looking objectively at it, the only reasonable inference is that the same sequence of events

occurred on this occasion. If you are not satisfied of that, you should put the evidence out of your mind. It would be entirely irrelevant to this case and it would be wrong to use it against the defendant. You certainly must not proceed on the basis that if you thought he'd [committed the other offences] he was generally the sort of person who might, or even would, commit [this offence].

Similar acts may of course be later than the act the subject of a charge, so the directions would require modification if that were the case.

C. Where the Crown have joined charges against a number of complainants

As I have said, you must consider the evidence in relation to each charge separately and you are to return a separate verdict for each charge.[1]

Here, there is more than one complainant and the prosecution case is that the evidence of each complainant does not stand alone.

The prosecution argues that each complainant is supported by the evidence of the other complainants.

The prosecution argues that similarities in the defendant's alleged conduct towards *each* of the complainants means that the evidence of each complainant supports the others and makes it *more likely* that what each complainant says about the conduct relating to them is *truthful and reliable.*

In other words, the prosecution argues that the degree of similarity between the versions makes it *highly improbable* that it is just by chance that the complainants have falsely complained about similar events.

However before you can use one complainant's evidence in support of the truthfulness and reliability of another complainant, you need to be satisfied beyond reasonable doubt about the following things:

No collusion

First you must be satisfied that the evidence of each complainant is *independent* of each other. By 'satisfied that the evidence of each complainant is independent',

[1] This direction assumes that charges involving difference complainants have been joined on the basis that the evidence from each is admissible on the trial of the charges in respect of the other or others, and admitted in conformity with the decision in *Phillips v The Queen* (2006) 224 ALR 216. For a recent discussion on 'similar fact' evidence see *R v McNeish* [2019] QCA 191.

I mean that you must be satisfied that there is no real risk that the complainants have together *concocted* similar complaints.

The value of any combination, and likewise any 'strength in numbers', is completely worthless if there is any real risk that what the complainants said was falsely concocted by them.

I direct you that you cannot use the evidence of the complainants in combination unless you are satisfied that there is no real risk the evidence is untrue by reason of concoction.

You must be satisfied that there is no *real* risk of concoction: a real risk is one based on the evidence, not one that is fanciful or theoretical.

[refer to any evidence of concoction]

Evidence reliable

Secondly, if you are satisfied there is no risk of concoction then you must also be satisfied –

(i) that the evidence of the particular complainant under consideration is truthful and accurate as to the alleged similar conduct; and

(ii) that the supporting evidence of the other complainant/s is *also* truthful and accurate as to the alleged similar conduct.

Strikingly Similar

Thirdly, you must be satisfied that the facts proved with respect to the other complainant/s are *so similar* to the allegations made by the particular complainant under consideration, that there is *no reasonable view of the evidence* of the other complainants, other than that the defendant committed the acts the particular complainant alleged.

[list striking features and dissimilarities]

The prosecution argues that the facts proved to you are *so similar* that, when judged by common sense and experience, they must be true; and in that way, you can use the evidence of the complainants in combination.

They argue that, in the absence of collusion, it is objectively improbable that complainant 'A' would complain of offending against him/her by the defendant in such similar circumstances as those alleged by complainant 'B', unless the offending against complainant 'A' actually occurred.[2]

Importantly, the defence argues that the allegations are *not so similar* as to allow you to use the evidence of one complainant in proof of the allegations made by another.

Further, the defence argues that you would *not* be satisfied that a particular complainant is truthful and accurate as to the alleged similar conduct. Thus you could not use the evidence of that complainant [those complainants] to support the others.

[or other arguments made on the defendant's behalf]

Summary

In summary,

the evidence of any one complainant, whom you consider to be truthful and reliable, as to the alleged similarities in the defendant's conduct may be used by you as a *circumstance* which might confirm, support, or strengthen the evidence of another complainant; *but only if* you are satisfied, on all the evidence that you have heard, that –

- **there is *no reasonable view of it* other than the defendant committed the acts alleged by the other complainant/s, and**
- **the possibility that the other complainant/s is [are] *lying* can be rejected; and**
- **the possibility that it is just by mere coincidence that the other complainant has complained falsely of similar conduct on the defendant's part can be rejected.**[3]

---

2 *R v CBM* [2015] 1 Qd R 165 at [45].

3 In *DPP v Boardman* [1975] AC 421 Lord Wilberforce wrote (at 444) that:

> "This probative force is derived, if at all, from the circumstances that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by

If you do not accept that *sufficient similarities* exist in the allegations of each complainant as to be able to rely on the evidence of one in support of the truthfulness and reliability of the evidence of another then you would reject the prosecution argument and look at the evidence of each complainant *independently* without having regard to the evidence of the others.

I caution you that, if you do not accept that sufficient similarity in the evidence of the complainants exists, then you cannot use the evidence to reason in this way – ' … that he is the *sort of person* who could commit these sort of offences, or is of *bad character*, and therefore we will convict him of all the charges'.

You cannot say to yourselves that because you are satisfied beyond reasonable doubt that the defendant committed offences against one complainant, he must therefore have committed the offences alleged by the other complainants, and so we will convict him of those.

At the end of the day, before you can convict the defendant on any count you must be satisfied that the prosecution has proved each element of the particular count beyond reasonable doubt; that is, that the particular complainant you are considering is truthful and reliable in his/her allegation upon which the particular charge is based.

---

experience and common sense, either all be true, or have arisen from a cause common to the witness or from pure co-incidence."

Jury Unanimity – Specific Issues

Direction where alternative bases of responsibility do not involve materially different issues or consequences

> **The prosecution has put to you two different bases on which you might find the defendant guilty of the offence [outline alternative bases]. You must reach a unanimous verdict,1 but it is not necessary that you all arrive at the same result by the same approach or for the same reasons. You must, however, be unanimous in a conclusion that the defendant is, beyond reasonable doubt, guilty of the offence before you can convict.**

Where there are alternative bases on which the jury might acquit.

> **Although your verdict must be unanimous,[2] you may find that you entertain a reasonable doubt as to guilt on different bases. It does not matter that different members of the jury entertain a reasonable doubt for different reasons.**

Where an offence requires unanimity as to means by which offence committed[3]

> **The defendant is alleged to have committed the crime of (insert description) in different ways. The first is that he (describe means). The second is that he (describe means). As they are different ways of committing the offence of (insert description), the prosecution does not have to prove both of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt on one or the other is enough. But in order to return a guilty verdict, all twelve of you must agree that the same one has been proved. To convict, all of you must agree that the prosecution has proved beyond reasonable doubt that the defendant (describe means); or, all of you must agree that the prosecution has proved beyond a reasonable doubt that the defendant (here describe alternative method).**

It is frequently the case that there is more than one basis on which a jury could arrive at a verdict of guilty. Whether they should be directed that they may do so depends on whether the alternative bases of responsibility "involve materially different issues or consequences":

---

1 As to majority verdicts see No 52A and General Summing Up Direction No 24.

2 As to majority verdicts see No 52A and General Summing Up Direction No 24.

3 See for example *R v Chignell* [1991] 2 NZLR 257, a case in which the victim might have been killed in the course of a bondage session at the defendant's house, or subsequently, when he was thrown over a waterfall. Since the alternatives were "separated by place and in time, and involved wholly different acts and …intents on the part of each accused", the NZ Court of Appeal concluded that the jury should have been instructed that they were required to be unanimous as to the alternative they found.

Leivers and Ballinger[4]. Thus, for example, in *Leivers*[5] the prosecution based its case against the appellants on s 7(1)(c) and s 8 of the *Criminal Code* as alternatives. Although the jury would be required to make different findings in respect of each provision, the same activities by each appellant were in essence relied on as a foundation for liability under each. It was proper for the trial judge in that circumstance to instruct the jury that they were entitled to reach the same conclusion by different routes.

It is conceivable, however, that a prosecution case entailing such alternative bases of responsibility might involve a mix of evidence which is capable of being exculpatory on one form of participation in murder, while inculpatory on the other. It would not be permissible for the jury in such an instance to be directed that they could adopt whatever route they chose, because to do so might entail selecting an inconsistent mix of inculpatory and exculpatory pieces of evidence. For a discussion of this scenario, see the judgment of Lamer J in the Supreme Court of Canada in *Thatcher*.[6]

In *Cramp*[7], the New South Wales Court of Criminal Appeal upheld a conviction which might have been based on manslaughter by gross negligence, or manslaughter by an unlawful and dangerous act. The alternative counts relied on similar evidence as to the appellant allowing the deceased to drive his vehicle fast and dangerously while under the influence of alcohol. The Court held that the jury was not obliged to adopt a uniform basis on which to reach its verdict of guilty. A distinction was drawn between "alternative factual bases of liability and alternative legal formulations of liability based on the same or substantially the same facts"[8].

That distinction seems clear enough when one considers decisions such as *KBT*[9], in which an appeal was upheld because the jury had not been directed that it must agree as to the acts upon which a conviction of maintaining an unlawful sexual relationship was based. Section 229B(1) of the *Code* created an offence of maintaining an unlawful relationship which required for conviction proof that the offender had committed an offence of a sexual nature with a child on three or more occasions. That finding as to three acts was an essential element of the offence, requiring the jury to reach a unanimous conclusion as to at least three specific acts out of those the subject of evidence.

Similarly, in *Brown*[10] the English Court of Appeal held that the jury had to be unanimous as to the false, misleading or deceptive character of at least one of several statements in order to convict the appellant of the offence of inducing another to enter into an agreement, by a statement known to be false, misleading or deceptive. Similar reasoning is evident in *Beach,*[11] in which the Victorian Court of Criminal Appeal observed that a verdict of causing death by culpable driving which might have been based on negligence or, alternatively, on driving under the influence of alcohol, where no direction as to the need for unanimity had been given, would not ordinarily be permitted to stand. That was because it might well be "based upon quite disparate findings relating to the very foundation upon which the verdict rests". (There was in that case, however, a verdict on a second count which supported the conclusion that the first

---

4 [1999] 1 Qd R 649 at 662.

5 Leivers & Ballinger.

6 [1987] 1 SCR 652; 32 CCC (3d) 481 at 518.

7 (1999) 110 A Crim R 198.

8 *Cramp* at 212. See also *Ryder* [1995] 2 NZLR 271: jury not required to be unanimous as to precise mode of death where stomping on head or blow causing deceased to fall back and strike head both possible.

9 (1997) 191 CLR 417.

10 (1984) 79 Cr App R 115.

11 (1994) 75 A Crim R 447.

count was based on a finding of negligence.) To be contrasted are the Canadian decisions in *Thatcher* [12] and *GLM*.[13]

The distinctions between essential and non-essential elements in an offence, and alternative bases of criminal liability not involving "materially different issues or consequences", illustrated by the cases above are not so clear when it comes to the question of manslaughter verdicts which may be based on an absence of finding of a specific intent to kill or do grievous bodily harm, or, alternatively, on a conclusion that although intent is established, the prosecution has not excluded provocation. In practice, however, it has generally not been considered necessary that the jury be required to reach unanimity of approach before convicting of manslaughter. The existence of such a practice in Victoria[14] and New South Wales was discussed in *Dally*[15]. The rationale is expressed in that case in terms of practicality, rather than involving any attempt to distinguish between essential and non-essential elements or materially different issues or consequences.

For American approaches to this question, see *Schad v Arizona*[16] in which the US Supreme Court concluded that unanimity was not required as to whether the petitioner had committed felony murder or premeditated murder; and *Richardson v United States*[17] in which it was held that where a "continuing series of violations" had to be proved, it was necessary that the jury agree as to which violations it was satisfied were established. Both cases turn, however, on constitutional and statutory construction questions.

---

12 [1987] 1 SCR 652; 32 CCC (3d) 481.

13 1999 BCCA 467.

14 *R v Clarke & Johnstone* [1986] VR 643 at 661.

15 (2001) 115 A Crim R 582 at [59] ff.

16 501 US 624 (1990).

17 526 US 813 (1999).

Jury Failure to Agree

Black Direction

Where the jury indicate that they are unable to reach a verdict and the preconditions for allowing a majority verdict direction under s 59A of the *Jury Act* are not or not yet satisfied, a direction as outlined by the High Court in *Black v The Queen* (1993) 179 CLR 44 at 51 should be given, keeping in mind of course that the jury must be free to deliberate without any pressure being brought to bear on them:

> **I have been told that you have not been able to reach a verdict so far. You are entitled to take as long as you wish to reach your verdict, but because of the time you have already devoted to your deliberations, I wish to say this. 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 enough 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 conscientiously try the charges and decide them 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. The process of considering your verdict should involve weighing up one another's opinions about the evidence and testing them by discussion. This 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.**
>
> **Experience has shown that often juries are able to agree in the end. 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, to allow you to give consideration to what I have said, I ask you to retire again and see whether you can reach a verdict. If you need any further**

assistance let me know. But I remind you not to reveal your voting figures in favour of conviction or acquittal in any communication to me.[1]

Where there is a complaint by a juror as to the conduct of another juror during deliberations, it is the duty of the trial judge to inquire into and deal with the situation so as to ensure that there is a fair trial. However, the appropriate course in such a case is not to deal with the situation by separating and questioning individual jurors.[2] Rather, when this type of problem arises the whole jury should be asked in open court, through their speaker, whether as a body it is likely that they would be able to reach a verdict, if given more time and asked whether the court could be of any assistance to the jury. The course then to be taken is a matter for the judge's discretion; whether to give a *Black* direction or take some other course.[3] In cases where a majority verdict is not allowed, such as murder, the judge should not discharge an individual juror at a time when it is known that the jury is in disagreement and the juror that is discharged is the sole dissenter, as that carries the risk of giving rise to a public perception that a subsequent verdict is an impermissible majority verdict.[4] Furthermore, the power to discharge an individual juror pursuant to s 56(1) of the *Jury Act* 1995 should only be exercised where the circumstances clearly call for its exercise.[5] A juror's refusal to discuss the evidence prior to deliberations cannot of itself constitute a basis for his or her discharge under s 56(1)(a). Nor does the fact that strongly held opposing views have led to a deterioration of relations between the jurors necessarily provide a basis for a juror's discharge under s 56(1)(a).

Where the complaint made against a juror is that he/she is disregarding the judge's directions on the law, and the trial judge chooses not to discharge the jury but to give a Black direction, the judge should in addition give a clear and emphatic direction reminding the jury that they must follow the judge's directions on matters of law.[6]

As to whether reference should be made to the circumstances being imminent for the taking of a majority verdict, where the jury indicates it is deadlocked before the time has come to consider a majority verdict: see *R v VST* (2003) 6 VR 569; [2003] VSCA 35 at [38] and *RJS v The Queen* (2007) 173 A Crim R 100; [2007] NSWCCA 241 at [22] – [23] where such reference was found to undermine the Black direction. But see *Doklu v The Queen* (2010) 208 A Crim R 333. See also *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29, where it was held at [44] that there was no error in combining a Black direction with a direction as to majority verdicts.

---

1 The judge should not be told details of voting figures and if so informed should not disclose that detail to the prosecution or defence: See *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29 at [27]; *R v Smith* [2015] 2 Qd R 452.

2 That approach will be appropriate where a matter external to the jury as a body arises, see *R v Orgles & Orgles* (1993) 98 Cr App R 185.

3 *R v Roberts* [2005] 1 Qd R 408, *R v Orgles & Orgles* (1993) 98 Cr App R 185.

4 *R v Roberts* [2005] 1 Qd R 408.

5 *R v Roberts* [2005] 1 Qd R 408. See Discharging a Juror in 'General Summing Up' No 5B.

6 *R v Smith* [2005] 2 All ER 29.

Majority Verdict

The *Criminal Code and Jury and Another Act Amendment Act* No 50 of 2008 which was assented to on 19 September 2008 makes provision for the taking of majority verdicts in criminal trials, except those covered by s 59 *Jury Act*.

By s 59 unanimous verdicts are still required in trials on indictment for the following offences:

1. murder (s 59(1)(a)(i));

2. an offence against s 54A(1) (*Demands with menaces on agencies of government*) of the *Criminal Code* which has mandatory life imprisonment as a penalty (s 59(1)(a)(ii));

3. Commonwealth offences (given s 80 of the Commonwealth Constitution).

Additionally, a unanimous verdict is required where the jury consists of only 10 jurors when it gives its verdict (s 59(1)(b)) notwithstanding that at a time before its verdict was given the jury consisted of more than 10 jurors (s 59(2)).

However, if on the trial of an offence mentioned in s 59(1)(a)(i) or (ii), the jury is unable to reach a unanimous verdict and the defendant is liable to be convicted of another offence not mentioned in those provisions, then in relation to the conviction for the other offence, s 59A (which allows for a majority verdict) applies as if the defendant were originally charged with the other offence: s 59(4).

A "majority verdict" is defined as a verdict, where the jury consists of 12 jurors, on which at least 11 jurors agree, or where the jury consists of 11 jurors, on which at least 10 jurors agree: s 59A(6). If the jury can reach a majority verdict, the verdict of the jury is the majority verdict: s 59A(3).

Where a majority verdict is allowed, s 59A(2) allows a judge to ask a jury to reach a majority verdict in a criminal trial if, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation. Accordingly, in respect of those charges and trials to which s 59A applies, two preconditions are required to be met before a judge may give directions as to the returning of a majority verdict, the first being that the "prescribed period" must have elapsed and the second that the trial judge is satisfied "that the jury is unlikely to reach a unanimous verdict after further deliberation": s 59A(2).

As a majority verdict may only be taken where the preconditions have been satisfied, a trial judge must turn his or her mind to the terms of s 59A and the evidence relevant to the preconditions. No *a priori* rules can be laid down as to what will constitute sufficient materials for their satisfaction: *R v McClintock* [2010] 1 Qd R 354, [48].

The trial judge ought to make a clear finding as to each of the preconditions required before the giving of a direction that a majority verdict will be permitted: *Hanna v R* (2008) 73 NSWLR 390, [71]. In *R v Muto and Eastey* [1996] 1 VR 336 at 343 the Victorian Court of Appeal observed in respect of similar Victorian legislation (s 47 of the Juries Act 1967): "As a general rule the judge should not explain to the jury the conditions laid down by s 47 or comment on the exercise of his or her own discretion, but we acknowledge that there may be cases in which it is desirable to tell the jury something of the way in which the section operates or to answer questions that the jury may have."

The "prescribed period" is defined in s 59A(6) as "a period of at least eight hours after the jury retires to consider its verdict", or such "further period the judge considers reasonable having regard to the complexity of the trial". In some jurisdictions no legislative guidance is

given as to the calculation of the minimum statutory period: see *R v VST* (2003) 6 VR 569. However s 59A(6)(a) specifies the periods that are excluded from the eight hour period. Accordingly, the eight hour period does not include any of the following periods:

1. a period allowed for meals or refreshments;

2. a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;

3. a period provided for the purpose of the jury being accommodated overnight.

Caution must be exercised in calculating the eight hour period. Arrangements should be put in place for keeping a record of the time periods excluded by s 59A(6)(a) in the calculation of the eight hour period.

In *RJS v The Queen* (2007) 173 A Crim R 100 Spiegelman CJ questioned the practice of recalling the jury once the minimum statutory period had passed, irrespective of any indication of difficulty in reaching a verdict. Such an approached was also disapproved of in *Rusovan v The Queen* (1994) 62 SASR 86; see also *R v K* (1997) 68 SASR 405 at 413; *R v Harrison* (1997) 68 SASR 304.

As to the requirement that there must be satisfaction that the jury is unlikely to reach a unanimous verdict after further deliberation, "the most certain way of ascertaining the [unlikelihood of a unanimous verdict] is to question the jury about the prospect of unanimity. Another would be to give a *Black* direction after the expiration of the prescribed period and wait a further reasonable time (which the judge must assess). If there is still no verdict the existence of the requirement might be inferred": See *R v McClintock* [2010] 1 Qd R 354, [41]. As to the latter course of first giving a *Black* direction, see *Hanna v R* (2008) 73 NSWLR 390; [2008] NSWCCA 173 at [23]; *RJS v The Queen* at [25] and *Doklu v The Queen* (2010) 208 A Crim R 333. See also *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29. Counsel should also be invited, in the absence of the jury, to make submissions before the discretion to allow a majority verdict is finally exercised: *RJS v R* at [25]; *R v Muto & Eastey* at 342; *R v K* (1997) 68 SASR 405 at 413. The judge should not be told details of voting figures and if so informed should not disclose that detail to the prosecution or defence: See *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29, [27].

Information as to the jury's interim votes and voting pattern are not relevant to the exercise of the discretion under s 59A(2), what is relevant includes the length and complexity of the trial as well as the time already spent deliberating: *Smith v The Queen* (2015) 255 CLR 161; 89 ALJR 698; [2015] HCA 27 at [49] and [53].

As to combining a majority verdict with a *Black* direction: see "Jury Failure to Agree" Direction No 52 and *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29. Having given a *Black* direction, it may not be inappropriate for the trial judge to inform the jury about the possibility of lawfully returning a majority verdict and the circumstances in which that might occur: *R v BCG* [2012] QCA 167 at [20].

As to whether a reference to the existence of majority verdicts should be made in the summing up: see "General Summing Up Directions" Direction No 24.

In respect of a charge where a judge has given directions to the jury that a majority verdict may be returned, the speaker, after indicating that a verdict has been reached, should be asked whether the verdict is unanimous or not. (Whether the verdict is a unanimous one or by majority may become relevant where it is contended that an error has occurred in the exercise of the discretion to take a majority verdict). In England and Wales before a majority verdict can be accepted a statement is required in open court as to the details of the verdict:

see s 17(3) *Juries Act* 1974 (UK); Practice Direction [1967] 3 All ER 137; *R v Pigg* [1983] 1 All ER 56. In Victoria no express provision is made, but the approach recommended in *R v Muto & Eastey* at 343 is that if there has been a majority verdict direction, the jury should be asked whether the verdict is "the verdict of not less than 11 [or as the case may be] of you."

When taking a verdict after giving a majority direction, care must be given to ensuring that it can be established that:

1. the jury have been unable to reach a unanimous verdict;
2. the jury have reached a majority verdict;
3. what the verdict is;
4. all members of the jury agree it is a majority verdict.[1]

Sample directions –

[Where the charge is one where a majority verdict is permitted]

> **Under our law a majority verdict is permitted in certain circumstances where a defendant has been charged with** [specify the offence]**. Those circumstances have now arisen.**
>
> **A majority verdict means a verdict on which 11 of you are agreed** [where the jury consists of 12 jurors] [or where 10 jurors agree where the jury consists of 11 jurors]**.**

---

[1] To take the verdict where a majority verdict direction has been given to the jury:

Associate: "*Speaker, have the members of the jury reached a verdict on which all 12 are agreed?*" If the speaker says "yes", the associate confirms what the speaker has said with the rest of the jury: "*So says your speaker, so say you all?*" (wait for the jury to assent).

The associate then proceeds to take the verdict in the usual manner, ie:

Associate: "*Members of the jury, do you find the defendant (Name) guilty or not guilty of ... (short form of charge)?*" Turn to the Judge and repeat the verdict given by the speaker.

Associate: "*So says your speaker, so say you all?*" (wait for the jury to assent)

If the speaker says "no" when asked if the jury are unanimously agreed on a verdict:

Associate: "*Speaker, have the members of the jury reached a verdict on which 11 are agreed* (where the jury consists of 12 jurors) (or *where 10 are agreed* where the jury consists of 11 jurors)*?*"

If speaker says "yes", the associate confirms what the speaker has said with the rest of the jury:

Associate: "*So says your speaker, so say you all?*" (wait for the jury to assent)

Associate: "*Speaker, do 11* (or 10 as the case may be) *members of the jury find the defendant (Name) guilty or not guilty of ... (short form of charge)?*" Turn to the Judge and repeat the verdict given by the speaker.

Associate: "*So says your speaker. Do you all agree that 11 of you have reached that verdict?*" (wait for the jury to assent).

Repeat this for further counts where majority verdict direction given for each accused.

Endorse the indictment with the date and verdict. If the accused is found not guilty, the Judge discharges him or her.

So, if you cannot all agree on a verdict, the verdict of 11 of you [or 10 as the case may be] **may be taken as the verdict of the jury.**

Shortly I shall ask you again to retire and resume your deliberations. With further deliberations you may find that you are able to deliver a unanimous verdict or you may find that you are able to deliver a majority verdict on which 11 of you are agreed. In either such case you should inform the bailiff that you have reached a verdict.

When you return after having reached that verdict, the procedure will be a little different from that which I outlined to you before you first retired. Your speaker will be asked by the associate whether you have reached a verdict on which all 12 are agreed. If the answer is "Yes", the procedure will then be as I originally told you.

If the answer is "No", your speaker will be asked whether you have reached a verdict on which 11 of you are agreed. If the answer is "Yes", the procedure will then be for the associate to ask your speaker if 11 members of the jury find the defendant guilty or not guilty. The speaker will announce the verdict of the majority. The associate will then ask you all to confirm that that is the verdict of 11 of you.

If 11 of you have not agreed on a verdict, or if you have not informed the bailiff within a reasonable time that you have reached a verdict, I shall then consider what course to take.

[Where an offence in respect of which a majority verdict is not allowed is charged with one where a majority verdict is allowed]

In respect of the charge of [eg Commonwealth drug or fraud offence] **your verdict, whether guilty or not guilty, must be unanimous and no majority verdict is permitted. However, while your verdict on that charge must be unanimous, in respect of the charge of** [eg State drug or fraud offence] **a majority verdict is permitted in certain circumstances. Those circumstances have now arisen.**

A majority verdict means a verdict on which 11 of you are agreed [where the jury consists of 12 jurors] [or where 10 jurors agree where the jury consists of 11 jurors]**. So, if you cannot all agree on a verdict, the verdict of 11 of you** [or 10 as the case may be] **may be taken as the verdict of the jury.**

Shortly I shall ask you again to retire and resume your deliberations. With further deliberations you may find that you are able to deliver a unanimous verdict in relation to the charges or in relation to the charge of [specify charge where majority verdict allowed] **you may find that you are able to deliver a majority verdict on which 11 of you are agreed. Inform the bailiff when you have reached your verdicts.**

When you return after having reached your verdicts, in relation to the charge of [specify charge where majority verdict allowed]**, the procedure will be a little different from that which I outlined to you before you first retired. Your speaker will be asked by the associate whether you have reached verdicts on which all 12 are agreed. If the answer is "Yes", the procedure will then be as I originally told you.**

If the answer is "No", in relation to the charge of [specify charge where majority verdict allowed] **your speaker will be asked whether you have reached a verdict on which 11 of you are agreed. If the answer is "Yes", the procedure will then be for the associate to ask your speaker if 11 members of the jury find the defendant guilty or not guilty. The speaker will announce the verdict of the majority. The associate will then ask you all to confirm that that is the verdict of 11 of you.**

If 11 of you have not agreed on a verdict, or if you have not informed the bailiff within a reasonable time that you have reached a verdict, I shall then consider what course to take.

[Where an offence in respect of which a majority verdict is not allowed, such as murder, is charged in circumstances where s 59(4) applies to allow a majority verdict to be taken on a lesser offence]

In respect of the charge of [eg murder] **your verdict, whether guilty or not guilty, must be unanimous and no majority verdict is permitted. However, while your verdict on that charge must be unanimous, in respect of the charge of [eg manslaughter] a majority verdict is permitted in certain circumstances. Those circumstances have now arisen.**

A majority verdict means a verdict on which 11 of you are agreed [where the jury consists of 12 jurors] [or where 10 jurors agree where the jury consists of 11 jurors]**. So, if you cannot all agree on a verdict in respect of the charge of** [eg

manslaughter]**, the verdict of 11 of you** [or 10 as the case may be] **may be taken as the verdict of the jury.**

Shortly I shall ask you again to retire and resume your deliberations.

When you return your speaker will be asked whether you have been able to reach a unanimous verdict in respect of the charge of [murder] **and then you will all be asked to confirm what your speaker has said. If you have reached a unanimous verdict, your verdict will be taken in the manner I previously indicated.**

If you have reached a unanimous verdict of not guilty on that charge, you will be asked through your speaker whether you have been able to reach a verdict on the charge of [manslaughter]**. Your speaker will then be asked whether the verdict is a unanimous verdict (that is one on which all 12 jurors are agreed). If the answer is "Yes", your verdict will be taken in the manner previously indicated.**

If the answer is "No", your speaker will be asked whether you have reached a verdict on which 11 of you are agreed. If the answer is "Yes", the procedure will then be for the associate to ask your speaker if 11 members of the jury find the defendant guilty or not guilty. The speaker will announce the verdict of the majority. The associate will then ask you all to confirm that that is the verdict of 11 of you. If 11 of you have not agreed on a verdict, or if you have not informed the bailiff within a reasonable time that you have reached a verdict, I shall then consider what course to take.

DNA

In *R v Karger* (2002) 83 SASR 135 there was considerable discussion on the directions appropriate to warn a jury against misusing statistical evidence in DNA cases. Reference was made to *R v Doheny and Adams* [1997] 1 Cr App R 369 and *R v GK* (2001) 53 NSWLR 317, particularly at 328 – 329 per Mason P. At 83 SASR 174 – 75, Gray J with whom Prior J agreed, approved at [155] the following procedures suggested in *R v Doheny and Adams*, describing those as a useful benchmark against which to measure the way in which DNA evidence was addressed in a case. Those suggested procedures, adapted to reflect the way in which DNA evidence is now presented, are:

- The scientist should adduce the evidence of the DNA comparison between the crime scene sample and the defendant's reference sample, together with the scientist's calculations of the likelihood of the DNA profile obtained from the crime scene sample occurring had there been, or not been, a contribution from the reference sample.

- Where DNA evidence is to be adduced the Crown should serve on the defence details as to how the calculations have been carried out which are sufficient to enable the defence to scrutinise the basis of the calculations.

- The Crown should make available to a defence expert, if requested, the statistical basis upon which the calculations have been based.

- Any issue of expert evidence should be identified and, if possible, resolved before trial. This area should be explored by the court in the pre-trial review.

- In giving evidence the expert will explain to the jury the nature of DNA, its characteristics and how they are used to provide a basis for determining the likelihood that a DNA profile obtained from a crime scene sample occurred with, or without, a contribution from the reference sample.

  > *The expert will, on the basis of empirical statistical data give the jury his or her estimate of the likelihood of the DNA profile obtained from the crime scene sample occurring had there been, or not been, a contribution from the reference. Such an expression of opinion is usually expressed in one of the two following ways: "It is estimated that the DNA profile obtained is greater than [xxx] times more likely to have occurred if there had been a contribution of DNA from the defendant rather than if there had not"; or*
  >
  > *""It is estimated that the DNA profile obtained is greater than [xxx] times more likely to have occurred if there had not been a contribution of DNA from the defendant rather than if there had".*

- In the summing up careful directions are required in respect of any issues of expert evidence, and guidance should be given to avoid confusion caused by areas of expert evidence where no real issue exists.

- The judge should explain to the jury the relevance of the DNA evidence in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives the likelihood estimate (or estimates) significance, and to that which conflicts with the conclusion that the DNA profile obtained from the defendant contributed to the crime scene sample.

The process of identification by DNA profiling is based on the testing of DNA molecules in bodily tissues and bodily fluids such as blood, saliva, and semen. From measurements taken at selected locations, a DNA profile for a sample of bodily tissue or fluid of unknown origin may be obtained and compared with the DNA profile obtained from a sample of bodily tissue or fluid of known origin.

If the profiling tests are done correctly it may be possible to provide an estimate of the likelihood that DNA from a person such as the defendant contributed to the DNA found in a crime scene sample. Thus, in this case, you have heard evidence from Dr [xxx] who expressed estimated that the DNA profile obtained from one of the samples taken from the crime scene, that is to say, the [identify the particular sample by location and forensic number] is greater than [xxx] times more likely to have occurred if there had been a contribution of DNA from the defendant rather than if there had not.

This evidence does not prove that DNA from the defendant actually contributed to the crime scene sample; rather, it is evidence as to the likelihood that this occurred. It is not absolute proof.

Furthermore, the reliability of this evidence depends on the accuracy and reliability of the profiling tests carried out with respect to both the sample obtained from the defendant and the crime scene sample. The results of that testing will not be reliable where there has, for example, been contamination of one or both of the samples to which I have just referred.[1]

[If there is any suggestion on the evidence of object to object transference,[2] refer to the evidence raising that possibility.]

---

1 If there is any question as to possible contamination at collection, in handling or in analysis, the jury should be directed as to the weaknesses and the impact of possible contamination. For a discussion on DNA evidence see: Judicial Officers Bulletin No 23 published by the Judicial Commission of NSW August 2011.

2 Object to object transference might provide an explanation for why a defendant's DNA is found at a crime scene when, in truth, the defendant was never present.

Fingerprints

Identity of fingerprints of a defendant with those of the apparent perpetrator of an offence is some evidence of the identity of the defendant as the perpetrator.[1] **The identification of the characteristics of fingerprints and their patterns is essentially a matter of expert evidence, and experts have given evidence in the case. It is for you to consider whether on a consideration of the expert and other evidence in the case you are satisfied that the examined fingerprints are those of the defendant.**[2]

---

1 This direction is not always appropriate: cf *R v Peel* [1999] 2 Qd R 400 at 411.

2 In England, juries are directed that the question whether the fingerprint is that of a defendant is not to be decided on the basis of any comparison carried out privately by the jury: see *Judicial Studies Board Specimen Directions* No 33.

Expert Witnesses

Certain witnesses whom you've heard referred to as expert witnesses have been called to give evidence. The ordinary rule is that witnesses may speak only as to facts and not express their opinions. An exception to the general rule is that persons duly qualified to express some opinion in a particular area of expertise are permitted to do so on relevant matters within the field of their expertise.

However the fact that we refer to such witnesses as expert does not mean that their evidence has automatically to be accepted. You are the sole judges of the facts and you are entitled to assess and accept and reject any such opinion evidence as you see fit. It is up to you to give such weight to the opinions of the expert witnesses as you think they should be given, having regard in each case to the qualifications of the witness and whether you thought them impartial or partial to either side and the extent to which their opinion accords with whatever other facts you find proved. This is a trial by jury, not a trial by expert; so it is up to you to decide what weight or importance you give to their opinions or indeed whether you accept their opinion at all.

It is also important to remember that an expert's opinion is based on what the expert witness has been told of the facts. If those facts have not been established to your satisfaction the expert's opinion may be of little value.

[Where there is unanimous expert opinion] In this case, the expert witnesses have expressed agreement as to [issue]. You ought not to reject that view unless the matters on which it is based have not been proved to your satisfaction, or you consider that there is other evidence which casts doubt on the experts' view.

A jury is entitled to scrutinise expert evidence for qualifications, concessions and reservations contained within it, and to consider whether the factual basis for opinions given has been made out[1] but it is not entitled to reject unchallenged medical evidence where there is no evidence to the contrary[2].

Where expert evidence is given by audio visual link or audio link under s 39PB of the *Evidence Act* 1977, the court must give the following directions:

---

1 *R v Michaux* [1984] 2 Qd R 159 at 164.

2 *R v Dick* [1966] Qd R 301; *R v Chester* [1982] Qd R 252; *R v De Voss* [1995] QCA 518. In *R v Gemmill* (2004) 8 VR 242, it was held that it was not a correct proposition that the trial judge had a right, let alone a duty, to direct a jury that where there is a conflict between witnesses they should regard one expert witness as superior to another. Such a notation would cut across the boundaries between judge and jury. This was a matter for the jury to determine.

[X] gave expert evidence by [audio visual link/audio link]. You must not give that evidence any more or less weight, or draw any adverse inferences against a party simply because that evidence was by [audio visual link/audio link].

Intention[1]

"Intent" and "intention" are familiar words. In this legal context, they carry their ordinary meaning. In ascertaining the defendant's intention, you are drawing an inference from facts which you find established by the evidence concerning his state of mind.[2]

Intention may be inferred or deduced from the circumstances in which [the death eventuated], and from the conduct of the defendant before, at the time of, or after he did the specific act which [caused the death]. And, of course, whatever a person has said about his intention may be looked at for the purpose of deciding what that intention was at the relevant time.[3]

In respect of the offence of [insert offence**], proof of intention to produce a particular result, [**namely…**], is an element of the offence. Accordingly, the prosecution must prove beyond reasonable doubt that the defendant meant to produce that result by his/her conduct.** [4]

---

1 A direction as to the meaning of intent (and its derivatives) should not be given unless the jury requests assistance concerning the concept: *R v Willmot (No 2)* [1985] 2 Qd R 413 at 418-419; *Cutter v The Queen* (1997) 71 ALJR 638 at 648. See too the discussion in *R v Glebow* [2002] QCA 442. It may sometimes be useful to tell a jury which requests assistance and seems troubled that intent connotes premeditation, that the prosecution has to prove that the defendant had the necessary intention at the time of the alleged offence, that it need not have been a long-standing intent, and that it is sufficient for it to have formed in a matter of seconds, say in a sudden flash of temper. In other words, it may be a momentary intent formed immediately before the relevant event. In *Willmot*, Connolly J wrote that the ordinary meaning of "intent" is to have in mind, to have a purpose or design, to mean. See also discussion in *R v Reid* [2007] 1 Qd R 64.

2 Though motive is rarely an element of an offence, evidence of motive, or of absence of motive, could bear on whether the defendant actually did (or omitted to do) something; or where intention is critical, be pertinent to that issue. Accordingly, it may sometimes be appropriate to inform the jury, in effect, that, although it is unnecessary for the prosecution to prove a motive, as motive is not an element of the offence, nonetheless the presence, or absence, of motive may be taken into account when considering whether the prosecution has proved guilt: cf *R v Neilan* [1992] 1 VR 57; *Griffiths v The Queen* (1994) 69 ALJR 77, 79; see also *De Gruchy v The Queen* (2002) 190 ALR 441.

3 Care is to be taken to ensure that adequate reference is made in the summing up to the defendant's evidence of lack of intent: *R v Butler* (2006) 45 MVR 391; [2006] QCA 51 at [37] – [40].

4 *Zaburoni v The Queen* (2016) 256 CLR 482 at [10], [14] (Kiefel, Bell and Keane JJ). The intention to be proved is an actual subjective intention to achieve the result as distinct from awareness of the probable consequence of the accused's actions (at [55] per Gageler J).

Reasonable Doubt

The issue of explaining the concept of reasonable doubt to a jury was considered by the High Court in *R v Dookhea*.[1] The High Court there said that although it is, general speaking, unwise for a trial judge to attempt any explication of the concept of reasonable doubt, trial judges should be encouraged to contrast the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities.

An appropriate direction is:

> **For the prosecution to discharge its burden of proving the guilt of the defendant, it is required to prove beyond reasonable doubt that he is guilty. This means that in order to convict you must be satisfied beyond reasonable doubt of every element that goes to make up the offences charged.**
>
> **Proof beyond reasonable doubt is the highest standard of proof known to the law. It can be contrasted with the lower standard of proof that is required in a civil case where matters need only be proved on what is called the "balance of probabilities." That is, the case must be proved to be more likely than not.**
>
> **In a criminal trial, the standard of satisfaction is much higher; the prosecution must prove the guilt of the defendant beyond reasonable doubt.**
>
> **It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences. If you are left with a reasonable doubt about guilt, your duty is to acquit: that is, to find the defendant not guilty. If you are not left with any such doubt, your duty is to convict: that is, to find the defendant guilty.**

[1] (2017) 91 ALJR 960; [2017] HCA 36 at [41]: "Secondly, although, as authority stands, it is generally speaking unwise for a trial judge to attempt any explication of the concept of reasonable doubt beyond observing that the expression means what it says and that it is for the jury to decide whether they are left with a reasonable doubt (and in certain circumstances explaining that a reasonable doubt does not include fanciful possibilities), the practice ordinarily followed in Victoria, as it was in this case, and often followed in New South Wales, includes contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities.[59] That practice is to be encouraged. It is an effective means of conveying to a jury that being satisfied of guilt beyond reasonable doubt does not simply mean concluding that the accused may have committed the offence charged or even that it is more likely than not that the accused committed the offence charged. What is required is a much higher standard of satisfaction, the highest known to the law: proof beyond reasonable doubt."

The references in footnote 59 are: Judicial College of Victoria, Victorian Criminal Charge Book, (2017) at 1.7. See also Judicial Commission of New South Wales, Criminal Trial Courts Bench Book, (2017) at [1.480], [1.490]; *R v Ho* (2002) 130 A Crim R 545 at 548 [15] per Bell J (Meagher JA and Hidden J agreeing at 562 [66], [67]); *Ward v The Queen* [2013] NSWCCA 46 at [54] per McClellan CJ at CL (Latham J and Adamson J agreeing at [246], [247]).

Caution in Using Hearsay – s 93C(2) *Evidence Act* 1977

Special considerations arise in relation to things which (name of witness) testified that (name of source**) told him.**

There is a risk that the witness's testimony is not a reliable account of what actually happened.

(Source's**) statement reaches you through the perceptions, interpretations and recollections of the witness, not through the recollections of (**source**). A witness who tells you of what somebody else said may have misheard or misinterpreted what was said. Or the witness might not recall things accurately because of faulty memory.**

Also the statements said to have been made to (witness**) were not on oath. In saying these things to (**witness**), (**source**) was not then under the same imperative to speak truthfully as if here in Court testifying on oath.**

No less importantly, what (source) told (witness) is untested and untestable: that is, what (source) said cannot be examined to ascertain its reliability by the usual means for testing the honesty and reliability of witnesses: cross-examination; and the opportunity given to a jury to see and hear the source of the information.

(Here add any particular consideration which may affect reliability: as, for example, motive in the source to concoct or exaggerate, or any other reason there may be to call into question the source's veracity.)

So there is need for caution in deciding whether to accept as reliable the things relayed to you as hearsay and, if you accept any of it, in forming a view about the weight that ought to be given to this information.

This section does not require a warning as to the unreliability of hearsay evidence. It is required only when admitted under this section and where a party requests it and unless there is a good reason for not doing so.[1]

[1] *R v Warradoo* [2014] QCA 299. See also *TJF v The Queen* (2001) 120 A Crim R 209 at [59].

Corporate Defendant

That a corporation is the defendant makes no difference. An individual and a corporation are both persons in the eye of the law.

Witnesses Whose Evidence May Require a Special Warning ("Robinson" direction)

Indemnified Witness

In this case the prosecution relies on the evidence of (Y), who, as you have heard, has been given an indemnity against prosecution provided that he gives truthful evidence here. There is a risk, of course, that having been protected from prosecution in that way, (Y) may have an incentive not to depart from the statement he gave to police, whether it is right or wrong, so as not to arouse any suspicions of untruthfulness. And he may wish to ingratiate himself with the authorities to ensure he maintains his indemnified position. You should therefore, scrutinize his evidence with great care. You should only act on it if, after considering it and all the other evidence in the case, you are convinced of its truth and accuracy.

Witness who has given a Section 13A Statement

The prosecution relies on the evidence of (Y), who gave a statement to the police which had the effect of reducing his own sentence. Under Queensland sentencing law, sentences may be reduced by the court where the offender undertakes to co-operate with law enforcement authorities by giving evidence against someone else. If an offender receives a reduced sentence because of that sort of co-operation, and then does not co-operate in accordance with his undertaking, the sentencing proceedings may be re-opened and a different sentence imposed. You can see therefore, that there may be a strong incentive for a person in that position to implicate the defendant when giving evidence. You should therefore scrutinize his evidence with great care. You should only act on it after considering it and all the other evidence in the case, you are convinced of its truth and accuracy.

Witness With a Mental Disability

You have heard evidence that (Y) has a long-standing condition of schizophrenia which disposes him to hallucinations and delusions, particularly if he is not keeping up with his prescribed medication. That creates a risk that his evidence might be the result of delusion rather than based in reality. Because of that risk you must approach his evidence with special care. You can act on it if you are convinced of its accuracy but it would be dangerous to convict the defendant on his evidence if you could not find other evidence to support it [supporting evidence may be found, if you accept it in…].

Section 632(3) *Code* prohibits the giving of any warning or suggestion that the law regards any class of persons as unreliable witnesses. However, it remains the case that the evidence of certain types of witness is likely to be underlain by motivations not immediately obvious to a jury.

Section 632 reads:

> *"Corroboration*
>
> *(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.*
>
> *(2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.*
>
> *(3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as an unreliable witnesses."*

In *Robinson v R* (1999) 197 CLR 162 a unanimous High Court judgment considered s 632(3) of the *Code* and held (at [20]) that:

> *"Once it is understood that s 632(2) is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence, its relationship to the concluding words of s 632(3) becomes clear, although the symmetry between the two provisions is not perfect.*
>
> ***[21]** Subsection (2) negates a requirement, either generally or in relation to particular classes of case, to warn a jury 'that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.' That does not mean, however, that in a particular case there may not be matters personal to the uncorroborated witness upon whom the Crown relies or matters relating to the circumstances, which bring into the operation the general requirement considered in Longman."*

In *R v Tichowitsch* [2007] 2 Qd R 462 the Court of Appeal considered s 632 and the decision in the High Court in *Tully v The Queen* (2006) 230 CLR 234; [2006] HCA 56. The Court of Appeal held that s 632 makes it clear that a warning is not required solely because a complaint is uncorroborated, or a child, or the alleged offence is sexual. However, features of such cases can result in a warning being necessary; in *Robinson v R, Tully v R,* and *R v Tichowitsch* the decisions stressed that whether a warning was necessary to avoid a perceptible risk of a miscarriage of justice depended on the circumstances of the case, and the warning should refer to and identify those circumstances. See also *MBX* [2013] QCA 214, *Nguyen* [2013] QCA 133.

In *Tully*, Crennan J referred at [179] to various intermediate appellate level distillations; in essence those require that a trial judge identify to the jury the features which the judge considers warrant a specific warning, the reasons for the warning, and the proper response to

it (to scrutinize the evidence with care). The judge should not simply repeat counsel's arguments, but "express the unmistakable authority of the Court."[1]

A suggested "*Robinson*" warning might be:

> **You will need to scrutinize the evidence of (the complainant) with great care before you could arrive at a conclusion of guilt. That is because of (the following circumstances):**
>
> - **the delay between the time of (each) (the) alleged incident and the time the defendant was told of the complaint, and the lack of any opportunity to prove or disprove the allegation by, for example, a timely medical examination;**
> - **the age of the complainant at the time of the alleged incident;**
> - **the difference between the accounts the complainant has given;**
> - **these other matters (identify them).**
>
> **You should only act on that evidence if, after considering it with that warning in mind, and all the other evidence, you are convinced of its truth and accuracy.**

The evidence of prison informers has been regarded as generally requiring a warning[2], as has the evidence of indemnified witnesses[3] and witnesses who have had the benefit of a reduced sentence pursuant to s 13A *Evidence Act*. It is not, however, inevitable that such a warning must be given in respect of every indemnified witness.[4]

"The general law requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case"[5]. Thus, "where there is some particular reason, such as bad character or hostility or self-interest, to question seriously the bona fides of a prosecution witness, the trial judge should give the jury such warning as is appropriate of the possible danger of basing a conviction on the

---

1 *JJB* (2006) 161 A Crim R 187 at 195.

2 See "Out of Court Confessional Statements" and *Pollitt v The Queen* (1992) 174 CLR 558. See too the discussion in *R v Benedetto* [2003] 1 WLR 1545 at [31] – [32], [34] – [38], [48].

3 The need for a warning was particularly acute where the indemnity contained a condition requiring the witness to give evidence in accordance with a statement implicating the defendant: *R v Falzon (No 2)* [1993] 1 Qd R 618. However, contemporary indemnities either give an undertaking not to prosecute for specified offences, subject to the giving of truthful evidence, or provide that statements made in the course of proceedings will not be used in any subsequent prosecution of the witness.

4 *R v Lovelock* [1999] QCA 501.

5 *Longman v The Queen* (1989) 168 CLR 79 at 86. See also **"**Delay Between (Sexual) Incident and Complaint (*Longman* Direction)".

unconfirmed testimony of that witness."[6] But the mere possibility of mistakenness is not enough.[7]

A warning should be given where a witness whose evidence is important has some mental disability which may affect his capacity to give reliable evidence.[8] It may also be appropriate, depending on the circumstances, to warn in respect of a witness whose recollection is likely to be drug-affected.[9]

---

6 *R v Sinclair & Dinh* (1997) 191 LSJS 53. The passage continues: "…There is no prescribed formula for the warning and it will often be sufficient to give it in brief and unelaborated terms. Its purpose will usually be to share with the jury the courts' 'sharpened awareness' of the danger of acting on the uncorroborated evidence of such witnesses."

7 *Brooks* (1999) 103 A Crim R 234 at 244.

8 *Bromley* (1986) 161 CLR 315.

9 See *Hickey & Komljenovic v The Queen* (1995) 89 A Crim R 554 at 567-569 (warning required) cf *R v Morgan* [1994] 1 VR 567 (no warning required).

Closed Court Exceptions to the General Rule of Openness

Introduction

The openness of our courts is a fundamental principle of our judicial system.[1] It is generally taken for granted that court proceedings are open to the public and may be freely reported.[2] However the idea of open justice is not absolute. Exceptions have been developed by courts through the common law where, on rare occasions, limits are placed on publicity. Numerous statutory provisions also recognise that justice requires that the general rule of openness be modified in particular cases

Statutory Exceptions

Crime and Corruption Act 2001 s 332

The *Crime and Misconduct Act* 2001 which came into force on 8 November 2001 (and was on 1 July 2014 renamed the *Crime and Corruption Act*) replaced the *Criminal Justice Act* 1989. Section 332 of the *Crime and Corruption Act* applies where a person subject to investigation by the Crime and Corruption Commission makes an application for injunctive relief on the ground that the investigation is being conducted unfairly or the complaint or information on which an investigation is being, or is about to be conducted, does not warrant investigation.[3] An application under this section must be held in closed court.[4] On the Commission's application, the judge may hear submissions from the Commission in relation to the investigation in the absence of the person or their lawyer.[5]

Child Protection Act 1999

In general, public reporting of proceedings in the Childrens Court is prohibited as it is not open to the public, unless approved by the Court. The Childrens Court aims to protect the privacy of children (under 18 years).

The *Child Protection Act* 1999 contains numerous provisions which restrict the openness of proceedings before a court (or tribunal).

The identity of a "notifier" is protected under this Act. A notifier is someone who has notified an authorised person that they suspect a child has or is likely to be harmed.[6] It is an offence for that authorised person to disclose the notifier's identity except in certain circumstances including the giving of evidence in proceedings where leave is granted. If leave is not granted, any witness cannot be asked questions or produce documents which might lead to the identification of the notifier.[7] In general a court must not grant such leave unless it is satisfied, after considering likely effects on the notifier and their family and the public interest in maintaining their confidentiality, that its disclosure is critical and in the public interest, or the notifier has agreed to the evidence being given.[8]

---

1 *Scott v Scott* [1913] AC 417.

2 G. Nettheim, "Open Justice versus Justice", *Adelaide Law Review* 9(4) May 1985, 487.

3 s 332(1).

4 s 332(8).

5 s 332(2).

6 s 186(1).

7 s 186(3).

8 s186(3), (4), (5), (6).

Similarly, it is an offence to identify a child who is or has been harmed or is at risk, or is in the guardianship of the Chief Executive, or is the subject of an order[9] without the written approval of the Chief Executive. The Chief Executive's approval is structured by various statutory criteria.[10]

In court proceedings where there is a notice directed to the Chief Executive or a government entity to produce documents relating to a child or their carer,[11] it is an offence for any court officer to allow the document to be inspected other than by the parties or their legal representatives.[12]

It is acceptable however for a person who is engaged in the administration of the *Child Protection Act* to refuse to disclose information to a court if its disclosure is likely to adversely affect a person's safety or mental health, if it identifies a source of information which would be prejudicial to the Act's purpose, if it is a counselling record and its disclosure would jeopardize counselling, or if it is purely personal information which is not relevant.[13]

However, a court can, on application by a party, override this refusal if the document is relevant and its disclosure is, on balance, in the public interest.[14] In that situation, the person who holds the information must disclose it to the judge to enable a determination to be made.[15] In such cases the judge must ensure that the information is not disclosed to anyone else.[16]

Evidence given in Childrens Court proceedings or contained in the Court's records or information which identifies a party cannot be published without the Court's approval.[17]

Similarly, in offences of a sexual nature where children are involved, whether as a witness, the complainant or the defendant, reports of the proceedings which identify the authorised person/ police officer are prohibited unless the court otherwise authorises it.[18]

Childrens Court Act 1992 ss 21A – 21E

Section 21B provides that in a proceeding before the court for a non-youth justice matter in relation to a child or for a youth justice matter in relation to a child who is a first time offender, the court must exclude from the court any person who is not a relevant person for the proceeding or an interested person whom the court permits to be present (s 21B(1). The terms "relevant person" and "interested person" are defined in s 21A.

For a youth justice matter in relation to a child who is a first-time offender the court may permit the presence of a representative of the media or a person if, in the courts opinion, the person has a proper interest in the proceeding and the person's presence would not be prejudicial to the interests of the child (s 21B(2A)).

---

9 s 189.

10 s 10 *Child Protection Regulation* 2000.

11 s 190(1)(a) and (b) *Child Protection Act* 1999.

12 s 190(5).

13 s 191(1).

14 s 191(2).

15 s 191(3).

16 s 191(4).

17 s 192.

18 s 193(1), (2), (3).

Subsection 21B(1) does not apply to the Childrens Court when constituted by a judge exercising jurisdiction to hear and determine a charge on indictment.

In relation to a youth justice matter involving a child who is not a first time offender, the proceeding must be held in open court unless the court orders the court to be closed or excludes a person under s 21E (s 21C(1)). The court may be closed to the public or to particular persons if the court considers it is necessary and desirable in the interests of justice (s 21C(2). The court may order the court to be closed for all or part of the proceedings on its own initiative or on an application under s 21D (s 21C(3).

Despite an order made under s 21C(3), the court may permit to be present an interested person, a representative of the media or a person who, in the courts opinion, has a proper interest in the proceeding and whose presence would not be prejudicial to the interests of the child (s 21(6)).

Section 21C(2) does not apply to the court when constituted by a judge exercising jurisdiction to hear and determine a charge on indictment (s 21C(7)).

Section 21D provides for an application to close the court for all or part of a proceeding to be made by a relevant person for the proceeding or the chief executive (child protection) or the child guardian.

Section 21E provides for the exclusion of the public in relation to a proceeding in relation to a child who is charged with a sexual offence when the complainant is giving evidence in any committal or trial.

Youth Justice Act 1992

Section 301 prohibits publication of identifying information about a first-time offender (s 301(1). "First-time offender" is defined in schedule 4 (Dictionary).

Section 301(1) does not apply to a publication in a way permitted by a court order or publication under written authority given by the chief executive if satisfied the publication is necessary to ensure a person's safety (s 301(2),(3)).

Section 234 provides that a court may order that identifying information about a child who is a first-time offender may be published if the court considers it would be in the interests of justice to allow publication. The court needs to have regard to the need to protect the community, the safety or wellbeing of a person other than the child or the child's rehabilitation and any other relevant matter (s 234(2)). This order can only be made concerning a child who has been dealt with pursuant to s 176(3)(b).

In relation to a child who is not a first-time offender, the court may, at any time during a proceeding, make an order it considers in the interests of justice prohibiting the publication of identifying information about the child (s 299A). The court may make a publication prohibition order on its own initiative or an application by a relevant party (s 299A(3)). "Relevant party" is defined in that section. The section also sets out the matters the court must consider in such an order.

Penalties and Sentences Act 1992

Under s 13A, an offender who has cooperated with authorities (ie an informer) has his undertaking placed in an unsealed envelope; oral submissions as to an informer's cooperation occur in a closed court. The imposition of the penalty is in an open court but afterwards the reasons for the reduced sentence are stated in closed court. The envelope containing the material relevant to the formation provided is then sealed. The judge/magistrate can prohibit

publication of all or part of the proceeding or the name and address of any witness either on his/her own initiative or on application.[19] In deciding whether or not to make an order the judge/magistrate may have regard to the safety of any person; and the extent to which the detection of offences of a similar nature may be affected; and the need to guarantee the confidentiality of information given by an informer.[20]

A similar procedure exists under s 13B for significant cooperation with the authorities except that the court is not required to be closed when the Judge delivers sentence.

Evidence Act 1977

This act makes special provision for the giving of evidence by children or people with mental, intellectual or physical impairment such as to make them likely to be disadvantaged as witnesses or those likely to suffer severe emotional trauma or those likely to be so intimidated as to be disadvantaged as witnesses. It allows the court in certain circumstances to close the court21 or to hear evidence by videotape.22

Where there is a danger to a witness or undercover, law enforcement agencies can issue a certificate of anonymity.23

Criminal Law (Sexual Offences) Act 1978

Exclusion of public

Complainants in sexual cases are able to give evidence in closed court. A support person may be present.[24]

Publication of complainant's identity prohibited

Publication prematurely of defendant's identity prohibited

Publication of the complainant's identity – name, address, school, employment etc or details of examination of witnesses at committal proceedings which might lead to the identification of a defendant are prohibited unless the court (in the first instance) or justice (in the second instance) for good and sufficient reasons order to the contrary.[25]

Justices Act 1886

Open / Closed Court

There is a general presumption that courts should be open and public but justices can, in the interests of public morality, require some or all persons to be excluded (but not the legal representatives of the defendant).[26] It is open to justices to exclude strangers if it appears that

---

19 s 13A(8).

20 s 13A(9).

21 s 21A(2)(b).

22 s 21A(2)(e).

23 s 21B.

24 s 5.

25 ss 6 and 7.

26 s 70.

the ends of justice require it.[27] The taking of photographs either in the court or a passageway / entrance leading to it are prohibited.[28]

Bail Act 1980

Restrictions on publication

Where the complainant or prosecutor opposes the defendant's release (under Part 2 – Grant and Enlargement of Bail and Other Release), a court can order that the evidence, information, representations of either party or the reasons for the court's refusal of bail shall not be published – in the case where the examination relates to a witness to an indictable offence which examination is held before the defendant's discharge, or where the defendant is tried or committed for trial but before the trial is ended.[29]

Coroners Act 2003

Inquests

An inquest shall be open unless the coroner orders that the court be closed while particular evidence is given.[30] The Coroners Court may exclude a person if the court considers that it is in the interest of justice, the public or a particular person to do so.[31] The coroner can make an order prohibiting publication of evidence.[32]

Adoption Act 2009

Restrictions on publication of identity of parties

The *Adoption Act* 2009 replaced the *Adoption of Children Act* 1964 on 26 August 2009. Pursuant to s 315(2), the publication of identifying material is prohibited without written approval by the chief executive or written consent by the identified person (if an adult), the parent of an identified person who is a child other than a proposed adoptee, the person with custody of an identified person who is a proposed adoptee in the custody of a person under an interim order, or the chief executive in relation to other proposed adoptees. Identifying material is defined as material that identifies, or is likely to lead to the identification of a party, or relative of a party, to an adoption or a court proceeding relating to an adoption, or a person whose consent to an adoption is or was required.[33]

Criminal Code 1899

Power to protect victim of violence by prohibiting publication of information about proceedings

Where a person has been committed for trial or sentence for an indictable offence involving personal violence, or where there is a summary hearing of an indictable offence involving personal violence[34] the Court can prohibit the publication of the victim's address (residential,

---

27 s 71.

28 s 71B.

29 s 12.

30 s 31(1).

31 s 43(1).

32 s 41.

33 s 315(1).

34 s 695A(1)(a) and (b).

school, employment etc). The order can only be made if the information is not relevant to the defendant's guilt or innocence.

Defences in Relation to Sexual Offences Which Relate to a Specific Age[1] or Person with Impairment of the Mind

A. If the offence is alleged to have been committed in respect of a child it is a defence to prove that the accused person believed on reasonable grounds that the Complainant was of, or above, the age specified in the charge.

The burden is upon the accused on the balance of probabilities.

B. It is a defence to prove that:

1. the accused person believed on reasonable grounds that the person was not a person with impairment of the mind; or

2. the doing of the acts which constitute the offence did not in the circumstances constitute sexual exploitation of the person with impairment of the mind.

A mere mistake is not enough. The mistaken belief must have been both honest and reasonable. An honest belief is one which is genuinely held by the defendant. To be reasonable, the belief must be one held by the defendant, in his particular circumstances on reasonable grounds.[2]

---

[1] See also s 229 – knowledge of age immaterial except as otherwise expressly stated. It is immaterial in the case of the offences (defined in Chapter 22) committed with respect to a person under a specified age, that the accused person did not know that the person was under that age, or believed that the person was not under that age.

[2] See direction on mistake of fact – s 24.

Direction where a defence is not raised by counsel but raised on the evidence[1]

I wish to say something to you about a further possible defence that arises for your consideration. It concerns the defence of [provocation etc]. It is my duty to direct with all possible defences which arise and therefore need to be considered by you in reaching your verdict, even where they are not raised by defence counsel. And the fact that I am mentioning this matter does not mean I have some particular view about it.

It is for you to consider this additional matter, as with all matters. (You will not need to consider it, should you find the defendant not guilty on the basis that the prosecution had not excluded [eg self defence] beyond a reasonable doubt).

[1] The judge is obliged to instruct the jury concerning any defence (even one not raised or pressed by a party or indeed disclaimed by the parties) that fairly arises on the evidence and therefore needs to be considered by the jury in reaching their verdict. See *Stevens v The Queen* (2005) 227 CLR 319, *Fingleton v The Queen* (2005) 227 CLR 166; 79 ALJR 1250 at [77] – [80], *Murray v The Queen* (2002) 211 CLR 193 at [78.4], [151], *Stingel v The Queen* (1990) 171 CLR 312 at 333-334.

Distressed Condition

Where evidence is led in support of a complainant's evidence that he or she was raped or sexually assaulted.

> **Evidence has been placed before you of the distressed condition of the complainant** (describe evidence, including time etc)**.**[1] **The prosecutor submits that you can use this evidence in support of the evidence that the complainant was raped/assaulted by the defendant. It is a matter for you as the sole judges of the facts whether you accept the evidence relating to the complainant's distressed condition. If you do, then you have to ask yourself: was the distressed condition genuine or was the complainant pretending? Was he or she putting on the condition of distress? Was there any other explanation for the distressed condition at the time? It is customary for judges to warn juries that you ought to attach little weight to distressed condition because it can be easily pretended. If you find that the distress was genuine then it may be used by you as evidence that supports the complainant's account.**

Where the evidence is led as part of the narrative, but is not led in support of the complainant's evidence of being raped.

> **Evidence has been placed before you of the distressed condition of the complainant** (here describe evidence, including time etc)**. The prosecution have led that evidence as part of the narrative of events which it alleges surrounds the act of rape/assault. It is not led in support of the complainant's evidence that he or she was raped/assaulted and must not be used by you for that purpose. It has no relevance to the defendant's guilt. There may be many innocent reasons for the condition at that time, such as: regret after consensual intercourse or sexual contact, or concern about some other issue entirely unrelated to the alleged sexual activity. The complainant's condition may be feigned or exaggerated, and as a matter of commonsense and human experience you may think of other reasons**[2] **based on the evidence. You should therefore disregard the evidence of distressed condition except to the extent that it is part of the narrative of events of that particular day.**

---

[1] If the circumstances are such that the causal connection or apparent relationship between the distressed condition and the alleged assault is tenuous or remote, the duty of the trial judge is to withdraw it from the jury as a circumstance capable of supporting the complainant: *R v Roissetter* [1984] 1 Qd R 477 per McPherson J at 482. See also *R v Williams* [2010] 1 Qd R 276.

[2] See *R v Rutherford* [2004] QCA 481, where the trial judge was held to have erred by not giving such a direction where evidence of this kind had been led.

Preliminary Complaint

In this case, there is evidence of the complainant's preliminary complaint(s)[1] to [name of recipient of information**] on [**date or event**] that [**describe substance of preliminary complaint/s**].**

That evidence may only be used as it relates to the complainant's credibility. Consistency between the account of [insert name of person to whom preliminary complaint made**] of the complainant's complaint and the complainant's evidence before you is something you may take into account as possibly enhancing the likelihood that her/his testimony is true.**

However, you cannot regard the things said in those out-of-court statements by the complainant as proof of what actually happened. In other words, evidence of what was said on that occasion may, depending on the view you take of it, bolster the complainant's credit because of consistency, but it does not independently prove anything.

Likewise any inconsistencies between the account of [insert name**] of the complainant's complaint and the complainant's evidence may cause you to have doubts about the complainant's credibility or reliability.**

Whether consistencies or inconsistencies impact on the credibility or reliability of the complainant is a matter for you.

[Where there is a conflict between the version of the complainant and that given by a witness it may be necessary to identify factors that are relevant to the assessment of the evidence such as the passage of time between the date of the conversation and when the witness was first asked to recall it. Whether there is a conflict in the accounts may depend on the assessment by the jury of the reliability of the complainant and the preliminary complaint witness.[2]]

---

[1] The definition of preliminary complaint is in s 4A of the *Criminal Law (Sexual Offences) Act* 1978. In *R v Van Der Zyden* [2012] 2 Qd R 568 the Court of Appeal held that a complainant may give evidence of preliminary complaint in the absence of evidence of complaint by the complainee. The Court said (at [68]), "Evidence by the complainant of a preliminary complaint, if unsupported by the evidence of a complainee, may serve to buttress the credit of the complainant if the complainant is believed, even though it suffers from a want of corroboration."

[2] *R v HBR* [2017] QCA 193 at [73].

Inconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable, and the inconsistencies are a matter for you to consider in the course of your deliberations. But the mere existence of inconsistencies does not mean that of necessity you must reject [the complainant's] evidence. Some inconsistency is to be expected, because it is natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time, to tell a slightly different version each time.[3]

Evidence of complaint (from or through the complainant and/or from or through the person or persons who received the complaint), in cases involving offences of a sexual nature is admissible as an exception to the general rule that evidence of previous consistent statements is not admissible.[4]

[3] This direction derives from *R v Ashley* [2005] QCA 293.

[4] Section 4A(2), ibid. The section overturns the previous law as to what judges can say about fresh complaint to a jury, but does not appear to affect the requirement for a "*Longman*" direction where appropriate; and nor does it appear to specifically affect or prohibit comments by counsel about recent or late, or no, complaint; nor to require a judge to give any positive directions, nor prohibit a judge from performing her/his duty to remind the jury of the arguments of each party. The section reads:

> **4A Evidence of complaint generally admissible**
>
> **(1)** This section applies in relation to an examination of witnesses, or a trial, in relation to a sexual offence.
>
> **(2)** Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.
>
> **(3)** Nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.
>
> **(4)** If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint.
>
> **(5)** Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interest of justice.
>
> **(6)** In this section –
>
> "**complaint**" includes a disclosure.
>
> "*Preliminary complaint*" means any complaint other than –
>
> (a) the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence; or
>
> (b) a complaint made after the complaint mentioned in paragraph (a)."

One of the examples of a preliminary complaint in s 4A is where "the complainant visits the local police station and makes a complaint to the police officer at the front desk". In *R v BDI* [2020] QCA 22 at [19]-[35], the Court of Appeal considered the meaning of a "formal witness statement".

Use of Preliminary Complaint Evidence

In *R v LSS,*[5] Thomas JA said:

> "The limited basis upon which such evidence may be received and used has been well established in Australia since *Kilby*…Its effect is confined to showing consistency of statement or conduct, the evidence having itself no probative value or capacity to prove the truth of what is said (or written). The familiar direction given in summings up is that such evidence constitutes a buttress to the credit of the complainant but that it does not independently prove anything [cf Kilby, 472]."

In *R v RH* [2005] 1 Qd R 180 the Court of Appeal noted (at [12]) that "[t]he wording of s 4A(4) is in precise terms and it should not be given any wider operation than those words strictly construed require". The Court agreed a direction should be given that evidence of preliminary complaints is not evidence of the matters complained of; that is, such evidence does not constitute proof of the commission of the offences in question.[6] Davies JA and Jerrard JA agreed that the limited use the jury might make of the evidence of preliminary complaints was

> "only as [they] related to the respective complainant's credibility…[C]onsistency between the accounts repeated by the … witnesses [who heard them] and that given by the relevant complainant child would be something the jury could take into account as possibly enhancing the likelihood that that child's evidence (given in chief by way of the provision of s 93A of the *Evidence Act* 1977 and in person in cross-examination) was true. Likewise directions would be appropriate that inconsistency between the terms of the complaint on one occasion and on another could be considered as possibly reducing the likelihood that the complaints…were accurate and a truthful description of events which really happened."[7]

The evidence of complaint must be "about the alleged commission of the offence" and not in relation to uncharged acts: *R v NM* [2013] 1 Qd R 374; *R v PAS* [2014] QCA 289; *R v KAW* [2020] QCA 57 at [33]-[39].

Section 4A(6) provides that a complaint includes a disclosure. A disclosure may be made by conduct, rather than a verbal statement: *R v Foster* [2014] QCA 226.

In *R v AW* [2005] QCA 152, the Court of Appeal held that a disclosure, for the purpose of s 4A(6), also includes "a revelation or disclosure after questioning, even questioning which might suggest a particular response" (at [26]).

In Cases of Multiple Offences

In cases involving multiple offences of a sexual nature, it may be clear that the evidence of preliminary complaint is admissible only in relation to one or some of the offences. In such circumstances, it is incumbent upon the trial judge to give directions as to how it should be used, e.g. in relation to a particular count or counts.

---

[5] [2000] 1 Qd R 546; [1998] QCA 303 at [15] (citations omitted); see also *Papakosmas v The Queen* (1999) 196 CLR 297; (1999) 73 ALJR 1274 at 1279.

[6] *R v RH* [2005] 1 Qd R 180 at [13].

[7] Ibid [23].

It bolsters the credit of the complainant and can be used only for that purpose in relation to the specific counts.[8]

The lapse of time in making a complaint may require the trial judge to warn the jury about the danger of convicting without some other supporting evidence.[9]

[8] *R v LSS* [2000] 1 Qd R 546; [1998] QCA 303 at [14].

[9] *Jones v The Queen* (1997) 191 CLR 439 at 445 (that is, give a "*Longman* direction"; see the suggested directions at 65.1).

Delay between (Sexual) Incident and Complaint (*Longman*[1] Direction)

Note: The direction which follows is the model direction as it was drafted prior to the commencement of section 132BA of the Evidence Act. The Bench Book committee is working on a model direction reflecting the requirements of section 132BA. In the meantime, trial judges will need to amend the model direction below to take into account section 132BA.

The *Evidence Act* 1977 was amended by the *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act* 2020 by the insertion of s 132BA which provides:

132BA Delay in prosecuting offence

(1) This section applies in relation to a criminal proceeding in which there is a jury.

(2) The judge may, on the judge's own initiative or on the application of a party to the proceeding, give the jury a direction under this section if the judge is satisfied the defendant has suffered a significant forensic disadvantage because of the effects of delay in prosecuting an offence the subject of the proceeding.

(3) For subsection (2), a significant forensic disadvantage is not established by the mere fact of delay in prosecuting the offence.

(4) In giving the direction, the judge—

(a) must inform the jury of—

(i) the nature of the disadvantage; and

(ii) the need to take the disadvantage into account when considering the evidence; but

(b) must not warn or in any way suggest to the jury that—

(i) it would be dangerous or unsafe to convict the defendant; or

(ii) the complainant's evidence should be scrutinised with great care.

(5) However, the judge need not give the direction if there are good reasons for not doing so.

[1] *Longman v The Queen* (1989) 168 CLR 79. As regards uncharged acts, a similar warning may be necessary – see the Uncharged Sexual Acts direction at 70.

(6) The judge must not, other than under this section, give the jury a direction about the disadvantages suffered by the defendant because of the effects of delay in prosecuting the offence.

(7) In this section—

delay, in prosecuting an offence, includes delay in reporting the offence.

The provision applies in cases where the trial starts on or after the commencement: s 154(1). The provision commenced on the day after the date of assent (s 2(1)). The date of assent was 14 September 2020.

Sample Direction (prior to s 132BA Evidence Act)

The complainant's long delay in reporting the incident she says happened on (insert date) **has an important consequence: her evidence cannot be adequately tested or met after the passage of so many years, the defendant having lost by reason of that delay means of testing, and meeting, her allegations that would otherwise have been available.**

By the delay, the defendant has been denied the chance to assemble, soon after the incident is alleged to have occurred, evidence as to what he and other potential witnesses were doing when, according to the complainant, the incident happened. Had the complaint instead been made known to the defendant soon after the alleged event, it would have been possible then to explore the pertinent circumstances in detail, and perhaps to gather, and to look to call at a trial, evidence throwing doubt on the complainant's story [or confirming the defendant's denial] – opportunities lost by the delay.[2]

The fairness of the trial (as the proper way to prove or challenge the accusation) has necessarily been impaired by the long delay.

[2] Elaboration is sometimes required: eg "Where it appears from the course of evidence, including cross-examination, or the conduct of the trial, including submissions, that specific difficulties were encountered by the [defence] in testing the evidence of the prosecution or adducing evidence in defence, then those specific difficulties should be highlighted in the summing-up in such a way as makes it clear that delay, for which the [defendant] had not been responsible, had created those difficulties": *R v Johnston* (1998) 45 NSWLR 362 at 375.

So I warn you that it would be dangerous[3] to convict upon the complainant's testimony alone[4] unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation[5], and paying heed to this warning, you are satisfied beyond reasonable doubt of its truth and accuracy.

The circumstances relevant to your evaluation of the complainant's evidence are:[6] [set out the relevant circumstances].

---

[3] The use of the words "dangerous to convict" is not essential: *R v MCD* [2014] QCA 326 at [24]; *R v Douglas* [2019] QCA 215 at [60]. The words "warn" or "warning" are not essential, but "… the words actually used must convey to the jury a real sense of warning in what they are told": *R v MCD* [2014] QCA 326 at [25]. However, in *R v Douglas* [2019] QCA 215 Philippides JA explained at [65]: "While the Benchbook is not to be approached as a statute prescribing mandatory conditions, very careful consideration should be given before departing from the guideline directions so as to minimise appellable error and any departure or modification should be discussed with counsel, as occurred in this case, to ensure avoidance of a miscarriage of justice." (Fraser JA at [2]; McMurdo JA at [71]).

[4] If there is such corroboration, the jury may be informed that there is evidence which, if the jury accepts it, might support or confirm the complainant's account, describing that evidence.

[5] Such circumstances may often need to be stated to the jury: eg, the age of the complainant; that the likelihood of error in recollection can be expected to increase with time. Factors tending to suggest distorted recollection or which otherwise detract from the reliability of a complainant's account should be the subject of a further warning, not just comment, about the dangers of reliance on the testimony: *R v C* [2002] QCA 166, [20]-[27]; *Crampton v The Queen* (2000) 206 CLR 161 at [42], [45]; *Doggett* (2009) 208 CLR 343 at [46]-[55]; *Robinson v The Queen* (1999) 197 CLR 162 at [25]-[26].

Care must be taken not to transgress s 632(3) of the *Criminal Code*. The essential concern in framing a Longman direction is the forensic disadvantage in adequately testing allegations or marshalling evidence to meet them because of delay. Neither *Longman* or *Robinson* is authority for the proposition that it is imperative to give a warning that it is dangerous to convict because the prosecution case depends on the testimony of a child complainant whose evidence is uncorroborated: *R v MBX* [2014] 1 Qd R 438 at 471; *R v WBC* [2015] QCA 156 at [50]-[55].

The need to warn about the forensic disadvantage encountered by reason of delay in testing an honest but erroneous recollection is based upon the long period of time which may elapse between an event that occurred during childhood and its recollection. It may be appropriate in the circumstances of a case to remark about the fallibility of recollection, particularly of events which occurred in childhood due to their remoteness in time. It also may be appropriate for a judge to observe that the perceptions a small child might have of an event may be very different to the perceptions an adult would have of the same event. Particular circumstances, such as evidence of sexual fantasies, demonstration that the complainant has made false complaints against the accused and the possibility of distorted perceptions when the child complainant is half asleep, may give rise to a risk of the kind which *Longman* and *Robinson* identify as requiring a warning to the jury of the need to scrutinise the evidence of a complainant with care before arriving at a conclusion of guilt, or that it would be dangerous to convict in such circumstances: *R v MBX* [2014] 1 Qd R 438 at [107]-[109]. As to repressed memory issues, see *Christophers v The Queen* (2000) 23 WAR 106 at 117 ff.

[6] Any circumstances relevant to the evaluation of the complainant's evidence which may not be apparent to the jury must be identified: *R v HBO* [2017] QCA 18 at [36]. In *R v Hyde* [2020] QCA 196 McMurdo JA said at [69]: "Where a *Robinson* direction is required, it need not repeat every point made by defence counsel about a weakness in the prosecution case. What must be identified for the jury's benefit are the factors that make the case in question one which requires that particular scrutiny in the assessment of the complainant's account."

Evidence of Other Sexual or Discreditable Conduct of the Defendant

This section deals with the following categories of evidence:

(a) Evidence which is adduced to prove a sexual interest of the defendant in the complainant.

(b) Evidence of the relationship between the defendant and the complainant which is adduced for another purpose.

(c) Evidence of a history of a domestic relationship, which is admitted under s 132B of the *Evidence Act* 1977 (Qld).

The directions to the jury will differ according to the category of the evidence. In sexual offence cases, the purpose of the tender will often be obvious, such as where it is evidence of other sexual acts by the defendant involving the same complainant. When the purpose is less obvious, it should be discussed with counsel before it is tendered, because if it is in the first category, its admissibility will depend upon the test in *Pfennig v The Queen* (1995) 182 CLR 461 ("*Pfennig"*) at 483, as was confirmed in *R v Bauer* (2018) 92 ALJR 846, at 861-862, [52]. It is possible that the evidence may be relevant for more than one reason, which again should be revealed by a discussion with the prosecutor.[1]

Where a *Longman* direction[2] is appropriate for the charged acts, it would usually be appropriate for other conduct which is relied upon to prove a sexual interest in the complainant. In such cases, the generalised nature of the evidence about other conduct, as well as the delay, will be relevant in warning the jury. The warning about this other conduct of the defendant can be added to the *Longman* direction at No 69.

Evidence to prove a sexual interest of the defendant in the complainant.

Evidence of other sexual conduct of a defendant towards the complainant is sometimes referred to as evidence of uncharged acts. However it is best to avoid the term "uncharged acts" in the summing up, because the term might invite speculation about why no charges were laid.[3]

In single complainant cases, the rationale for the admission of evidence of other sexual conduct by the defendant towards the complainant is that, at least when taken in combination with other evidence, it may establish the existence of a sexual attraction to the complainant and a willingness to act on it, which assists to eliminate doubts that might otherwise attend the complainant's evidence of the charged acts.[4]

To be admissible in single complainant cases (when the conduct involves only that complainant), it is unnecessary that the uncharged acts have about them some special,

[1] *HML v The Queen* (2008) 235 CLR 334 at 387 [123] ("*HML"*).

[2] *Longman v The Queen* (1989) 168 CLR 79 (*"Longman"*).

[3] *HML* (2008) 235 CLR 334 at 389 [129].

[4] *Bauer v The Queen* (2018) 92 ALJR 846 at 860-861 [49] (*"Bauer"*); *HML* (2008) 235 CLR 334 at 352-353 [6]-[7], 354 [11], 358-359 [25]-[27], 382-384 [103], [109]-[110], 425-426 [277]-[278], 478-480 [425]-[433], 494-495 [492]-[493], 500-502 [506], [510], [512].

particular or unusual feature.[5] A sexual interest in the complainant may be proved also by evidence of other conduct of the defendant which is not itself a sexual act.[6]

On one view, it would seem preferable that the jury be instructed not to act upon evidence of a sexual interest unless they are satisfied of that fact beyond reasonable doubt.[7] On the other hand, in *Bauer*, after referring to the practice in New South Wales which should no longer be followed, the High Court said:

> "Such a direction should not be necessary or desirable unless it is apprehended that, in the particular circumstances of the case, there is a significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt."[8]

Moreover, the Court also said that "[o]rdinarily, proof of the accused's tendency to act in a particular way will not be an indispensable intermediate step in reasoning to guilt."[9]

Where the defendant is charged with an offence under s 229B of the *Criminal Code* (maintaining an unlawful sexual relationship), the evidence of a sexual act may be directly relevant in the proof of that charge and it may also be relevant to prove a sexual interest upon which the defendant was prepared to act.[10]

In cases in this category, the appropriate directions to the jury will be as follows, as moulded to the particular issues of the case. Detailed guidance for directions of this kind is contained in the judgment of Hayne J in *HML* at [123]-[133].

> **The defendant is charged with the [number] offences set out in the indictment.**
>
> **The prosecution has led evidence of the conduct with which the defendant is charged. In addition, the prosecution has led evidence of other incidents in which the complainant says that there was sexual conduct by the defendant towards him/her.**
>
> **[Describe the evidence upon which the prosecution relies in this respect.]**

---

[5] Of the kinds described in *IMM v The Queen* (2016) 257 CLR 300 and *Hughes v The Queen* (2017) 92 ALJR 52, as the Court held in *R v Bauer* (2018) 92 ALJR 846 at 860 [49].

[6] See for example, *HML* (2008) 235 CLR 334 at [172]-[174] and *R v Douglas* [2018] QCA 69. Evidence of statements by the defendant in a pretext telephone call may be such as to evidence a sexual interest in the complainant, because of apparent admissions by the defendant in the conversation about other sexual conduct towards the complainant: see for example *R v IE* [2013] QCA 291 and *R v BCQ* (2013) 240 A Crim R 153; [2013] QCA 388.

[7] That being the majority view in *HML* (see, particularly, at [247]); cf *Bauer* at 869 [86], which referred to the position in New South Wales where "tendency" evidence of this kind is admissible on a less demanding test than common law test according to *Pfennig*. In *HML*, Hayne J (Gummow and Kirby JJ agreeing) held that the standard of beyond reasonable doubt had to be applied in order to "reflect… the legal basis for … admission [of the evidence]": at [132].

[8] *R v Bauer* (2018) 92 ALJR 846 at [86].

[9] Ibid [80].

[10] *R v UC* [2008] QCA 194 at [3].

The prosecution relies on this other evidence to prove that the defendant had a sexual interest in the complainant and was prepared to act upon it. The prosecution argues that this evidence makes it more likely that the defendant committed the offence [or offences] with which he/she is charged.

You can only use this other evidence if you are satisfied beyond reasonable doubt that the defendant did act as that evidence suggests, and that the conduct demonstrates that he/she had a sexual interest in the complainant which he/she was willing to pursue.

If you are not satisfied of those things, beyond reasonable doubt, then that may affect your assessment of the complainant's evidence about the acts which are the subject of the offences with which the defendant is charged. [As I have already explained or as I will explain later.][11]

If you do not accept that this evidence proves, to your satisfaction, that the defendant had a sexual interest in the complainant, you must not use the evidence in some other way to find that the defendant is guilty of the offences with which he/she is charged.

And if you are satisfied that one or more these other acts did occur [or there was this other conduct] and that this conduct does demonstrate a sexual interest of the defendant in the complainant, it does not follow that the defendant is guilty of the offence/offences which are charged. You cannot infer only from the fact that this other conduct occurred that the defendant did the things with which he/she is charged. You must still decide whether, having regard to the whole of the evidence, the offence(s) charged has/have been proved to your satisfaction beyond reasonable doubt.

Relationship evidence not admitted to prove a sexual interest

In *HML*, Kiefel J explained that "relationship evidence" is admissible for two purposes. One is to show the sexual interest of the defendant in the complainant, making it more likely that the defendant committed the offences (category one above). The other purpose is the more limited one of "providing answers to questions which might naturally arise in the minds of the jury, such as questions about the complainant's reaction, or lack of it, to the offences charged, or questions about whether the offences charged were isolated events."[12] Kiefel J cautioned that where the evidence is admitted for this purpose, a jury must be directed as to the limits on the

[11] See Direction 34 for a *Markuleski* direction.

[12] *HML* (2008) 235 CLR 334, at 502 [513].

use to which the evidence can be put, and where it is not considered that a direction could overcome the potential for misuse of the evidence, it should not be admitted on this basis.[13]

Where evidence is admitted *only* for this purpose, then a direction could be given as follows:

> **You have heard evidence of other conduct which has taken place between the defendant and the complainant, which the prosecution says is necessary to explain what occurred in the incidents which are the subject of the alleged offences. You must understand that the relevance of this evidence is limited. If you accept this evidence, it does not make it more probable that the defendant committed the alleged offence(s). This evidence is relevant only to answer questions which you might naturally have about the background to the incidents which the prosecution allege were the charged offences.**

If the evidence of other acts is tendered for *both* purposes, the more stringent test for admissibility (*Pfennig*) must necessarily be applied.[14] In such a case, a direction along the lines of that in category one would be given, together with a statement such as this:

> **The prosecution says that if you are satisfied that these other acts occurred, they would also assist in your understanding of the background to the incidents which are the subject of the alleged offences. It is for you to decide whether the evidence assists you in that way. But you cannot use the evidence at all unless you are satisfied, beyond reasonable doubt, that the other act(s) occurred. Again, you cannot infer only from the fact that the other act(s) occurred that the defendant did the things with which he/she is charged.**

If there is evidence of violence by the defendant, this may explain the relationship between the defendant and the complainant, and why he or she was deterred from complaining. It may also explain a non-consensual submission to sexual offending, because of fear.[15] In cases of that kind, the purpose of the evidence should be explained to the jury, and they should be told that if this violence did occur, they should not conclude from it that the defendant was a person who was likely to have committed the offences charged. A different direction is required in cases within the third category, where the evidence is admitted under s 132B of the *Evidence Act* 1977 (Qld).

Evidence of a domestic relationship, admitted under s 132B of the Evidence Act

In a criminal proceeding against a person for an offence defined in chapters 28 to 30 of the *Criminal Code*, s 132B of the *Evidence Act* provides that relevant evidence of the history of the domestic relationship between the defendant and the complainant is admissible evidence. A "domestic relationship" means a relevant relationship under the *Domestic and Family Violence Protection Act* 2012 (Qld), s 13. In cases of this kind, the *Pfennig* test of admissibility

[13] Ibid at 502 [512], [513]. See also s 130 of the *Evidence Act* 1977 (Qld).

[14] Ibid at 499 [503].

[15] *R v R* (2003) 139 A Crim R 371; [2003] QCA 285 at [31], [43]-[44] and [59].

does not apply.[16] Importantly however, s 132B refers to *relevant* evidence, and the prosecution must explain the relevance of the evidence to the particular case. It may be relevant although its purpose is to demonstrate that the defendant had a propensity to commit the act of violence against the complainant which is the subject of the charge.[17] Except where the evidence constituted an indispensable link in the chain of proof, the conduct, which is the subject of the history of the domestic relationship, need not be proved beyond reasonable doubt.[18]

Again, subject to the facts of a particular case, a direction might be given as follows:

> **The defendant is charged with [one count of (eg) assault occasioning bodily harm]. The prosecution has led evidence of the history of the relationship between the defendant and the complainant, in which it is said that the defendant did these things [detail]. The prosecution relies upon this evidence to show that the defendant had a propensity or tendency to commit acts of violence against the complainant in circumstances where [detail]. It is for you to decide whether you are satisfied that this other conduct occurred and, if so, what you make of it. You must not decide that the defendant is guilty from only this evidence. If you are not satisfied that it shows a propensity or tendency to commit an offence of the type which is alleged in this case, you must not use it to assess whether the defendant is guilty of the offence charged. You may think that if the defendant did these other things it reflects poorly upon his character; but that does not matter if you do not think that it demonstrates a propensity to commit this type of offence.**

[16] *R v Roach* (2009) 213 A Crim R 485 at 490 ("*Roach"*); [2009] QCA 360 at [14].

[17] *Roach* at 492-493 [19]-[23].

[18] *Roach* at 495 [30] applying *Shepherd v The Queen* (1990) 170 CLR 573.

Attempts

Section 4 of the *Criminal Code* is as follows:

> *Attempts to commit offences*
>
> *(1) When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.*
>
> *(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on the offender's part for completing the commission of the offence, or whether the complete fulfilment of the offender's intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of the offender's intention.*
>
> *(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.*
>
> *(4) The same facts may constitute one offence and an attempt to commit another offence.*

That definition in s 4 applies to s 535 of the *Criminal Code* which, by sub-section (1), provides as follows:

> *Attempts to commit indictable offences*
>
> *(1) If a person attempts to commit a crime, the person commits a crime.*
>
> *(2) If a person attempts to commit a misdemeanour, the person commits a misdemeanour.*

The definition in s 4 also applies to other provisions of the *Criminal Code*, which provide for an offence constituted by an attempt to do something which is itself another offence. An example is s 306, by which a person who attempts unlawfully to kill another is guilty of a crime, it being an offence to kill another unlawfully: *R v O'Neill* [1996] 2 Qd R 326 at 432 per Dowsett J (Pincus JA agreeing at 422).

The position is different, where there is a provision of the *Criminal Code*, under which it is an offence to attempt to bring about a physical result, which is not itself another offence. An example is s 317 of the *Criminal Code*, considered in *R v Leavitt* [1985] 1 Qd R 343. The distinction between cases of that kind, and cases of, for example, attempted murder, was described in *R v Chong* [2012] QCA 265 at [22] per Holmes JA.

There must be an actual intent to commit an offence; knowledge or foresight of a result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the *Criminal Code*: *Zaburoni v The Queen* (2016) 256 CLR 482 at 490; [2016] HCA 12 at [14]. Where the accused knows that a particular result of his or her conduct is certain, an inference that the accused intended that result may be compelling; but that is a matter for the jury which should not be directed in those terms, but instead told that they must be satisfied that the accused intended to produce the particular result: *Zaburoni* at 490 [15]. Intention and motive are different things in this context: *Zaburoni* at 490 [16].

An intent to cause death is an essential element of the charge of attempted murder: *Cutter v R* (1997) 71 ALJR 638; (1997) 94 A Crim R 152.

The defendant must begin to put that intention into execution by means adapted to its fulfilment, and the intention must be manifested by some overt act. There is a well-established distinction between mere preparation to commit an offence and an attempt to commit it: *R v De Silva* (2007) 176 A Crim R 238 at 247; [2007] QCA 301 at [27], where it was also said that it is not necessary to establish that the last act possible was done before the defendant could be said to have attempted to commit the offence.

In *R v Williams* [1965] Qd R 86, Stable J (at 100), with the agreement of Wantstall J (at 95), said that there is an attempt if there is a step towards the commission of specific crime, and that step could not reasonably be regarded as having any other purpose than the commission of that crime. That was applied in *R v Savins* [1996] QCA 513 at [4] and in *De Silva* at [29]-[30] per Holmes JA.

In cases where the particular facts raise the issue, the jury should be directed about the effect of s 4(2) or s 4(3).

A suggested direction is as follows:

> **The defendant is charged with attempting to** [describe the relevant result, such as unlawfully kill V]**. Under our law, if a person attempts to** [e.g. unlawfully kill another person]**, he/she or she commits an offence. I will now explain to you what the law means by an "attempt" in this context.**
>
> **For someone to be attempting to commit a particular offence, that person must intend to commit that offence.** [So in this case, for the defendant to have attempted to unlawfully kill V, the defendant must have been acting with the purpose of unlawfully killing that person.] **Someone who is attempting to bring about a certain result must be meaning to do so at the time of engaging in the conduct which the prosecution says was an attempt to commit the offence. This intention on the part of the defendant must be proved by the prosecution, beyond reasonable doubt.**
>
> **You then have to consider what the defendant did, when, it is alleged, he/she was attempting to** [kill V]**. A mere intention to commit an offence does not matter, if the defendant had not started to put his/her intention into effect, by conduct, i.e. some acts or acts by him/her which were directed to achieving the defendant's purpose. Further, the defendant's conduct must have been something which, if anyone had been watching it, would have made the defendant's purpose clear. The prosecution must prove, beyond reasonable doubt, that there was something done by the defendant which was conduct of the kind which I have just described.**
>
> **Therefore you have to consider the evidence of what the defendant was doing when, the prosecution argues, he/she was attempting to** [kill V]**. You must be**

satisfied, beyond reasonable doubt, that he/she was doing what the prosecution alleges he/she was doing. You then have to consider whether, by that conduct, the defendant had begun to put his/her intention into effect, and whether the conduct would make it clear to someone watching it that the defendant had the purpose which the prosecution alleges.

It is unnecessary for the prosecution to prove that the defendant did everything which he could have done to bring about the intended result.

[Describe the competing arguments, by reference to those elements of an "attempt".]

[Where appropriate, this might be added: **The argument for the defendant is that what was done/alleged to have been done was, at the most, merely preparation ahead of any attempt to** [state the result], **so that when the defendant was doing those things, he/she was not then in the process of trying to** [state the result]**. Our law recognises that merely doing something to prepare for the commission of an offence, is not of itself an attempt to commit the offence. It is for you to assess whether you are satisfied, beyond reasonable doubt, that the defendant's acts went beyond mere preparation.**]

Conspiracy (other than under the *Criminal Code* (Cth))

The prosecution must prove that on [or between] the date [or dates] alleged in the indictment the defendant entered into an agreement with (person or persons named or referred to in the indictment**) to (**set out the unlawful purpose pleaded in the indictment**).**[1]

A criminal conspiracy is an agreement between two or more persons to do an unlawful act. In this case it is alleged that there was a common unlawful agreement to (state common unlawful purpose alleged**).**

The essence of the offence of conspiracy is the unlawful agreement.[2] **The prosecution must prove that the defendant intended, when he entered into an agreement to play some part in the agreed course of conduct involving**[3] **(here set out alleged unlawful purpose), even if he intended to participate in only part of the conduct. [It does not matter that the defendant, at some later time withdrew voluntarily from further participation in the agreement].**

It is not necessary for the prosecution to prove performance of the agreement and it is irrelevant that performance of the (alleged unlawful purpose**) is impossible. The agreement need not be in writing. It is not necessary for people to formally agree for there to be an agreement.**

Parties can join or leave a conspiracy at different times according to their role and level of involvement. It is not necessary that each participant know all of the details of how the scheme was to be implemented. It is not necessary that all parties be in direct communication with each other. They may not even know each other.

You will need to examine the evidence and ask yourselves whether it is proved beyond reasonable doubt that that defendant entered into an agreement to (state alleged unlawful purpose**) and intended, when he entered into the agreement, to play**

---

1 The unlawful purpose may be to defraud the public or named persons. In prosecutions for conspiracy to defraud under the *Crimes Act* 1914 (Cth), special regard must be had to *Peters v The Queen* (1998) 192 CLR 493 as to the element of conspiracy.

2 *Ahern v The Queen* (1988) 165 CLR 87 at 93; *R v Thomson* (1965)50 Cr App R 1. A conspiracy to commit an offence is an inchoate offence in the sense that it is complete without the doing of any act save the act of agreeing to commit the offence: *R v Rogerson* (1992) 174 CLR 268 at 279. Evidence of acts following the agreement may be the only available proof that the agreement was made, but it is the agreement and not the evidence of the acts that constitutes the offence: *R v Gudgeon* (1995) 133 ALR 379 at 389.

3 *R v Anderson* [1985] 2 All ER 961; *R v Thomson* (1965) 50 Cr App R 11.

some part in the agreed course of conduct involving the (alleged unlawful purpose**).**

The prosecution seeks to prove these matters by means of circumstantial evidence; that is, by means of inferences to be drawn from other facts. It seeks, by such inferences, to prove the conspiracy to (state alleged unlawful purpose**) and the defendant(s) participation in it. Bear in mind the direction I gave you concerning the use of circumstantial evidence. Importantly, the circumstantial evidence relied upon to prove the elements of the offence of conspiracy must be such that any reasonable hypothesis consistent with innocence must excluded. It is for the prosecution to disprove, beyond reasonable doubt, all hypothesis, raised by the whole of the evidence consistent with innocence.[4] So bear in mind that the overt acts alleged against the (each) defendant when taken with any relevant surrounding circumstances must be incapable of rational explanation, except as manifestations of the conspiracy alleged by the prosecution.[5]**

Look at all the evidence and decide whether you are satisfied that the (each) defendant has joined in an agreement to carry out the (alleged unlawful purpose**). The prosecution relies on the following evidence to prove the agreement (**set out summary of the evidence**).**

4 See *Ahern v The Queen* (1988) 165 CLR 87 at 93.

5 See *R v Moore* [1988] 1 Qd R 252 at 258.

Evidence in Conspiracy Cases
(Acts and Declarations of Co-Conspirators out of the Presence of the Defendant)[1]

Where the trial judge has concluded that there is independent evidence admissible against the defendant to show he was a participant in the conspiracy[2]

You have heard evidence of acts done and things said by (A & B) out of the presence and hearing of the defendant. The prosecution says that (A & B) in combination with the defendant were parties to the conspiracy alleged against each defendant and that the acts and declarations of (A & B) were in furtherance of the agreed common purpose and go to establish the conspiracy alleged and the defendant's participation in it.

Ordinarily such evidence, of acts done or things said by another or others out of the presence and hearing of the defendant, would not be admissible against the defendant, because it relates to acts done and things said when he was not present. However, in the case against each defendant, evidence of acts done and things said by (A & B) out of the presence and hearing of a particular defendant, in furtherance of the common purpose, can be considered by you as proof of the defendant's guilt, in cases in which it is alleged that a number of persons (in this case the prosecution alleges (A & B) and the defendant) have entered into an agreement to do something unlawful.

If you are satisfied the acts or things alleged were done or said and were done or said in furtherance of the agreed common unlawful purpose you may use this evidence in deciding whether the prosecution has proven beyond reasonable

---

1 Initially such evidence may only be used as proof of the alleged agreement: *Ahern v The Queen* (1988) 165 CLR 87; *Tripodi v The Queen* (1961) 104 CLR 1. Once there is reasonable evidence from which an agreement can be inferred, the acts and declarations of the participants in furtherance of the agreement may be used to prove not only the existence of the conspiracy, but also the defendant's participation in it. "Reasonable evidence" implies an element of judicial discretion to limit the use which might be made of the co-conspirator's acts and declarations when its admission might operate unfairly against an accused: *Gouroff* (1979) 1 A Crim R 367 at 371-372; *R v Masters* (1992) 26 NSWLR 450; *Ahern* at 100. The trial judge alone and not the jury must determine the sufficiency of the independent evidence of the participation of the defendant in the agreement before evidence can be led of acts and declarations of the other participants in further proof of the participation of the defendant: *R v Moore* [1988] 1 Qd R 252.

2 In *Ahern* at 103, the High Court made it clear that it is for the trial judge to decide whether there was independent evidence of the participation of the defendant in the illegal combination sufficient to let in against him evidence of the acts and declarations of the other participants in further proof of that participation. That question should not be left to the jury.

doubt that the conspiracy or combination alleged existed and that the defendant participated in it. Before you may find the defendant's guilt proven you must be satisfied of the existence of the conspiracy or combination and that the defendant was a participant in it.

In your consideration of this sort of evidence (of the acts and declarations of (A & B)) as evidence of the existence of the alleged conspiracy and the defendant's participation in it you should give consideration to (any shortcomings in the evidence including *if it be the fact* that there has been no opportunity to cross-examine (A) and/or (B) and the absence of corroborative evidence). So you should scrutinise this sort of evidence with care and you should not conclude that a defendant is guilty merely on the say so of another alleged co-conspirator.[3]

In some cases the following additional direction may be required:

There is a qualification to what I have said about the use of the evidence of acts and statements of alleged co-conspirators. Evidence as to the acts and statements of existing members of a conspiracy, made before a particular defendant was recruited, but from which an inference is available that the conspiracy existed, may be used against that defendant not yet recruited, in order to establish the fact of the conspiracy.[4]

[3] *Ahern* at 104.

[4] See *Masters*.

Parties to An Offence: ss 7, 8

Section 7

(Read the section or relevant parts to the jury).

General:

This section extends criminal responsibility to any person who is a party to an offence. The section makes each of the following persons guilty of an offence.

The person or persons who actually do the act or one or more of the acts in the series which constitute the offence.[1]

- **Each person who does an act for the purpose of aiding another to commit the offence.**
- **Each person who aids another to commit the offence.**
- **Each person who counsels or procures another to do it.**

So it is not only the person who actually does a criminal act who may be found guilty of it. Anyone who aids – that is, assists or helps or encourages – that person to do it may also be guilty of the (same or a less serious) offence.[2]

Aiding (general):

That is the basis on which the defendant is charged with [offence] in the case before you. The prosecution argues that, although it was not the defendant who actually committed the [offence], the defendant is also guilty of [that offence] because he aided (the alleged principal offender) to commit it.

Proof of aiding involves proof of acts and omissions intentionally directed towards the commission of the principal offence by the perpetrator, and proof that the defendant was aware of at least the essential matters constituting the crime in contemplation.[3] **To aid means to assist or help.**[4]

The prosecution do not need to prove that the person who actually committed the offence has also been convicted.[5] **It is enough if the prosecution proves, not**

---

1 *R v Wyles*; *ex parte A-G* [1977] Qd R 169, approved in *R v Webb; ex parte A-G* [1990] 2 Qd R 275.

2 See *Barlow v The Queen* (1997) 188 CLR 1 (now apparently confirmed by s 10A of the Code).

3 *R v Tabe* (2003) 139 A Crim R 417 at [12].

4 *R v Sherrington* (2003) 139 A Crim R 417, [2001] QCA 105.

5 *R v Lopuszynski* (1971) 26 LGRA 237.

necessarily the identity of the perpetrator, but that there was a principal offender or perpetrator, and proof of the commission of an offence by that someone, and that the defendant aided that person to commit it. The prosecution must prove that that other perpetrator was guilty of committing the offence by evidence which is admissible against the defendant.[6]

The prosecution must prove that the defendant knew that the type of offence which was in fact committed was intended; but not necessarily that that particular offence would be committed on that particular day at that particular place.[7] **It is not enough if the prosecution prove the defendant knew only of the possibility that the offence might be committed.**

S 7(1)(b) and (c) direction (shorter version)

You may find the defendant guilty of the (offence) only if you are satisfied beyond reasonable doubt of four things. The first is that (an identified or unidentified perpetrator) committed the offence; that is, that (the perpetrator) [outline elements of offence]. The second is that the defendant either in some way assisted (the perpetrator) to [commit offence] or did an act with the purpose of assisting or enabling him to [commit offence] even if that act did not in fact assist.[8] **The third is that he assisted or did the act with the intention of helping (the perpetrator) to [commit the offence].**[9] **The fourth is that, when he assisted (the perpetrator) or did the act with that purpose, the defendant *knew*[10] that (the perpetrator) intended to [**identify acts of which offence is comprised**].**

As to the first two, there is evidence [outline elements of offence as to which there is evidence of assistance].

However, the defendant can be found guilty of the [offence] only if you are satisfied beyond reasonable doubt that, when he [identify respects in which the defendant is said to have given assistance] did so intending to help (the perpetrator), knowing (the perpetrator) was going to [identify acts, and intent if relevant, constituting offence]. If you are not satisfied that the defendant knew that (the

---

6 *R v Buckett* (1995) 132 ALR 669 at 676.

7 *R v Ancuta* [1991] 2 Qd R 413.

8 Generally, mere presence during the commission of a crime by another is not of itself sufficient to involve criminal responsibility as an aid under s 7; but is nevertheless capable of affording some evidence to that effect; *Jefferies v Sturcke* [1992] 2 Qd R 392 at 395.

9 *R v Roberts & Pearce* [2012] QCA 82 at [170]-[171].

10 See *Lowrie* [2000] 2 Qd R 529.

perpetrator) meant to do those things, or if you have a reasonable doubt about it, then you must find him not guilty of [the offence charged].[11]

S 7(1)(b) direction (expanded version)

The prosecution must prove to your satisfaction beyond reasonable doubt each of the following things:

1. **that (the identified perpetrator or an unidentified perpetrator) committed the offence.**
2. **that the defendant did acts or made omissions for the purpose of enabling or aiding that person to commit the offence, even if those acts or omissions did not in fact assist.**
3. **that the defendant did so with the intention to aid (the alleged perpetrator or unidentified perpetrator) to commit the offence.**
4. **that the defendant had actual knowledge or expectation of the essential facts of that offence, that is, all the essential matters which make the acts done a crime,**[12] **(including [where relevant] the state of mind of the (alleged perpetrator or unidentified perpetrator)**[13] **when that person committed the offence.**

S 7(1)(c) direction (expanded version)

The crown must prove to your satisfaction beyond reasonable doubt that:

1. **(the identified or alleged perpetrator, or an unidentified perpetrator) [committed the offence].**
2. **the defendant assisted (the perpetrator) to [commit offence]**
3. **that when the defendant assisted (the perpetrator), he did so intending to help him to [commit the offence]**[14]

---

[11] *Jefferies* CA 154 of (1997); *Lowrie* [2000] 2 Qd R 529.

[12] *R v Giorgianni* (1984-5) 156 CLR 473 at 482.

[13] *R v Stokes and Difford* (1990) 51 A Crim R 25; *R v Pascoe* [1997] QCA 452.

[14] *R v Roberts & Pearce* [2012] QCA 82 at [170]-[171].

4. **that the defendant had actual knowledge or expectation of the essential facts of the principal offence, (including, [where relevant] the state of mind of the principal offender).** [15]

Counselling s 7(1)(d)

For the prosecution to prove beyond reasonable doubt that the defendant is guilty because he counselled[16] (the perpetrator) to commit the offence of (identify offence), the prosecution must prove beyond reasonable doubt:

1. **(the perpetrator) committed the offence of …… (acts which constitute the offence, with intent if relevant).**
2. **that the defendant counselled, in the sense of urging or advising (the perpetrator) to commit that offence.**
3. **that (the perpetrator) committed that offence after being urged or advised by the defendant to commit (that offence or an offence of – describe offence).**
4. **that (the perpetrator) committed the offence when carrying out that counsel.**

[Section 7(1)(d) direction combined with s 9]

5. **that the facts constituting the offence actually committed (by the perpetrator) were a probable consequence of carrying out the counsel given by the defendant. A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, the facts constituting the offence actually committed (by the perpetrator) must be shown to be "a probable consequence" of carrying out the counselling, in the sense that they could well have happened as a result of carrying out the counselling.** [17]

In considering whether the defendant urged or advised the perpetrator to commit (the offence) you must consider with care what it was that the defendant urged or advised (the perpetrator) to do, if anything.

---

[15] *R v Beck* [1990] 1 Qd R 30 at 38 and *R v Tabe* (2003) 139 A Crim R 417,[2003] QCA 356 at [36], judgment of Mackenzie J.

[16] In *R v Georgiou* (2002) 131 A Crim R 150; [2002] QCA 206 the Court of Appeal suggested that explanation for the meaning of "counselled" was not essential; while noting that Gibbs J used the terms "urged" or "advised" in *Stuart v The Queen* (1976) 134 CLR 426 at 445. "Counsel" involves intentional participation: see *R v Hawke* [2016] QCA 144 at [37] – [39], [58].

[17] See *Darkan v The Queen* (2006) 227 CLR 373; (2006) 80 ALJR 1250 at [72]-[81], [130] - [132].

S 7(1)(d) counselling with s 9 – example

In the present case, the defendant did not tell (the perpetrator) to kill (the victim) or to injure him seriously; but the question for you is whether the killing of (the deceased) by (the perpetrator) with an intention to kill or do grievous bodily harm to him was a probable consequence of his carrying out the defendant's plan to assault (the deceased) with a baseball bat. In law each of them has taken to have murdered (the deceased) if (but only if) murdering (the deceased) was a probable consequence of (the perpetrators) carrying out the defendant advising or urging to give (the deceased) a beating.

A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, the facts constituting the offence actually committed must be shown to be "a probable consequence" of carrying out the counselling, in the sense that they could well have happened as a result of carrying out the counselling.

If you are left in doubt whether murder was a kind of offence that was a probable consequence of (the perpetrators) carrying out the defendant's advice, then you may find the defendant guilty of the lesser offence of manslaughter. For that you need to be satisfied beyond reasonable doubt that (the perpetrator's) killing of (the deceased), without any intention to cause death or grievous bodily harm, was the probable consequence of carrying out the advice to give (the deceased) a beating. If you are left with a reasonable doubt about that, then you must return verdicts of not guilty of murder and not guilty of manslaughter.

S 7(1)(d): procure

To procure means to bring about, cause to be done, prevail on or persuade, try to induce. To procure means to procure by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.[18]

Procuring involves more than mere encouragement, and means successful persuasion[19] **to do something. You may find the defendant guilty of the [offence**

[18] *R v F*; *Ex Parte A-G* [2004] 1 Qd R 162.

[19] *R v Adams* [1998] QCA 64 at [6]. See also *R v Oberbillig* [1989] 1 Qd R 342 at 345; *R v F; ex parte Attorney-General (Qld)* [2004] 1 Qd R 162 at [58], *R v Hawke* [2016] QCA 144.

charged] on the basis of procuring only if you are satisfied beyond reasonable doubt of these things:

- **That [the perpetrator, identified or unidentified] committed the offence;**
- **That the defendant procured (that perpetrator) to commit that offence by successfully persuading (the perpetrator) to do it and thereby bringing about the commission of the offence;**
- **The defendant knew that (the perpetrator) intended to (commit the acts constituting the offence).**

Presence at scene - aiding by encouraging

A defendant may assist or aid another by giving actual physical assistance in the commission of an offence, but it is not necessary for the crown to show actual physical assistance. Wilful encouragement can be enough, certainly if the defendant intended that (the perpetrator) should have an expectation of aid from the defendant in the commission of (the offence).

Where the prosecution alleges aiding by encouragement, such as from the presence of the person charged at the commission of the offence, the prosecution must prove both that the person charged as an aider did actually encourage the perpetrator in the commission of the offence, such as by presence at the scene; and also that the person charged intended to encourage the commission of that offence (by his or her presence).[20] **Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding.**[21]

Assault by a number of persons resulting in the victim's death

For the prosecution to establish criminal responsibility for murder under either s 7(1)1(b) or (c) it is necessary for it to prove that the defendant committed his act to enable or aid one or more of the others to kill or do grievous bodily harm to the victim, knowing that that other or others intended to kill or inflict grievous bodily harm upon the victim. It is not necessary to prove that the defendant himself had such an intention; it is sufficient (and necessary) that the defendant knew that one

---

[20] *R v Clarkson, Carroll, and Dodd* (1971) 55 Cr App R 445; *R v Beck* [1990] 1 Qd R 30.

[21] *R v Beck* at [37].

or more of the others had it and that, knowing this, did an act to aid or enable that or those others to kill or do grievous bodily harm.[22]

Section 8

Read the section to the jury:

So, if two or more people plan to do something unlawful together and, in carrying out the plan, an offence is committed, the law is that each of those people is taken to have committed that offence if (but only if) it is the kind of offence likely to be committed as the result of carrying out that plan.

For the prosecution to prove the defendant guilty relying on this section, it is necessary for you the jury to be satisfied beyond reasonable doubt:

1. **that there was a common intention to prosecute an unlawful purpose. You must consider fully and in detail what was the alleged unlawful purpose, and what its prosecution was intended to involve;**
2. **that (the offence charged) was committed in the prosecution or carrying out of that purpose. You must consider carefully what was the nature of that actual crime committed;**
3. **that the offence was of such a nature that its commission was a probable consequence of the prosecution of that purpose.**[23]

Common unlawful purpose

Obviously, a great deal depends on the precise nature of any common unlawful purpose, proved by the evidence in the light of the circumstances of the case, particularly the state of knowledge of the defendant.[24] **It is the defendant's own subjective state of mind as established by the evidence, which decides what was the content of the *common* intention to prosecute an unlawful purpose.**[25] **That common intention is critical because it defines the restrictions on the nature of the acts done or omissions made which the defendant is deemed by the section to have done or made.**

---

[22] This direction follows the decision in *R v Pascoe* [1997] QCA 452.

[23] This direction combines what Gibbs J (and Mason J) wrote in *Stuart v The Queen* (1974) 134 CLR 426 with the words of s 8.

[24] Jacobs J in *Stuart v The Queen*.

[25] So held in the joint judgment of Brennan CJ, Dawson and Toohey JJ in *R v Barlow* (1997) 188 CLR 1 at 13.

When considering what any common intention was, and what was any common unlawful purpose, you should consider whether you are satisfied beyond reasonable doubt that the defendant agreed to a common purpose:

(by way of example only)

- **that involved the possible use of violence or force; or**
- **to carry out a specific act;**[26] **or**
- **that involved inflicting some serious physical harm on the victim.**[27]

Commission of the offence in the prosecution of the common unlawful purpose

If you are satisfied beyond reasonable doubt there was a common intention to prosecute an unlawful purpose and what that was, you must ask if you are satisfied beyond reasonable doubt that an offence of (describe offence)[28] was committed in the prosecution or furtherance or carrying out that purpose. If you are so satisfied, then in considering whether you are satisfied beyond doubt that the nature of the offence committed was such that its commission was a probable consequence of the prosecution or furtherance or carrying out of the common unlawful purpose,[29] **the probable consequence is a consequence which would be apparent to an ordinary reasonable person with (the defendant's) state of knowledge at the time when the common purpose was formed. That test is an objective one and is not whether (the defendant) himself recognised the probable consequence or himself realised or foresaw it at the time the common purpose was formed.**[30]

---

26 See *R v Keenan* (2009) 236 CLR 397 at [118].

27 See *R v Keenan*. Care must be taken in identifying the common intention by focusing only on the means used to effect the common unlawful purpose (per Hayne J at [85]). Where a method by which physical harm is to be inflicted has been discussed, or may be inferred as intended, it does not follow that the use of other means will prevent a person being held criminally responsible. In some cases the means intended to be used may permit an inference as to the level of harm intended. (per Kiefel J at [121]). An inference about the level of harm involved in the common purpose to be prosecuted may be drawn from the general terms in which an intended assault is described, the motive for the attack and the objective sought to be achieved, amongst other factors (per Kiefel J at [120]).

28 Refer to the act or omission and its nature, the harm it causes and the intention with which it is inflicted. Where, for example, the act is one of shooting, the question for the jury may be whether the shooting which caused grievous bodily harm was an offence of such a nature that its commission was a probable consequence of the common purpose, such as it is found to be (per Kiefel at [132, 133]).

29 See *R v Keenan*.

30 See the caution in *R v AAP* [2013] 1 Qd R 244; [2012] QCA 104 at [27] against leading the jury to consider the defendant's view of probable consequence; and see also *Stuart v The Queen at* 453-5, (Jacobs J); *R v Pascoe* [1997] QCA 452 (McPherson JA at 9; Davies JA at 12).

Probable Consequence

A probable consequence is more than a mere possibility. For a consequence to be a probable one, it must be one that you would regard as probable in the sense that it could well have happened. So, for the offence actually committed to be "a probable consequence" of carrying out the unlawful common purpose, the commission of the offence must be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose.[31]

Section 8 – Direction on alternative verdict open – s 10(A)

If you are satisfied that acts constituting an offence were committed, and that the commission of those acts was the probable consequence of the prosecution of the unlawful common purpose, it does not matter that the actual perpetrator who committed those acts did so with a specific intent, where the fact the perpetrator had that intent was not itself either subjectively agreed or an objectively probable consequence of the prosecution of that unlawful common purpose. The defendant can still be convicted of the offence constituted by those acts, but not the offence of committing those acts with that extra specific intent, where that specific intent was not an agreed or probable consequence of carrying out that purpose.

For example, if you are satisfied beyond reasonable doubt that in fact a murder occurred, which is an unlawful killing of another person committed by a perpetrator who intended to cause the victim death or grievous bodily harm, you must obviously ask yourselves whether you are satisfied beyond reasonable doubt that that offence of unlawful killing with that specific intent was objectively a probable consequence of the prosecution of the subjectively agreed unlawful purpose held in common, if any, which you have found to exist. If you were so satisfied, (and satisfied of other relevant matters) you could find the defendant guilty of murder.

However, if you are not so satisfied, you would then consider whether the commission of an offence of manslaughter was a probable consequence of carrying out the agreed unlawful purpose. Manslaughter is an offence of unlawful killing when one person kills another in circumstances not authorised, justified, or excused by law. There is no element of intention to kill or do grievous bodily harm in manslaughter.

---

[31] See *Darkan v The Queen* (2006) 227 CLR 373; 80 ALJR 1250 at [72]-[81], [130]- [132]

If you were satisfied beyond reasonable doubt that an unlawful killing of another person in circumstances which would amount to manslaughter, and the acts constituting such an offence, were committed, and that the commission of those acts and that offence of manslaughter was objectively a probable consequence of prosecuting the subjectively agreed unlawful purpose, then you could find the defendant guilty of manslaughter; even though satisfied that the actual perpetrator went *beyond* the agreed or probable consequences and committed the more serious offence of murder.

Section 8 - direction on group assault resulting in death

For the Crown to prove beyond reasonable doubt that the defendant is guilty of murder on the basis of s 8, it must prove to your satisfaction beyond reasonable doubt that a probable consequence of the prosecution of the common purpose of assaulting (the deceased) must have been that one or more of the people attacking (the deceased) would have the intention of doing (the deceased) at least grievous bodily harm. The relevant common intention which must be proven beyond reasonable doubt, contemplated by s 8 and necessary to support a verdict of guilty of murder, is one to commit an assault of sufficient seriousness that an intention to cause death or grievous bodily harm on the part of at least one or more of those attacking (the deceased) was a probable consequence of the prosecution of that purpose. If that probable consequence is absent, but the assault the subject of the common intention was nevertheless of sufficient seriousness that a death was the probable consequence and it occurred, the proper verdict is manslaughter. It is not necessary in either case that those consequences were intended or even foreseen by the defendant.[32]

[Example] **Here the evidence is that the defendant and (B) planned to rob a bank together, and, in carrying out that plan together, (B) murdered Mr Smith the bank teller. In those circumstances, the defendant is in law taken to have murdered Mr Smith if (but only if) murdering someone was the kind of offence that was a probable consequence of carrying out the plan to rob the bank.**

If you are satisfied of those matters, then the offence committed by the defendant [or by each of the defendants] is murder. I have already told you that murder is killing someone with the intention of causing death or doing grievous bodily harm. If you are not satisfied that murder, in the sense of killing with such an intention,

[32] This direction is taken from *R v Pascoe* [1997] QCA 452.

was the kind of offence that was a probable consequence of carrying out such a plan, then you may find the defendant guilty (if at all) only of the lesser offence of manslaughter. For that, you would have to be satisfied that death was something that was likely to result from carrying out the plan.[33]

Here the defendant may be found guilty of murdering Mr Smith the bank teller if (but only if) you are satisfied beyond reasonable doubt that killing him with that intention was something that was a probable consequence of carrying out the plan to rob a bank. If you are not satisfied of that, then you may find the defendant guilty at most only of manslaughter.

If you are left in doubt whether murder was the kind of offence likely to result from carrying out their plan, then you may find the defendant guilty of the lesser offence of manslaughter. For that you need to be satisfied beyond reasonable doubt that killing Smith, without any intention to cause death or grievous bodily harm, was something that was a probable consequence of carrying out the plan to rob. If you are left with a reasonable doubt about that, then you must return verdicts of not guilty of murder and not guilty of manslaughter.

To establish criminal responsibility on the part of a defendant under s 7(1)(b) or s 7(1)(c), the prosecution must prove that he knows "the essential facts constituting or making up the offence that is being or about to be committed by the person he is aiding or assisting".[34] It is not necessary to prove that the defendant had a specific intention to commit the offence, but it is necessary to show that he knew of the intention of the principal offender to do so.[35] Knowledge of no more than a possibility that the offence might be intended will not suffice.[36] Thus, where the charge is murder under s 302(1)(a), it must be shown that the defendant assisted or aided the principal offender in carrying out the killing knowing at the time of doing so that the other was intending to kill the victim or do him grievous bodily harm. If that state of knowledge is not established the defendant may be guilty of manslaughter, subject to defences under s 23(1) of the *Criminal Code*.

A person "aids" another to commit an offence if he assists or helps him to do so. It is not necessary for the aider to be present at the crime but he must be "aware at least of what is being done…by the other actor."[37]

---

[33] Where there is an "escalating" plan or intention, it is essential that the defendant be proved to have been a party to that expanded intention: *R v Ritchie* [1998] QCA 188.

[34] *R v Jeffrey* [1997] QCA 460; [2003] 2 Qd R 306; *Giorgianni vThe Queen* (1985) 156 CLR 473 at 482; *R v Brown* (2007) 171 A Crim R 345; [2007] QCA 161 at [48].

[35] *Jeffrey; Lowrie* at 535.

[36] *Lowrie* at 525, 541.

[37] *Sherrington & Kuchler* [2001] QCA 105 at 7.

"Procuring" in s 7(1)(d) has been defined as "effort, care, management or contrivance towards the obtaining of a desired end".[38] It has been said that it involves more than mere encouragement; it entails successful persuasion.[39] A person may be charged under s 7(1)(d) with procuring another to commit an offence with a circumstance of aggravation where the circumstance of aggravation merely attracts additional punishment rather than constituting a specific offence.[40]

Section 9 expands criminal responsibility for "counselling" by making the counsellor liable for an offence committed by the principal other than what was counselled where the facts constituting the committed offence are a probable consequence of carrying out the counsel.[41]

Section 10A(1) *Code*, which was inserted shortly after the decision in *Barlow*[42] (although the amending bill was introduced before the High Court's decision), provides that the criminal responsibility of a secondary party under s 7 extends to any offence that, on the evidence admissible against him is either the offence proved against the principal offender "or any statutory or other alternative to that offence." While the meaning of the sub-section is far from clear, it does seem that its effect includes enabling a jury to convict of a lesser offence when the secondary offender's intent as an aider, counsellor or procurer extends no further than that offence. It does not allow a person charged under s 7(b) (c) or (d) to be convicted of an offence which, though technically a statutory alternative, is independent in its factual basis of the offence committed by the principal offender.[43]

"Offence" should be given the same meaning in both ss 7 and 8 *Code*, that is "the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment".[44]

Section 10A(2) *Code* provides that a defendant's criminal responsibility under s 8 "extends to any offence that, on the evidence admissible against him or her, is a probable consequence of the prosecution of a common intention to prosecute an unlawful purpose, regardless of what offence is proved against any other party to the common intention". Consistently with the analysis in *Barlow,* it follows that a defendant may be found guilty of the principal offence to the extent that its elements were the probable consequence of a common intention to prosecute an unlawful purpose. So, in the case of murder under s 302(1)(a), the "nature" of the offence for the purposes of s 8 is to be regarded as consisting of the *elements* of murder (unlawful killing plus intent), rather than murder itself.[45]

Thus a defendant charged under s 302(1)(a) may be convicted of manslaughter, notwithstanding that the principal offender is convicted of murder, if intentional killing was

---

[38] *R v Castiglione* [1963] NSWR 1at 6, a meaning adopted in *R v Chan* [2001] 2 Qd R 662; [2000] QCA 347at [52].

[39] *R v Adams* [1998] QCA 64 at 6.

[40] *R v Webb* [1995] 1 Qd R 680at 685.

[41] For an examination of the relationship between s 7(1)(d) and s 9 see *R Oberbillig* [1989] 1 Qd R 342 at 345; *Hutton* (1991) 56 A Crim R 211. See also *Darkan v The Queen* (2006) 227 CLR 373; 80 ALJR 1250.

[42] *Barlow* (1997) 188 CLR 1 at 9.

[43] *R v Sullivan & Marshall* [2002] 1 Qd R 95; [2000] QCA 393.

[44] *Barlow; Sullivan & Marshall.*

[45] *R v Brien & Paterson* [1999] 1 Qd R 634 at 645.

not a probable consequence of their mutual plan but an unlawful killing, objectively speaking, was.[46]

Where acts of violence escalate beyond the level of force initially contemplated, it is necessary, before a secondary party can be held criminally responsible under s 8, that the jury be satisfied he shared in the expanded intention to inflict such greater violence.[47]

Where the prosecution relies on s 8 responsibility in relation to a murder charge brought under s 302(1)(b) ("death … caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life"), the question as to what extent the elements of the offence were a probable consequence of the unlawful purpose, will entail a consideration of whether it was a probable consequence that an act of such a nature as to be likely to endanger human life as the act which caused death would occur. If that element were missing, a secondary offender could not be convicted of murder but might be convicted of manslaughter.[48]

The expression "a probable consequence" used in s 8 and s 9 *Code* was considered recently in *Darkan v The Queen* (2006) 227 CLR 373. The High Court held that the expression "a probable consequence" does not mean a consequence likely to happen on the balance of probabilities (which would be unduly generous to a defendant). A more exacting standard than a "possibility" is imposed by the expression. The expression means more than a real or substantial possibility (a test which would be unduly harsh to a defendant). The expression "a probable consequence" means the occurrence of the consequence is probable in the sense that it could well happen. It was stated at [81]:

> *"It is not necessary in every case to explain the meaning of the expression 'a probable consequence' to the jury. But where it is necessary or desirable to do so, a correct jury direction under s 8 would stress that for the offence committed to be 'a probable consequence' of the prosecution of the unlawful purpose, the commission of the offence had to be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose. And where it is desirable to give the jury a direction as to the meaning of the expression 'a probable consequence' in s 9, a correct jury direction would stress that for the facts constituting the offence actually committed to be 'a probable consequence' of carrying out the counselling, they had to be not merely possible, but probable in the sense that they could well have happened as a result of carrying out the counselling."*

Withdrawal as a Party to the Offence

Whether the defendant has withdrawn from a common purpose, or from a role enabling, aiding, counselling or procuring an offence, may arise as a question of fact relevant to whether the offence has been committed, rather than as constituting a defence. The question of what amounts to effective withdrawal has met with different answers in relation to both s 7 and s 8 liability, although it is clear that a mere change of mind is not sufficient.

---

[46] It is, conversely, conceivable that the secondary party may be guilty of a more serious offence than the principal offender: See *Barlow* at 14, eg. diminished responsibility. See *R v Hallin* [2004] QCA 18.

[47] *R v Ritchie* [1998] QCA 188.

[48] *Brien & Paterson*.

In *White v Ridley* (1978) 140 CLR 342, Gibbs J's view was that an accused would not be liable if he had given a timely countermand to the innocent agent whom he had procured to commit a crime and had done whatever was reasonably possible to counteract the effect of his earlier actions. But Stephen and Aickin JJ considered it necessary that he take steps which were actually effective to prevent his conduct resulting in the crime, so that if it occurred it was attributable to some new cause. The Gibbs approach was taken by Thomas J in *R v Menniti* [1985] 1 Qd R 520, while the Stephens/Aickin formulation was followed by Derrington J in the same case. The less stringent approach adopted by Gibbs J seems, generally, to have been preferred by State courts dealing with liability of the s 7 kind: *Croxford v The Queen* (2011) 34 VR 277; [2011] VSCA 433; *R v Heaney & Ors* [1992] 2 VR 531; *R v Wilton* (1993) 64 A Crim R 359.

It is questionable whether either approach should be applied to withdrawal for the purposes of s 8. In *R v Saylor* [1963] QWN 14, the Court of Criminal Appeal held that a defendant relying on dissociation from a common purpose must be able to point to evidence showing "that he made to the other party an unequivocal 'timely communication' of his intention to abandon the common purpose". There was no suggestion that steps to counteract the common purpose were also required. In *R v Menniti*, Thomas J pointed out that withdrawal was more readily effected in common purpose cases "because the destruction (by countermand or otherwise) of the common purpose may mean that the eventual crime was not committed in the prosecution of that common purpose". Consistently with that view, in *R v Emelio* (2012) 222 A Crim R 566; [2012] QCA 111, Dalton J, with the agreement of McMurdo P and Muir JA, observed that there was a distinction between what was necessary to show withdrawal under s 7 and that under s 8, because the relevance of withdrawal to a case under s 8 was to show that the common purpose had come to an end before the commission of an offence.

On the other hand, in *R v Tietie* (1988) 34 A Crim R 438, the New South Wales Court of Criminal Appeal held that a jury was properly directed that an accused had not withdrawn from the common purpose unless he had made a timely communication of his withdrawal and done what he could reasonably do to dissuade the others from continuing with the unlawful purpose. The court relied on Gibbs J's judgment in *White v Ridley*, and did not draw any distinction between common purpose and accessorial offending of the kind with which s 7 deals. In a dissenting judgment in *Miller v Miller* (2011) 242 CLR 446 (the case did not turn on this point) Heydon J described s 8(2) of the Criminal Code WA as reflecting the equivalent common law rule; it absolves a defendant of liability only if, having withdrawn from a common unlawful purpose, he takes all reasonable steps to prevent the commission of the offence.

Logically, however, if the defendant withdraws before the offence is committed and communicates that withdrawal, it would seem to follow that, whether or not he takes any steps to prevent its occurrence, the offence was not committed in the prosecution of any common purpose to which he was a party.

Accessory After the Fact: s 10

Legislation

Criminal Code s 10

> ***Accessories after the fact***
>
> *A person who receives or assists another who is, to the person's knowledge, guilty of an offence, in order to enable the person to escape punishment, is said to become an accessory after the fact to the offence.*

Commentary

Section 10 defines the expression "accessory after the fact", the offence being created and penalties imposed by other provisions of the *Criminal Code*.[1]

In contra-distinction to ss 7 and 8, the conviction of the other person is admissible, and is prima facie evidence, that that person did the acts and possessed the state of mind (if any), which constitute the principal offence.[2]

Where criminal responsibility depends upon the defendant's knowledge of a matter, actual knowledge is required. Wilful blindness alone is not sufficient, but it may be a basis for inferring the defendant's actual knowledge.[3] Mere suspicion is not sufficient.[4]

The prosecution must prove some positive act by the defendant "in an aspect of the behaviour by the defendant, directed towards" the other person, before it can be said that the defendant assisted or received that person.[5]

Assistance may take many forms, including[6] joining in the removal of a body and weapon and cleaning up blood after a murder;[7] disposing of stolen goods;[8] changing the engine number on a stolen vehicle;[9] concealing evidence;[10] and making a false statement to the police.[11]

---

1 See ss 307, 544, 545.

2 *R v Carter and Savage*; *ex-parte Attorney-General* [1990] 2 Qd R 371. However, the reasoning of the majority in *R v Carter and Savage* was doubted in *R v Kirkby* [2000] 2 Qd R 57 at [44], [80]-[81]. *In R v Triffett* (1992) 1 Tas R 293, Underwood J refused to apply *R v Carter and Savage*, and to permit evidence of the conviction of the other person on a plea of guilty.

3 *Pereira v Director of Public Prosecutions* (1988) 82 ALR 217, 219-220; *Giorgianni v The Queen* (1985) 156 CLR 473 at 504-505; notwithstanding the view of Gibbs CJ at 487-488 and Mason J at 495. See the discussion by White J in *ASIC v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 at [398]-[411], quoted by Douglas J in *ASIC v Managed Investments Ltd and Ors (No 9)* (2016) 308 FLR 216; [2016] QSC 109 at [751].

4 *R v Bainbridge* [1960] 1 QB 129, 134; *R v Ancuta* [1991] 2 Qd R 413, 418-419.

5 *R v Winston* [1995] 2 Qd R 204, 207.

6 For further examples of discussion of assistance see *J W Cecil Turner Russell on Crime* (12th ed) London, Stevens & Sons, 1964, pp 163, 164-165.

7 See *R v Hawken* (1986) 27 A Crim R 32.

8 *R v Phelan* [1964] Crim LR 468.

9 *R v Tevendale* [1955] VR 95.

10 *R v Levy* [1912] 1 KB 158, *R v Williamson* [1972] 2 NSWLR 281.

11 *Leaman v The Queen* [1986] Tas R 223.

A person may "receive" another, when the first person accepts the second person into an area or location which the first person controls, or over which the first person exercises some influence. This conduct will then constitute a particular form of assistance.[12] However, the resumption by the defendant and the other person of their former habit of living together in a joint household will not, without more, constitute receiving sufficient for this element of the offence.[13]

Directions

The trial Judge should select and/or adapt directions from those suggested below. Relevant evidence and/or admissions should be identified for each direction. It will often be convenient to provide a short summary of the arguments of the parties in relation to each direction.

> **I must now direct you about the offence of being an accessory after the fact to the offence of ... I shall refer to this offence as the principal offence.**
>
> **To prove that the defendant is an accessory after the fact, the prosecution must prove four elements beyond reasonable doubt:**
>
> **One - that someone committed the principal offence. In these directions, I will sometimes refer to** [X]**, the person who committed that offence, as the "principal offender".**
>
> **Two - that, after the principal offence was committed, the defendant assisted** (or received) **the person who had committed it.**
>
> **Three - that, when the defendant assisted (or received) the principal offender, he/she knew or believed that** [X]**, the principal offender, had committed the principal offence.**
>
> **Four - that the defendant performed the act with the purpose of enabling the principal offender to escape punishment.**
>
> **Before you can find NOA guilty of assisting an offender you must be satisfied that the prosecution has proved all four of these elements beyond reasonable doubt.**
>
> **I will now further explain each of these elements.**
>
> **The first element is that the principal offender,** [X]**, committed the offence of …**

[12] *R v Winston* [1995] 2 Qd R 204, 208.

[13] *R v Lee and Scott* (1834) 6 Car & P 536, 172 ER 1353; *R v Winston* [1995] 2 Qd R 204, 207.

[If appropriate] **In this case, a certificate of conviction has been tendered to prove that** [X] **committed the offence of ..., and there has been no evidence to the contrary, so you may find yourselves satisfied of the first matter.**

[Otherwise directions relating to the commission of the principal offence should be given, with references to the relevant evidence.]

The second element the prosecution must prove is that, after the offence of ... was committed, the defendant assisted (or received) **the principal offender.**

To prove this, the prosecution must establish that the defendant performed some act by way of assistance to the principal offender (or that the defendant in some way received the principal offender)**.**

In this case it is alleged that the defendant [describe relevant act].

This element will only be met if you are satisfied, beyond reasonable doubt, that

1. **He/she performed this act; and**
2. **this occurred after the principal offence was committed; and**
3. **this act in some way assisted** [X] (or that the defendant thereby received [X]; it will often be necessary to explain the concept of receiving a defendant, in a way relevant to the case)**.**

The third element the prosecution must prove is that, when the defendant [describe relevant act]**, he/she knew or believed that the principal offender had committed the offence of ...**

[If appropriate, add] **You must be satisfied that the defendant actually knew this; mere suspicion on the part of the defendant is not sufficient.**

The fourth element the prosecution must prove is that the defendant assisted (or received) [X] **by** [describe relevant act] **in order to enable** [X] **to escape punishment for the principal offence.**

Claim of Right: s 22(2)

Under our law, a person is not criminally responsible, for an offence relating to property, if what he did [or omitted to do**] with respect to the property was done [**or omitted to be done**] in the exercise of an honest claim of right and without intention to defraud.[1] [**Offence charged**] is an offence relating to property.**

An accused person acts in the exercise of an honest claim of right (in respect of the property the subject of the charge) if he honestly believes himself to be entitled to do what he is doing in relation to that property.[2] An honest claim of right may stem from a belief in a right the law does not recognize.[3]

For the excuse of honest claim of right to apply, the defendant must believe that he/she has a legal entitlement to the property the subject of the charge (as for example, its owner).

It is not enough that the defendant believed that he/she was entitled to do what they did.

Also, for the excuse to apply, the defendant must act without an intention to defraud.

"To defraud" in this context means to do [or omit to do**] something dishonestly, so the requirement that the claim of right be honest and the requirement of the absence of an intention to defraud are really two ways of saying that the defendant must have honestly believed himself to be entitled to do what he did [**or omitted to do**].[4]**

---

[1] See *R v Perrin* [2017] QCA 194. The offences created by sections 488 (forgery/uttering) or 408C (fraud) of the Code include elements that the defendant's relevant act was done with an intention to defraud (s 488) or dishonesty (s 408C). For the Crown to exclude s 22(2), the Crown must prove an intention to defraud – in other words, prove dishonesty. Therefore proof of one eliminates proof of the other. There is no need to direct the jury about section 22(2) in such a case.
Intention to defraud is a subjective state of mind of the accused, but to be assessed as dishonest according to the standards of ordinary, decent people – an objective test.

[2] *R v Pollard* [1962] QWN 13 at 29; *R v Waine* [2006] 1 Qd R 458 at [27].

[3] *R v Williams* [1988] 1 Qd R 289. In *R v Mill* [2007] QCA 150 at [81] the Court noted with approval the suggested direction and its focus upon the belief of the accused person to do the act the subject of the charge.

[4] See *R v Perrin* [2017] QCA 194 at [72]: "The meaning of dishonesty has been accepted as explaining an intention to defraud.". The Court cited Toohey and Gaudron JJ in *Peters v The Queen* (1998) 192 CLR 493*:* "In a case in which … a jury [has] to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest."
The question whether a person holds an intention to defraud is subjective – but it is to be assessed objectively, according to the standards of ordinary, decent people.

Dishonesty – or an intention to defraud – is a subjective state of mind, to be assessed according to the standards of ordinary decent people.

Remember the onus of proof. The defendant does not have to prove that he/she made an honest claim of right without intention to defraud. The prosecution must satisfy you beyond reasonable doubt that he/she did not do so.

So if the prosecution has failed to satisfy you beyond reasonable doubt that when [the defendant**] [**details of act or omission (e.g., took the suitcase owned by X)**] he did not honestly believe he was entitled to [**act or omission, (e.g., take it)**], you must find the defendant not guilty.**

Unwilled Acts (Automatism) s 23(1)(a)[1]

Read the section to the jury.

This section excuses a person from criminal responsibility for an act that the prosecution does not prove beyond reasonable doubt was a willed act.[2] The law holds that the relevant willed act is the (injury or death causing) act (for example the discharge of a loaded gun)[3] considered as a physical act, and quite separate from the consequences of the act.[4]

The need to prove an act was willed does not need proof of any intention or wish to cause a particular result by doing the act. What is needed to prove that an act was willed is proof of a choice, consciously made, to do a (physical) (injury or death causing) act[5] of the kind done.[6]

Obvious examples of acts that are not willed would include a reflex action following a painful stimulus; or a spastic movement,[7] or an act done when sleep-walking, or when concussed and in a state of post traumatic automatism.[8] [A defence of post traumatic automatism must be closely scrutinized: blackout can be one of the first refuges of a guilty conscience and is a popular excuse.]

---

1 Section 23(1)(a) (formerly the first "limb" of s 23) incorporates as a primary element of every offence charged that there be an "act" (or omission) of the defendant (*Kaporonovksi v The Queen* (1973) 133 CLR 209 at 226-227), and that it be an act which results from the exercise of his will; or, in other words, that it be a "voluntary" act (or omission): *R v Falconer* (1990) 171 CLR 30 at 38, 72. For the purpose of s 23(1)(a), the word "act" means some physical action apart from its consequences (*R v Taiters, Ex parte A-G* [1997] 1 Qd R 333 at 335), more fully defined as a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility: *Falconer*. The "act" must be distinguished from the "event" or result caused by it: *R v Taiters* [1997] 1 Qd R 333 at 335; in murder, death is not the "act", but the intended consequence (*Falconer* at 38); in grievous bodily harm, the act is the pushing of the glass into the victim's face and not the injury that ensues: *Kaporonovksi* at 228-232. The concept of an "act" within s 23(1)(a) embraces human movement in association with some mechanism or implement. So just as a person can be criminally responsible for the consequences of the discharge of a gun, only if the discharge of the gun was a deliberate choice by that person, so a person can be criminally responsible for the consequences of driving his vehicle forward only if he made a choice to drive the vehicle forward by hitting the accelerator. Thus the discharge of a gun will not be a willed "act" if the person firing it believed that he or she was engaging the safety catch, likewise the hitting of the accelerator will not be a willed act if the defendant meant to hit the brake: See *R v Ellis* [2007] QCA 219 at [39].

2 *R v Falconer* (1990) 171 CLR 30 at 63

3 *Falconer* at 40 at 81.

4 *R v Taiters ex parte Attorney-General* [1997] 1 Qd R 333.

5 *Ugle v The Queen* (2002) 211 CLR 171 at [26].

6 *Falconer* at 39 at 40.

7 *Falconer* at 43.

8 As in *Cooper v McKenna; ex parte Cooper* [1960] Qd R 406.

The prosecution must exclude beyond reasonable doubt the possibility that the (injury or death causing) act occurred independently of the will of the defendant. This is a matter for you to decide; it may help to ask if the prosecution has proved that the defendant made a conscious choice to (do the act). You should ask yourselves if the prosecution[9] has excluded beyond reasonable doubt the possibility of (discharge of the gun without pressure being applied to the trigger, or the possibility of that discharge by) an unwilled reflex or automatic motor action of the defendant.[10] Putting it the other way, have the prosecution proved beyond reasonable doubt that the act (of discharging the firearm) (of inserting the knife in the deceased's body) was an act willed by the defendant?

---

[9] The onus of proof of voluntariness of the acts rest on the prosecution *Falconer* at 41; *Griffiths v The Queen* (1994) 125 ALR 545; 69 ALJR 77 at 78n I. See also *Breene v Boyd ex parte Boyd* [1970] Qd R 292, 297. As to the circumstances in which a direction is called for under s 23(1)(a), see *Griffiths* at 77 at 80; and c.f. *Falconer* at 30, 40, 62, 68; *Guise* (1998) 101 A Crim R 143; [1998] QCA 158.

[10] This direction comes from *Murray v The Queen* (2002) 211 CLR 193 at [17]. Under s 23(1)(a) a person is excused from criminal responsibility for an act that, so far as he or she is concerned, is involuntary *Falconer* 38, 72. Hence a person is not criminally responsible for an act done by an employee without authority and contrary to instructions, nor for an act done, for example, while asleep; or in a state of automatism due to concussion; (*Kaporonovski* at 227) or in the state of disassociation (*Falconer).* But he may be criminally responsible under s 7 for an act done by another (*Kaporonovski* at 227) and cases of insanity and intoxication are governed by ss 27 and 28 and not by s 23(1)(a) (*Kaporonovski* at 227).

Accident, s 23(1)(b)[1]

General Directions

The evidence in this case requires you to consider the excuse of "accident" – which operates like a defence, which the prosecution must exclude, beyond reasonable doubt, for you to convict the defendant.

As you know, the defendant has been charged with [xx**].**

The excuse of accident requires you to consider the way in which [the event**] occurred.** [2]

Speaking generally, a defendant is not criminally responsible for the consequences of an act or omission if they did not intend those consequences, or reasonably foresee them, and an ordinary person in their position would not have reasonably foreseen the consequences as a possible consequence of the act or omission either.

The evidence raising the possibility of the excuse of accident in this case is: [Refer to the evidence raising the possibility of the defence excuse of accident].

That evidence raises for your consideration the possibility that neither the defendant nor an ordinary person would reasonably have foreseen that [the event] – that is, an injury *of the type* which in fact occurred[3] would occur.

---

1 Accident is an "excuse" rather than a defence. Formerly the second "limb" of s 23. The sub-section was amended in 2011, effectively substituting the common law definition of 'accident' for the term itself.

2 Care must be taken to identify the relevant "event". In *R v Taiters* [1997] 1 Qd R 333, the Court of Appeal explained that the reference to "act" is to "some physical action apart from its consequences" and the "event" in the context of occurring by accident is a reference to "the consequences of an act" For example, in a homicide, the relevant event will be death. For an offence of unlawfully doing grievous bodily harm, the "event" is injury *of the kind* in fact suffered (see footnote 4 below).

It is important to differentiate between the defendant's act or omission, and the event caused by the act or omission. In *Murray v The Queen* (2002) 211 CLR 193 the trial judge had not separated the concept of the (willed) act, in "discharging the gun", from the "event" caused by the will act – that is the death of the deceased.

Further, Kirby J (at [94]-[102]), Callinan J (at [103]-[155]), and Gaudron J (at [1]-[24]) concluded that a direction on s 23 was required in a trial on a charge of murder even where intention was the major issue on the trial where the evidence raised its application.

3 In *Irwin v The Queen* [2018] HCA 8; (2018) 92 ALJR 342 at [51] the High Court said that "[w]hat is required is proof beyond reasonable doubt that an ordinary person in the position of the accused would reasonably foresee the possibility of the type of injury in fact caused." (emphasis added).

The High Court observed that a number of decisions of the QCA established that the event for the purposes of s 23(1)(b) is (relevantly to the facts in *Irwin*) an injury of a kind which constituted the grievous bodily harm in fact suffered by the complainant.

If, on the whole of the evidence, the prosecution has not persuaded you, beyond reasonable doubt, that:

- **The defendant intended [the event] to occur; or**
- **The defendant reasonably foresaw [the event] as a possible consequence of his/her act or omission; or**
- **An ordinary person, in the position of the defendant, would have reasonably foreseen [the event] as a possible consequence of the defendant's act or omission,**

then the excuse of accident applies, and the defendant would be not guilty of the offence.

In considering whether the defendant did foresee [the event],or whether an ordinary person would have foreseen it, you should focus on whether [the type of injury in fact caused] was foreseeable as something which could happen, disregarding possibilities that are no more than remote or speculative.[4]

In the context of this case: [frame direction around facts, for example as follows:

- ***If* the defendant did not intend or foresee [**the event, that is an injury of the type sustained, such as a life threatening injury, a broken bone etc**.] of** [the complainant**] as a possible consequence of his actions [**e.g. kicking him, hitting him with a bat**]; and**
- ***If* an ordinary person in the position of the defendant would not have foreseen that as a possible consequence of those actions,**

In *R v Condon* [2010] QCA 117 ("*Condon"*), the Court of Appeal held that the relevant event was the injury suffered by the complainant, namely, a broken jaw, and that the trial judge had misdirected the jury by referring to the foreseeability of "injury amounting to grievous bodily harm", which could include a less serious injury than a broken jaw. The Crown had conceded that this was a misdirection. However, earlier decisions in *R v Stuart* [2005] QCA 138 ("*Stuart"*) and *R v Peachey* [2006] QCA 162 ("*Peachey"*) (to which the Court in *Condon* was not referred) suggested that a broader reference may suffice ("injury of the kind in fact suffered": *Stuart* [22] and "serious injuries similar to those actually incurred": *Peachey* [32]). Such an approach was described as "arguably' sufficient in *R v Wardle* [2011] QCA 339.

It is not possible to be prescriptive about the precision with which the injuries sustained must be identified; for example, it may not be necessary to name the exact facial bone fractured by a blow. See also: *R v Camm* [1999] QCA 101; *R v Francisco* [1999] QCA 212; *R v Grimley* [2000] QCA 64; *R v Coomer* [2010] QCA 6.

[4] It was accepted in *Irwin v The Queen* [2018] HCA 8 at [29] that a direction in these terms contained no error. See also *R v Trieu* [2008] QCA 28.

then the defendant would be excused by law of the offence of [xx**], and you would have to find him not guilty.**

It is not for the defendant to prove anything.

Unless the prosecution proves beyond reasonable doubt that the defendant intended or foresaw [the event**] or that an ordinary person in the position of the defendant would reasonably have foreseen [**the event**] as a possible consequence of his actions, you must find him/her not guilty.** [5]

Even if you reject the defendant's account of what happened, you must still consider the possibility that the event occurred unforeseen and unintended.

NB: This excuse is excluded in the case of an assault causing death if the defendant has been charged with unlawful striking causing death under section 314A. If a charge under that section has been included as an alternative to murder or manslaughter then, even if the excuse of accident would apply to manslaughter, it would not apply to the section 314A offence. The following example direction would need to be supplemented with directions about the section 314A offence.

Further suggestion for directions on offence of murder or manslaughter:

On the evidence, you may decide that Ben Brown punched John Smith in the head in the course of argument between them in the street; that Ben Brown fell back and hit his head on the kerb; that he was taken to hospital and received treatment there; but that he died some 36 hours later.

If you are satisfied beyond reasonable doubt that when he punched Smith, Ben Brown intended to cause his death or do him grievous bodily harm, then you may find Brown guilty of murdering Smith. For that purpose, the question is not whether Brown meant to punch Smith - you may think he certainly did - but whether in punching him he intended[6] **to kill him.**

If you are not satisfied Brown had such an intention so as to make him guilty of murder, then you must go on to consider whether or not he is guilty of

---

[5] These directions are taken in part from the direction suggested by Callinan J in *Stevens v The Queen* (2005) 227 CLR 319 at 370, para [160]; McHugh J agreed with those.

[6] The onus of excluding s 23(1)(a) rests on the prosecution: *R v Taiters, ex parte A-G* [1997] 1 Qd R 333 ("*Taiters*") at 336. The "event" in s 23(1)(b) refers to the consequences of the act, and not to the physical action itself: *Taiters* at 335. See standard direction in this Bench Book on s 23(1)(a), (No.77 – "Unwilled Acts Automatism") footnotes 1 and 2.

manslaughter. Manslaughter in circumstances like these is killing another human being but without having the intention to kill or having any excuse in law for doing so.[7]

In law a killing is excused if an ordinary person in the position of the accused - Brown in this case - would not have foreseen the death[8] **of Smith as a possible consequence or result of his punching him in the head. In order to convict, the Crown must satisfy you beyond reasonable doubt that an ordinary person in the defendant's position would reasonably have foreseen Smith's death as a possible outcome of punching him in the way he did. Unless the Crown so satisfies you, you must find the defendant not guilty of manslaughter.**

(Concealed) defect, weakness, or abnormality

The present case is, however, complicated by the medical evidence we have heard at this trial. Dr Tong, who examined Smith's body after death, said he found that what, in his opinion, had caused death was the rupturing or bursting of an aneurism, which is like a bubble on a blood vessel in the brain. He told us here that it was likely that the aneurism burst when Smith's head struck the kerb. He also said that Brown, or anyone else, could not have known that Smith had such an aneurism or bubble in his brain. Indeed, even the victim Smith himself would not have known that he suffered from such a condition.

That might well lead you to think that no reasonable person would have foreseen the possibility that Smith would die as a result of being punched in the way he was.

However, I am bound to tell you that in law this may not matter in this instance. That is so because under our law a person is not excused of manslaughter if the death of the victim is the result of a defect, weakness or abnormality from which the victim suffered.[9] **If, therefore, you are satisfied beyond reasonable doubt that**

---

7 Authority and justification are not relevant here.

8 In this instance, the death is the "event", result or consequence of the punch, which is the act and not the event or result: *R v Van Den Bemd* [1995] 1 Qd R 401 affirming *Taiters* at 337. Notwithstanding dicta in *R v Mullen* (1938) 59 CLR 124 and *Fitzgerald* (1999) 106 A Crim R 215 that "accident" is not relevant to an offence under s 302(1)(a) where an intention to cause a particular result (e.g. death or grievous bodily harm) is an element, where appropriate, accident under s 23(1)(b) is required to be left to the jury and is not subsumed in the question of intent: see *Murray v The Queen* (2002) 211 CLR 193, *Stevens v The Queen* (2005) 227 CLR 319. See *R v Coomer* [2010] QCA 6 where a direction on accident was not required.

9 See s 23(1)(a). This subsection is apparently intended in effect to reinstate the decision in *R v Martyr* [1962] Qd R 398, as regards cases falling within its scope.

the aneurism of which Dr Tong told you was a "defect, weakness or abnormality" from which Smith suffered, and also that Smith's death resulted because of it, then it is open to you as the jury to find Brown guilty of unlawfully killing Smith, even though no reasonable person would or could have foreseen his death as a possible result of the punch delivered by Brown. In that event, you may return against Brown a verdict of manslaughter.

Mistake of Fact, s 24

A person who does [or omits to do**] an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act [**or omission**] to any greater extent than if the real state of things had been such as the person believed to exist.**

So, if [the defendant**] [**act or omission alleged**] under an honest and reasonable, but mistaken, belief that [**details of state of things mistakenly believed to exist**] he is not criminally responsible to any greater extent than if the real state of things had been such as he believed to exist.**

If you conclude that the real state of things was [details**], but [**the defendant**] honestly and reasonably believed that [detail of mistaken belief], [**the defendant**] will not be criminally responsible to any greater extent than if [**details of mistaken belief**]. That would mean that [the defendant] should be found not guilty of [**as appropriate**]. A mere mistake is not enough, the mistaken belief must have been both honest and reasonable. An honest belief is one which is genuinely held by the defendant.**[1] **To be reasonable, the belief must be one held by the defendant, in his particular circumstances, on reasonable grounds.**[2]

Finally, I must emphasise that there is no burden on the defendant to prove that he made a mistake of fact. The prosecution must satisfy you beyond reasonable doubt that he did not do so. If the prosecution has failed to satisfy you that the defendant did not act under an honest and reasonable mistake of fact you should find the defendant not guilty of [as appropriate**].**[3] **So if the Crown proves to your satisfaction beyond reasonable doubt that:**

1. **The defendant did not honestly hold the relevant mistaken belief about [**the facts**].**

---

1 The defendant's intoxication may be relevant to whether the defendant's mistaken belief was honest: *R v O'Loughlin* [2011] QCA 123 at [34].

2 Section 24(1) requires consideration of whether a defendant's belief, based on the circumstances as he or she perceived these to be was held on reasonable grounds (as opposed to whether a reasonable person would have held it: *R v Julian* (1998) 100 A Crim R 430 at 434; *R v Mrzljak* [2005] 1 Qd R 308 at 321, 326; *R v Wilson* [2009] 1 Qd R 476 at [20]; see also extensive discussion of the authorities in *R v Rope* [2010] QCA 194. Since the focus is on the defendant's belief rather than that of a theoretical reasonable person, the information available to the defendant and the defendant's circumstances (such as an intellectual impairment or language difficulty) are of relevance in considering whether a belief was reasonably held: *R v Mrzljak* at 321, 329-330.

3 This direction was approved by the Court of Appeal in *R v Keevers; R v Filewood* [2004] QCA 207 at [37].

or

2. that belief was not reasonable in the defendant's circumstances, then you would find that the defence of mistake of fact did not apply.

Commentary

The circumstances in which a trial judge ought to direct the jury on the excuse of mistake of fact in the case of non-consensual sexual offences were considered in detail in *R v Makary* [2019] 2 Qd R 528; [2018] QCA 258 ("*Makary*"). (See also *R v FAV* [2019] QCA 299 per Fraser JA at [5]-[6], per Mullins JA at [45]-[48], per Henry J (dissenting) at [108]-[111] and *R v Kellett* [2020] QCA 199 per Morrison JA at [18]-[23], per Mullins JA at [128]-[129].)

In *Makary,* the trial judge's refusal to direct the jury on mistake of fact was held to be correct. Sofronoff P (with whom Bond J agreed) said:

> [54] It follows that before s 24 can arise for a jury's consideration in connection with the issue of consent there must be some evidence that raises a factual issue about whether the accused believed that the complainant had a particular state of mind and also believed that the complainant had freely and voluntarily given consent in some way. Inevitably, that will require some evidence of acts (or, in particular circumstances, an omission to act) by a complainant that led the defendant to believe that the complainant had a particular state of mind consisting of a willingness to engage in the act and believed also that that state of mind had been communicated to the defendant, that is, that consent had been "given".
>
> [55] Where s 24 arises for a jury's consideration the onus of proof lies upon the prosecution to exclude mistake as an excuse … The excuse afforded by that provision may have to be excluded by the prosecution even if the accused does not invoke the section … [Section 24 arises if] there [are] facts in the case that justify consideration of the issue by the jury …[T]he only question is whether there is evidence which raises the issue of mistaken belief for the jury's consideration so that the prosecution must exclude the excuse afforded by s 24.
>
> …
>
> [59] In cases like this one, in which the appellant alleges that the complainant consented but did not give evidence, the raising of s 24 is problematical because the element of the accused's belief can arise only by way of inference. As always, inference must not be confused with speculation.
>
> …
>
> [61] In a case like this one, in which the primary answer to the charge is one of consent, it is likely that the very facts relied upon to show consent, being objective facts, will also be relied upon to raise an inference that the accused held a reasonable but mistaken belief about that issue …
>
> …
>
> [71] The appellant's submission that anything that the complainant said, did, or did not say or do could reasonably have been understood as her giving consent to having sexual intercourse with him so as to generate an inference that he believed that she had given her consent was utterly unreal and …Richards DCJ was right not to direct the jury in the way invited.

(The President's reference to the unreality of the appellant's submission drew upon a quote from the reasons of L'Heureux-Dube J in *R v Ewanchuk* [1999] 1 SCR 330, at 376 – 377 [97]. *R v Ewanchuck* was also cited with approval by McMurdo P in *R v Cutts* [2005] QCA 306 at [14], with her Honour quoting: "…there is, on the record, no evidence that would give an air of reality to an honest belief in consent for any of the sexual activity which took place in this case.")

McMurdo JA (in *Makary*) said:

> [90] To raise the operation of s 24, there must be some evidence of a mistaken belief by the defendant … I would not describe the requirement as going as far as a need for evidence on which there could be a finding that the mistaken belief was held. I prefer the formulation by McPherson JA in *R v Millar* [[2000] 1 Qd R 437, 439 [7]], which is that there must be evidence on which the jury could legitimately entertain a reasonable doubt about whether the defendant honestly and reasonably believed the complainant had consented.

Matters relevant to a defendant's belief

The defendant's intoxication may be relevant to whether the defendant had an honest belief that the complainant was consenting: *R v O'Loughlin* [2011] QCA 123 at [34].

Section 24(1) requires consideration of whether a defendant's belief, based on the circumstances as he or she perceived them to be, was held on reasonable grounds (as opposed to whether a reasonable person would have held it: *R v Julian* (1998) 100 A Crim R 430 at 434; *R v Mrzljak* [2005] 1 Qd R 308 at 321, 326; *R v Wilson* [2009] 1 Qd R 476 at [20]).

Since the focus is on the defendant's belief, rather than that of a theoretical reasonable person, the information available to the defendant and the defendant's circumstances (such as an intellectual impairment or language difficulty) are of relevance in considering whether a belief was reasonably held: *R v Mrzljak* [2005] 1 Qd R 308 at 321, 329-330.

Sample Direction

> **If you are satisfied beyond reasonable doubt that the complainant did not consent there is another matter you must consider.**
>
> **Our law provides that a person who does an act under an honest and reasonable, but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist.**
>
> **In the context of this case that means that, even though the complainant was not in fact consenting, you must consider whether the defendant, in the circumstances, honestly and reasonably believed that the complainant was consenting?** (It may help to describe those circumstances at this stage of the directions).

A mere mistake by the defendant is not enough, the mistaken belief in consent must have been both honest and reasonable.

An honest belief is one which is genuinely held by the defendant.[1]

A defendant's belief is reasonable, when it is one held by the defendant, in his particular circumstances, on reasonable grounds.[2]

The complainant says that he/she did not consent [and made that clear to the defendant**]. If you accept the complainant's evidence that he/she [**quote the evidence**], you might think that the defendant could not have honestly and reasonably believed the complainant was consenting.**

Remember however the onus of proof. It is not for the defendant to prove that he/she honestly and reasonably believed the complainant was consenting but for the prosecution to prove beyond reasonable doubt that the defendant did not honestly and reasonably believe that the complainant was consenting.

Accordingly if you find that the complainant wasn't in fact consenting, you must ask yourself "can I be satisfied beyond reasonable doubt that the defendant did not have an honest and reasonable belief that she was consenting?".

If the prosecution have satisfied you beyond reasonable doubt that the defendant did not have such a belief you must find the accused guilty.

If you are not so satisfied, even though the complainant was not consenting, you must find the defendant not guilty.

---

1 See commentary above on relevance of defendant's intoxication.

2 See commentary above on whether a defendant's belief was reasonably held.

Extraordinary Emergency, s 25

A person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise.

It is not for the defendant to prove that he acted as he did because of the stress of a sudden [extraordinary] emergency. It is for the prosecution to satisfy you beyond reasonable doubt that he did not. Has the prosecution satisfied you that the circumstances which confronted the defendant did not amount to a sudden [extraordinary] emergency? If it has, you do not need to consider this issue further [summarise arguments as to why it is/is not emergency].

If the prosecution has not satisfied you that the defendant was not acting under the stress of a sudden extraordinary emergency, are you satisfied beyond reasonable doubt that his reaction in the circumstances was outside what you could reasonably expect of an ordinary person with ordinary powers of self control? A person in a sudden [extraordinary] emergency may make a wrong choice. But you must look at the situation as it presented itself on the moment. The defendant is not expected to be wiser or better than an ordinary reasonable person in the same circumstances; and you will appreciate that a person in an emergency cannot always weigh up and deliberate about what action is best to take. He must act quickly and do the best he can. If you consider that an ordinary person with ordinary powers of self control could not reasonably have been expected to act differently, or if the prosecution has not satisfied you beyond reasonable doubt of the contrary, you must acquit.

See *Zuccala* (1991) 14 MVR 466; and see R.S. O'Regan *New Essays on the Australian Criminal Codes* Ch IV "Sudden or Extraordinary Emergency". In *R v Lacey; ex parte A-G* (Qld) (2009) 197 A Crim R 399 the Court of Appeal held that where the specific provisions of the Code concerning self-defence (and, by extension, compulsion or provocation) arise for the jury's consideration there is no scope, on the same facts, for the operation of s 25.

The defence of extraordinary emergency is available in relation to a charge of dangerous operation of a motor vehicle: *R v Warner* [1980] Qd R 207, *R v Sheldon* [2014] QCA 328.

Insanity: ss 26, 27(1), (2), 28(1), (2)

If you are satisfied beyond reasonable doubt that the defendant committed the offence with which he has been charged, you will need to consider the effect of the evidence about his state of mind.

Every person is presumed to be of sound mind, that is sane, and to have been of sound mind at any time which comes into question until the contrary is proved.[1]

The defendant contends that he was not of sound mind [or the evidence in this case raised the question whether] when he did the things which constitute the offence with which he is charged. The defendant must satisfy you of this fact, but does not have to do so beyond reasonable doubt. It is enough if you are satisfied that it is more probable than not that he was not of sound mind when he did the act constituting the offence.

The defendant will not be criminally responsible for the offence if, when doing the act (or making the omission) which constituted it, he was in a state of mental disease or natural mental infirmity that it had one or more of the following consequences, namely, deprived him of the capacity to understand what he was doing, or of the capacity to control his actions, or of the capacity to know that he ought not to do the act (or make the omission).

Putting it another way, the question is whether the defendant had a mental disease or natural mental infirmity which took away his ability to understand what he was doing, or to control his actions, or to know that he ought not do the act or make the omission.

A mental disease, or disease of the mind, is a condition that affects the functions of the mind, its ability to reason, remember and understand. Were the functions of reason and understanding deranged or disordered from some mental disease or natural mental infirmity?

The next point to consider is whether that disease or infirmity took away the defendant's capacity to know the nature and quality of the act he was doing at the time of committing the offence; or the capacity if he did know it, to know that what

---

[1] Where there is evidence before the court which could justify the finding by the jury of a verdict of not guilty on the ground of insanity, it is the duty of the trial judge to give the appropriate direction to the jury and to leave the decision thereon to them, notwithstanding that the defence does not seek to raise such an issue: *R v Meddings* [1966] VR 306.

he was doing was wrong when judged by the standards of ordinary reasonable people; or the capacity to control his actions. A loss of the capacity to know that what he did, or omitted to do, was wrong means that, because of the mental disease or natural mental infirmity, the defendant was deprived of taking into account the considerations which determine whether something is right or wrong. That is, that he was unable to reason about the rightness or wrongness of the act or omission.

You are not obliged to accept the opinions of the doctors but should evaluate their evidence by having regard to all of the evidence and the circumstances which are relevant to the defendant's state of mind.[2]

If you are satisfied that it was more probable than not that, because of mental disease or natural mental infirmity, the defendant was deprived of one or more of the capacities, you should find him not guilty on account of unsoundness of mind. Before you can reach that verdict, you must be satisfied that the defendant had a mental disease or natural mental infirmity and that the disease or infirmity deprived the defendant of one or more of the capacities. If you are not so satisfied and the prosecution has satisfied you beyond reasonable doubt that the defendant committed the offence, you would find him guilty.

I will now remind you of the evidence that you should consider in respect of the defence of insanity.

Whether a particular mental state amounts to "a disease of the mind" or a "natural mental infirmity", is a question of law for the judge.[3] So the judge must determine whether the evidence is capable of establishing the elements of the defence. It is for the jury to determine whether it was more probable than not that the defendant did have a mental disease or natural mental infirmity and, if so, whether it was more probable than not that it deprived him of one or more of the described capacities.[4]

Where the evidence is capable of supporting a defence of insanity the trial judge must give the jury a direction on that issue.[5]

As to the meaning of "disease of the mind", see *Falconer* at 53-4.

---

2 For a variation of this possible direction, see "Expert Witnesses".

3 *R v Falconer* (1990) 171 CLR 30 at 49, 51

4 *R v Joyce* [1970] SASR 184 at 194; *R v Kemp* [1957] 1 QB 399.

5 *Hawkins v The Queen* (1994) 179 CLR 500 at 517.

"Natural mental infirmity" is a defect in intelligence or of the higher intellectual processes such as abstract thinking or problem solving.[6]

The question for the jury is whether the defendant suffered from a malfunctioning of the mind having its source primarily in some subjective, internal condition or weakness which prevented him from perceiving the reality of the situation in which he acted or deprived him of making a moral judgment about how to act in the situation.[7]

Expert medical or psychiatric evidence is admissible on the question of unsoundness of mind. Such an expert may swear to the very fact in issue, that is whether a defendant was insane with respect to the act in question.[8] The court may act on other than expert evidence and may take into account "the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality."[9]

The jury is not obliged to accept the expert medical evidence. But if it is unanimous, its rejection will be perverse in the absence of other evidence conflicting with the expert testimony so as to throw doubt on it.[10]

Expert medical evidence is not essential to support a defence of insanity but its absence may mean that there is insufficient evidence to support the defence.[11]

When s 27 speaks of the deprivation of one of the described capacities "at the time of doing the act", the deprivation must operate with respect to the particular act which constitutes the criminal offence with which the defendant is charged.[12]

The capacity "to know that the person ought not to do the act" is the capacity for moral judgment.[13] A defendant will lack that capacity if he is unable to reason about the moral character of the acts in question or to make a moral judgment about it.

The jury should be directed, if satisfied of insanity, to bring in a verdict of "**not guilty on account of unsoundness of mind.**"[14] It is generally undesirable that a jury be informed on the consequences of a verdict of not guilty on the ground of insanity.[15] Where, however, some such direction is needed, the jury may be informed, **there is a system in force under the *Mental Health Act* which provides for the indefinite detention of such persons and there are review procedures which could lead to release at some future stage**.[16]

If a defendant is deprived of one or more of the capacities described in s 27 as a result of his mind becoming disordered from the unintended consumption of alcohol or drugs, he will have

---

6 *GNM v ER* [1983] 1 NSWLR 144 at 147; *Re Jenkins* 1999 QMHT [14].

7 *Falconer* at 51.

8 *R v Holmes* [1953] 1 WLR 686; *R v Barry* [1984] 1 Qd R 74 at 89.

9 *Walton v The Queen* [1978] AC 788 at 793; *R v Jennion* [1962] 1 WLR 317 at 321.

10 *R v Dick* [1966] Qd R 301 at 305-6; *Taylor v The Queen* (1978) 22 ALR 599.

11 *Lucas v The Queen* (1970) 120 CLR 171 at 174.

12 *Stapleton v The Queen* (1952) 86 CLR 358 at 370.

13 *R v Porter* (1933) 55 CLR 182 at 189, approved in *Stapleton* at 367. See also *Willgoss* (1960) 105 CLR 295, 301.

14 *Code* s 647; *R v Smith* [1949] St R Qd 126; *R v Foy* [1960] Qd R 225.

15 *Maloney* [2001] 2 Qd R 678; [2000] QCA 355, [19]; *Shannon v United States* 512 US 573 (1994).

16 *Maloney* at [23].

a defence as if he were insane: s 28(1). The suggested direction will need adjustment for this circumstance.

Unintentional Intoxication: s 28

Unintended ingestion of an intoxicant disordering the mind: s 28(1) and s 27

The defendant says he was intoxicated[1] through no fault of his own at the time when he did the things which constitute the charge against him. If that is so, you will need to consider if the liquor (or drugs) which caused this intoxication[2] disordered his mind.

Every person is presumed to be of sound mind until the contrary is proved.[3] As the defendant contends that he was not of sound mind, he must prove that.[4] He does not have to prove that beyond reasonable doubt. It is enough that he satisfy you that it was more probable than not that he was not of sound mind when (insert event). Proving this involves three steps.

The first step is to prove that his intoxication was caused without any intention on his part.

The second step is to prove that the intoxication disordered his mind. The medical evidence provides guidance about the effect of drugs on how the mind functions. Among people there is a range within which normal, ordered minds function. The defendant must satisfy you that his mind was functioning so differently at the time that you can say it was disordered. You should consider all of the evidence, including the medical opinions, in considering whether his mind was disordered at the time he is alleged to have (insert essence of prosecution case).

The third step is to decide whether the defendant's disordered mind had one or more of the following consequences:-

Did it deprive him of the capacity to understand what he was doing, or did it deprive him of the capacity to control his actions, or did it deprive him of the capacity to know that he ought not to do the act[5] in question?

---

1 When appropriate to the state of disorder, substitute "stupefied" for "intoxicated" throughout the direction.

2 Substitute "stupefaction" for "intoxication" where appropriate.

3 *Criminal Code*, s 26.

4 *R v Foy* [1960] Qd R 225 at 240.

5 Substitute "make the omission", where appropriate.

Again, you will be guided by the medical evidence.

It is not necessary to explain further what is involved in a loss of understanding of what he was doing, or of a loss of control of his actions. A loss of the ability to know what he did was wrong means that, because of intoxication, he was quite incapable of taking into account the considerations which go to make right or wrong.[6]

If the defendant satisfies you that it was more probable than not that, because of unintended intoxication, his mind was disordered so that he was deprived of one or more of these capacities, you should find him "not guilty on account of unsoundness of mind".[7]

The essence of the evidence you need to consider in deciding these issues is:

---

6 *R v Porter* (1933) 55 CLR 182 at 190.

7 Section 647 and *R v Smith* [1949] St R Qd 126.

Intentional Intoxication: s 28

Intentional intoxication where charge does not involve a specific intent.

> **There is evidence that at the time when he did the things which constitute the charge, the defendant was affected by liquor (or drugs). Intoxication**[1] **does not relieve a person of responsibility for committing a crime. It may help you when you are considering the state of his memory of the events surrounding the incident which has given rise to this charge. It may offer some explanation for his conduct. It does not entitle him to an acquittal.**[2]

Intentional intoxication where charge does involve a specific intent[3]

> **A specific intent is an element of the offence of (**insert offence**): namely an intent to (**set out the specific intent/s involved**). The prosecution must prove beyond reasonable doubt that the defendant had in fact formed the requisite specific intent.**
>
> **There is evidence that the defendant was intoxicated when the incident occurred. This evidence about intoxication is relevant to the issue of intent. When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining of whether such an intention in fact existed.**
>
> **The fact that the defendant was intoxicated (**whether by drink or drugs or a combination of both**) may be regarded for the purpose of ascertaining whether the special intent in fact existed.**
>
> **If because of the evidence as to the effect of the intoxication or otherwise, you are not satisfied beyond reasonable doubt that the defendant did in fact form**[4] **the**

---

1 Substitute "stupefaction" where appropriate.

2 *R v Kusu* [1981] Qd R 136.

3 In *R v Buckley*, Supreme Court Brisbane, 7 April 1982, Connolly J held that arson is an offence involving a specific intention to cause a specific result having regard to the interpretation of "wilfully" in *R v Lockwood, ex parte A*-G [1981] Qd R 209. In *R v Eustance* [2009] QCA 28 the Court of Appeal held that the trial judge erred in refusing to direct the jury with respect to intoxication on a charge of arson where the prosecution case was that the defendant had an intention to set fire to the property.

4 In *R v Middleton* [2003] QCA 431 the Court of Appeal noted that the purpose of s 28(3) is better served by focusing only on the question of whether the defendant did in fact form the intention rather than directing attention to whether the defendant had the capacity to form the intention, any concern about capacity being subsumed in that enquiry. See also *R v Batchelor* [2003] QCA 246.

necessary intent (here describe essence of necessary intent**), you must find him not guilty of (**insert description of offence where more than one is charged or available on the indictment**).**[5]

The evidence that the defendant was intoxicated will not itself entitle him to a verdict of not guilty, because a person when intoxicated may form the necessary intent, and one who has formed the intent does not escape responsibility because intoxication has diminished his power to resist the temptation to carry it out.

However, if because of the evidence as to the effect of the intoxication or otherwise, you are not satisfied beyond reasonable doubt that the defendant did in fact form the necessary intent, you must find the defendant not guilty of the offence which involves that intent.

It is for the prosecution to satisfy you beyond reasonable doubt that, although intoxicated, the defendant did in fact have the requisite intention. If the prosecution fails to satisfy you of that beyond reasonable doubt, you must find the defendant not guilty of the charge that (involves that specific intention**).**[6]

The essence of the evidence you need to consider in relation to this issue of intent is, in summary, (here set out evidence**).**

---

5 *Viro v The Queen* (1978 – 79) 141 CLR 88 at 112.

6 In an appropriate case, add: It is open to you, if you are not satisfied beyond reasonable doubt that the requisite specific intent existed at the time, to consider the offence of (set out the offence), which does not involve a specific intent as an element. You may convict the defendant of that offence, if you are satisfied beyond reasonable doubt that the elements of that offence have been established.

Capacity: s 29

The defendant is a person who, at the date alleged in the indictment, was under the age of 14 years[1]. The prosecution must prove beyond reasonable doubt that at that time the defendant had the capacity to know that he ought not do the act [or make the omission] the subject of the charge.[2] The prosecution case is that you will be satisfied that the defendant had the capacity to know that what he was doing was seriously wrong on the basis of this evidence (here briefly summarise the evidence relied upon by the prosecution**).[3] The defence contends that you will not be so satisfied because (**here summarise defence submissions**).[4]**

---

1 From 1 July 1976 until 1 July 1997, the age was 15 years. Prior to 1 July 1976, the age was 14 years.

2 In *R* v *F ex parte A-G* [1999] 2 Qd R 157, [1998] QCA 97 Davies JA doubted that the phrase "that the person ought not to do the act" needed to be paraphrased, but if it did the preferable expression was that the act was "wrong according to the ordinary principles of reasonable men" citing *R* v *M* (1977) 16 SASR 589. See also *R* v *EI* [2009] QCA 177.

3 In *R v B* [1997] QCA 486, the Court ruled that it is not necessary for the prosecution to prove actual knowledge that the act was wrong, only the capacity to know that the person ought not do the act. An expectation that a child of a certain age would have the capacity to know something was wrong does not affect the existence of the presumption, but it may affect the strength of the evidence necessary to rebut it. The closer a child is to 14 years of age, the less strong the evidence must be to rebut the presumption.

4 In *R v CDR* [1996] 1 Qd R 183, the Court of Appeal noted that Parliament may not have intended to place the onus of proving a defendant's age on the prosecution where no issue as to the application of s 29 is raised. In many cases, the defence will not admit capacity, but will address no submissions to the issue.

Compulsion: s 31(1)(c)

Legislation

s 31 Justification and excuse – compulsion

(1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, that is to say—

(a) in execution of the law;

(b) in obedience to the order of a competent authority which he or she is bound by law to obey, unless the order is manifestly unlawful;

(c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person, or to another person in the person's presence;

(d) when—

(i) the person does or omits to do the act in order to save himself or herself or another person, or his or her property or the property of another person, from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat; and

(ii) the person doing the act or making the omission reasonably believes he or she or the other person is unable otherwise to escape the carrying out of the threat; and

(iii) doing the act or making the omission is reasonably proportionate to the harm or detriment threatened.

(2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself or herself liable to have such threats made to the person.

(3) Whether an order is or is not manifestly unlawful is a question of law.

Commentary

If there is some evidence capable of raising the issue, the legal or persuasive burden rests upon the prosecution to exclude the proposition that the accused was acting upon compulsion beyond reasonable doubt – i.e., to exclude any reasonable possibility that the proposition is true.

In *Taiapa v The Queen* (2009) 240 CLR 95 the High Court said at [53]:

> *In deciding whether the evidence sufficiently raises the issue to leave compulsion to the jury, it is necessary for the trial judge to be mindful of the onus of proof. The question is whether, on the version of events most favourable to the accused that is suggested by the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused was not acting under compulsion. It*

was not disputed that the onus on that question – an evidential burden – is on the accused. It is the accused who must tender evidence, or point to prosecution evidence, to that effect.

The exceptions contained in s 31(2) will be strictly construed: in *Pickering v The Queen* (2017) 260 CLR 151; [2017] HCA 17, the appellant allegedly stabbed the deceased and he was tried on a charge of murder; he was acquitted of that charge but convicted of manslaughter (available as an alternative verdict under the *Criminal Code*). The defence of compulsion was not raised by counsel at first instance and not put to the jury. The Court of Appeal held the circumstances identified in s 31(1)(c) were fairly raised but the application of the defence was precluded by s 31(2).

The High Court held that s 31(2) applies to an act only if the accused has been charged in relation to that act with an offence described in s 31(2) and seeks to invoke s 31(1) to deny criminal responsibility on that charge. Therefore, s 31(1) is not available to deny criminal responsibility on a charge of any of the offences described in s 31(2), but may be available in relation to any other offence that is charged or that is available as an alternative verdict. In this case, the protection afforded by s 31(1)(c) was available to the appellant in relation to the offence of manslaughter, which was not an offence described in s 31(2). The appellant's conviction was quashed and a new trial ordered.

Direction

In certain circumstances the law offers us some protection – a defence – if we are compelled to act to resist the violence of others. The Queensland Criminal Code calls this 'compulsion' and says, for present purposes, that a person is not criminally responsible for an act if that person does the act because it is reasonably necessary to resist a threat of actual and unlawful violence to themselves [or, to another person in their presence]**.**

[Where the defence applies to some charge or charges but not to all charges clearly identify which charge(s) its potential operation is limited to.]

[Discuss evidence material to compulsion.]

In this case, you must consider whether:

1. **actual violence was threatened to the defendant** [X] **or to another person in** [X]**'s presence; and**
2. **the violence threatened was unlawful; and**
3. **the act done by** [X] **was reasonably necessary in order to resist the threatened violence.**

There is no burden upon the defendant [X] **to prove that he/she did the act in those circumstances. The prosecution carries the burden of satisfying you, beyond reasonable doubt, that he/she did not. To do that the prosecution must have**

proved to you, beyond reasonable doubt, that at least one of those three factual circumstances was not present.

Example: act not reasonably necessary

The prosecution alleges that the act was not reasonably necessary because [X] **could have availed him/herself of an opportunity to do something else to render the threat ineffective. The mere existence of a potential opportunity to render the threat ineffective by some alternative action is not determinative of whether** [X]**'s act was reasonably necessary. Matters of degree are involved. You should consider how apparent and realistic the potential opportunity was in light of all of the circumstances in weighing up whether** [X]**'s act was reasonably necessary to resist the threatened violence. You should, for example, consider any risk to** [X] **which might have been involved if he/she had adopted the opportunity which the prosecution asserts as a reasonable alternative.** [Discuss material evidence.]

Because it is for the prosecution to exclude this defence you should ask yourself whether the prosecution has proved to you, beyond reasonable doubt, at least one of these three things:

1. **that** [X] **was not threatened with actual violence; or**
2. **that the violence threatened was lawful; or**
3. **that what** [X] **did was not reasonably necessary to resist the threatened violence.**

If your answer to any of these questions is 'yes' – that is, the prosecution has proved that matter to you beyond reasonable doubt – then the defence of compulsion will not apply to excuse the defendant's act.

If your answer to all three questions is 'no' – that is, the prosecution has not proved any of the three matters to you beyond reasonable doubt – then the defendant is not criminally responsible and you must acquit her/him [where the defence does not apply to all charges, specify in which charge(s) such a conclusion would prompt acquittal(s)]**.**

[In some cases the presence of the last exclusory circumstance in s 31(2) – a person has entered into an unlawful association or conspiracy and by doing so has rendered himself or herself liable to be threatened as alleged – may turn upon facts which are in issue. If so, it is a matter for the jury and it will be necessary to modify the standard

direction above to explain the defence does not apply to such a person and add another thing to the list of things the prosecution can prove to exclude the defence, namely:

4. That [X] **entered into an unlawful association or conspiracy and by doing so rendered him/herself liable to have such violence threatened to him/her.]**

Compulsion: s 31(1)(d)

Legislation

s 31 Justification and excuse – compulsion

(1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, that is to say—

(a) in execution of the law;

(b) in obedience to the order of a competent authority which he or she is bound by law to obey, unless the order is manifestly unlawful;

(c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person, or to another person in the person's presence;

(d) when—

(i) the person does or omits to do the act in order to save himself or herself or another person, or his or her property or the property of another person, from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat; and

(ii) the person doing the act or making the omission reasonably believes he or she or the other person is unable otherwise to escape the carrying out of the threat; and

(iii) doing the act or making the omission is reasonably proportionate to the harm or detriment threatened.

(2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself or herself liable to have such threats made to the person.

(3) Whether an order is or is not manifestly unlawful is a question of law.

Commentary

If there is some evidence capable of raising the issue, the legal or persuasive burden rests upon the prosecution to exclude the proposition that the accused was acting upon compulsion beyond reasonable doubt – i.e., to exclude any reasonable possibility that the proposition is true.

In *Taiapa v The Queen* (2009) 240 CLR 95 the High Court said at [53]: 'In deciding whether the evidence sufficiently raises the issue to leave compulsion to the jury, it is necessary for the trial judge to be mindful of the onus of proof. The question is whether, on the version of events most favourable to the accused that is suggested by the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused was not acting under compulsion. It was not disputed that the onus on that question – an evidential burden – is on

the accused. It is the accused who must tender evidence, or point to prosecution evidence, to that effect.'

The exceptions contained in s 31(2) will be strictly construed: in *Pickering v The* (2017) 260 CLR 151; [2017] HCA 17, the appellant allegedly stabbed the deceased and he was tried on a charge of murder; he was acquitted of that charge but convicted of manslaughter (available as an alternative verdict under the *Criminal Code*). The defence of compulsion was not raised by counsel at first instance and not put to the jury. The Court of Appeal held the circumstances identified in s 31(1)(c) were fairly raised but the application of the defence was precluded by s 31(2).

The High Court held that s 31(2) applies to an act only if the accused has been charged in relation to that act with an offence described in s 31(2) and seeks to invoke s 31(1) to deny criminal responsibility on that charge. Therefore, s 31(1) is not available to deny criminal responsibility on a charge of any of the offences described in s 31(2), but may be available in relation to any other offence that is charged or that is available as an alternative verdict. In this case, the protection afforded by s 31(1)(c) was available to the appellant in relation to the offence of manslaughter, which was not an offence described in s 31(2). The appellant's conviction was quashed and a new trial ordered.

Direction

In certain circumstances the law offers us protection – a defence – if we are compelled to act or to refrain from acting to avoid threatened harm.

The Queensland Criminal Code calls this 'compulsion' and says, for present purposes, that a person is not criminally responsible for an act (or omitting to do an act) **if that person does** (or omits to do) **the act in order to save themselves or their property** (or another person, or their property) **from serious harm or detriment threatened by some person in a position to carry out the threat; and, when the person doing** (or omitting to do) **the act reasonably believes that they** (or the other person) **are otherwise unable to escape the carrying out of the threat; and, when the doing of the act** (or making of the omission) **is reasonably proportionate to the threatened harm or detriment.**

[Where the defence applies to some charge or charges but not to all charges clearly identify which charge(s) its potential operation is limited to.]

[Discuss evidence material to compulsion.]

In this case, you must consider whether:

1. **a threat was made of serious harm or detriment to the person or property of** [X] **or another person ("detriment" is a common English word meaning injury or damage); and**

2. **the person making the threat was in a position to carry it out; and**

3. **the defendant** [X] **reasonably believed he or she or the other person was unable to escape the carrying out of the threat other than by the act (or omission) alleged; and**

4. **the doing of the act (or making of the omission) was reasonably proportionate to the harm or detriment threatened.**

There is no burden upon the defendant [X] **to prove that he/she did** (or omitted to do) **the act in those circumstances. The prosecution carries the burden of satisfying you, beyond reasonable doubt, that he/she did not.**

To do that the prosecution must have proved to you, beyond reasonable doubt, that at least one of those four factual circumstances was not present.

Example: unable to escape?

The prosecution alleges that [X] **did not reasonably believe he/she could not escape. That question is to be measured by reference to** [X]**'s own state of mind, The question you must ask yourself is: *Did [X] reasonably believe that he/she was otherwise unable to escape the carrying out of that threat?***

Example: reasonable proportionality

In deciding whether the doing of the act by [X] **was what the law calls 'reasonably proportionate' the test is an objective one. You can decide the matter by asking yourself this question: *Did [X]'s act bear a reasonable relationship to the degree of threat? Or, has the prosecution proved beyond reasonable doubt that the act exceeded what was a reasonable response to the threat?***

I remind you, again, that there is no burden upon the defendant to prove that he/she did the act (or made the omission) **in circumstances that will attract this defence.** (The fact that the defendant has called evidence about the act, and those circumstances, does not change that. Nor does the fact [X]'s lawyer has raised the matter in submissions to you.)

Because it is for the prosecution to exclude this defence you should ask yourself whether the prosecution has proved to you, beyond reasonable doubt, any one of these four things:

1. **that there was no threat of serious harm or detriment to the person or property of** [X] **or another; or**

2. **that the person making the threat was not in a position to carry it out; or**

3. **that** [X] **did not reasonably believe he/she was otherwise unable to escape the carrying out of the threat; or**

4. **that the doing of the act** (or making of the omission) **by** [X] **was not reasonably proportionate to the harm or detriment threatened.**

If your answer to any of these questions is 'yes' – that is, that the prosecution has proved that matter to you beyond reasonable doubt – then the defence of compulsion will not apply to excuse the defendant's act (or omission)**.**

If your answer to all the questions is 'no' – that is, that the prosecution has not proved any of the four matters to you beyond reasonable doubt – then the defendant is not criminally responsible and you must acquit her/him (where the defence does not apply to all charges, specify in which charge(s) such a conclusion would prompt acquittal(s))**.**

[In some cases the presence of the last exclusory circumstance in s 31(2) – a person has entered into an unlawful association or conspiracy and by doing so has rendered himself or herself liable to be threatened as alleged – may turn upon facts which are in issue. If so, it is a matter for the jury and it will be necessary to modify the standard direction above to explain the defence does not apply to such a person and add another thing to the list of things the prosecution can prove to exclude the defence, namely:

5. **That** [X] **entered into an unlawful association or conspiracy and by doing so rendered him/herself liable to have such a threat made to him/her.**]

Section 267 – Defence of a Dwelling House

The law provides certain protection for a householder where there is an intrusion onto his premises by someone he believes is intending to commit a crime. A person in peaceable possession of a dwelling may use force to prevent or repel another person from unlawfully entering or remaining in the dwelling if the person using the force believes on reasonable grounds, firstly, that the other person is attempting to enter or to remain in the dwelling with intent to commit an indictable offence in it and secondly, that it is necessary to use that force.[1] Now I will refer to this as a defence, but it is important that you understand this: it is not something that the defendant must prove, but something that the prosecution must rule out beyond reasonable doubt.

The first question that arises is whether the defendant was in peaceable possession of the dwelling.[2] A dwelling is a building or part of it kept by the owner or occupier for his residence and that of his family or servants.[3] On the evidence the defendant was living in these premises which he rented as his place of residence, and there was no dispute about his entitlement to be there.

Was the force used for the purpose of repelling the intruder (X) from unlawfully entering [or remaining]? If the prosecution has satisfied you beyond reasonable doubt that (X) was lawfully on the premises,[4] or that the force was used not to repel him but as a form of vengeance [as the case may be**] then this particular defence is not open.**

The next way the prosecution seeks to exclude the defence is this: It contends that the defendant could not have believed on reasonable grounds that (X) was attempting to enter or to remain in the dwelling with intent to commit an indictable offence in it. In other words, the question here is whether the defendant genuinely believed (X) had the intention of committing an indictable offence – that is to say

---

1 See *R v Cuskelly* [2009] QCA 375 for a discussion of the defence and comparison with the requirements of self-defence in ss 271 and 272.

2 For a useful examination of the authorities on "peaceable possession" see *Shaw v Garbutt* (1996) 7 BPR 97,600; [1997] NSW Conv R 55,277.

3 Refer to definition of "dwelling" in s 1 *Code* as applicable. Issues could conceivably arise, for example as to whether the part of the premises in which the offence occurred was connected to the main dwelling. Reference to a highset "dwelling", at least as a general proposition, includes reference to the whole of the relevant structure from the top of the roof to the ground: *R v Bartram* [2013] QCA 361.

4 The question of mistake of fact might arise here.

one of sufficient seriousness to require it to be dealt with by a higher court – in this case it being suggested that he believed (X) meant to [steal property].

If you are satisfied beyond reasonable doubt that the defendant did not have that belief, or did not hold it on reasonable grounds, the prosecution has properly excluded the defence and you need not consider it further. Otherwise you go on to consider this further point.

The prosecution contends that the defendant did not believe on reasonable grounds that the force he used was necessary to prevent (X) from entering [or remaining].

You should remember that a person defending himself or his home cannot always weigh precisely the exact action which he should take in order to avoid the threat which he reasonably believes that he faces at the time. You should approach your considerations in a practical way. Take account of the situation in which the defendant found himself. Bear in mind that unlike those of us in this courtroom, he would appear to have had little, if any, opportunity for calm deliberation or detached reflection. It is relevant, of course, to look at the degree of force he actually used in considering whether he could have believed on reasonable grounds it was necessary, but it is only a part of the whole picture. You must consider the whole of the circumstances.

If you conclude in the end that he did not believe that the force he used was necessary, or if he did have that belief, that it was not held on reasonable grounds, that is the end of this particular question and this particular defence could not apply.

If the prosecution cannot, to your satisfaction beyond reasonable doubt, exclude the possibility that [eg. the wounding] occurred in the use of force which the defendant believed on reasonable grounds was necessary to prevent unlawful entry or remaining in the dwelling as I have outlined it to you, that is the end of the case. The defendant would not be regarded as criminally responsible for the result and you should find him not guilty.

Section 267 – Defence of Moveable Property

The law provides certain protection for a householder where there is an intrusion onto his premises by someone he believes is intending to commit a crime.

A person in peaceable possession of such property under a claim of right may use such force as is reasonably necessary in order to defend his possession of the property, even against a person who is entitled by law to the possession of the property provided that he does not do grievous bodily harm to the other person. Whether or not a person is in peaceable possession of property is a question of fact for you to decide.

The law recognises that 'possession' is a very wide concept. It includes having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question (refer to the evidence relevant to this question).

"Property" includes everything that is capable of being the subject of ownership[1] [2].

A (refer to property) is movable property.

A "claim of right" is a right to the property (refer to the evidence relevant to this question)[3].

This section does not authorise the doing of grievous bodily harm.[4] This section does not permit a person to use unreasonable force.

You should remember that a person defending his property cannot always weigh precisely the exact action which he should take in order to avoid the threat to his property. You should take account of the situation in which the defendant found himself. You must consider the whole of the circumstances.

---

1 See s1, for the definition of property.

2 For a useful examination of the authorities on 'peaceable possession see *Shaw v Garbutt* (1996) 7 BPR 97,600; (1997) NSW Conv R 55-801.

3 See s 22 for the general effect of a claim of right. See also *R v Waine* [2006] 1 Qd R 458.

4 See s 1 for definition of grievous bodily harm.

It is not for the defendant to prove that he used reasonable force. It is for the prosecution to satisfy you beyond reasonable doubt that the force used was more than reasonably necessary[5].

If the prosecution cannot satisfy you of that beyond reasonable doubt, the defendant would not be regarded as criminally responsible for the result and you should find him not guilty.

If the prosecution does satisfy beyond reasonable doubt that the force used was not reasonable, this particular defence is not open.

[5] See the directions on Self Defence in respect of the term "reasonably necessary".

Domestic Discipline – Section 280

The prosecution must satisfy you beyond reasonable doubt that any assault in this case was unlawful, which means not authorised, justified or excused by the law. The law permits a parent [or a person in the place of a parent, school teacher or master[1]**] to use by way of correction, discipline, management or control towards a child under that person's care, such force as is reasonable under the circumstances.**

It is accepted here that [the complainant**] was in her father's care at the time. It is for the prosecution to satisfy you beyond reasonable doubt either -**

1. **that the defendant's actions in [**describe actions**] were not by way of correction, discipline, management or control of his child; or**
2. **that the force he used was not reasonable.**

It is for you to decide what is reasonable on an objective view of the circumstances as you find them to be. It is important that you understand that the defendant does not have to prove that he was disciplining [or controlling etc**] his child or that the force used was reasonable; it is for the prosecution to prove either that he was not disciplining her, or that the force used was not reasonable under the circumstances.**

If the prosecution has satisfied you beyond a reasonable doubt, either that the defendant was not disciplining the child or, alternatively, that the force he used was not reasonable under the circumstances, it has established that the defendant's actions were not lawful on this basis. If it cannot do so, the defendant is entitled to be acquitted.[2]

---

1 *Horan v Ferguson* [1995] 2 Qd R 490 contains dicta (at 504) that " school…master" should be given "a broad meaning to cover any person employed by the school authorities to maintain the school as an educational community."

2 This direction is largely based on that given in *R v DBG* (2013) 237 A Crim R 581, which was uncontentious on appeal.

Provocation ss 268, 269

In order to convict the defendant [of xx**] you must be satisfied that the assault**[1] **was unlawful. An assault is unlawful if it is not authorised, justified or excused by law.**

An assault is excused by law if, at the time of the assault, the defendant was acting under what our law defines as "provocation". Provocation, as defined in our law, is a defence to an assault.

(Judges may wish to provide jurors with a copy of the relevant parts of section 268 and 269.)

Provocation is defined in our *Criminal Code* as

> **"…any wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered …"**[2]

Our law provides that:

> **"When such an act or insult is done or offered by one person to another, the former is said to give the latter provocation for an assault."**[3]

The defence of provocation operates in this way:

> **"A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if –**
>
> - **the person is in fact deprived by the provocation of the power of self-control; and**
>
> - **acts upon it on the sudden and before there is time for the person's passion to cool, and**

---

1 Provocation is only available in relation to "an offence of which an assault is an element" (s 268(1) *Criminal Code*). The section does not apply to a charge of unlawfully doing grievous bodily harm, *Kaporonovski v The Queen* (1975) 133 CLR 209, or an unlawful wounding.

2 See s 268(1) *Criminal Code*.

3 See s 268(2) *Criminal Code*.

- **if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely to cause death or grievous bodily harm."**

It is not for the defendant to establish the defence by proving that he or she was provoked to assault the complainant.

It is for the prosecution to exclude the defence by satisfying you, beyond a reasonable doubt, that it does not apply.

You need to consider –

- **whether the complainant has offered the defendant provocation for the assault;**
- **whether the defendant was deprived by the provocation of the power of self control;**
- **whether the defendant acted on the sudden and before there was time for their passion to cool; and**
- **whether their response to the provocation was proportionate.**

Whether the complainant has offered the defendant *provocation* for the assault

The wrongful act or insult of the complainant which the defendant wishes to rely upon as provocation is …

[Here identify the matters in evidence potentially constituting provocation.][4]

For the wrongful act or insult[5] to amount to provocation, it must be of such a nature as to be likely, if done to an ordinary person, to deprive the ordinary person of the power of self-control.

In other words, the wrongful act or insult must have been serious enough to cause an ordinary person to lose self-control.[6]

---

4 Whether provocation arises for consideration is a question for the judge. The decision must be made by reference to the version of events most favourable to the defendant: *Stingel v The Queen* (1990) 171 CLR 312 ("*Stingel*") at 318. A judge should leave the issue to the jury if in the least doubt whether the evidence is sufficient: *Stingel* at 334. It is immaterial that the defendant does not raise provocation in any statement by him in evidence, or in a record of interview or elsewhere, or that counsel may or may not raise it: *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161-162, 169.

5 As to whether the word 'wrongful' in the phrase 'any wrongful act or insult' should be read as qualifying the word 'insult', see *Stingel* where the court ruled in relation to s 160(2) of the Tasmanian Criminal Code 1924 that word 'wrongful' should not be read as qualifying the word 'insult'.

6 It is a two stage test for the jury to determine, firstly, if the particular act or insult was such as to deprive the ordinary person of the power of self-control, then to decide from the view point of the particular defendant if the defendant was in fact deprived of the power of self-control: *Stingel*.

An ordinary person in this context is a person with the ordinary human weaknesses and emotions common to all members of the community and with the same level of self-control as an ordinary person of the defendant's age.[7]

It means an ordinary person, in the position of the defendant, who has been provoked to the same degree of severity and for the same reason as the defendant.

So, the first question for you is whether the wrongful act or insult would have deprived an ordinary person in the defendant's position of the power of self-control?

Whether the defendant was actually provoked.

The next question for you is whether the defendant <u>was in fact deprived</u> of the power of self-control by the wrongful act or insult.

You must consider the gravity of the provocation to the particular defendant. His/her race, colour, habits and relationship to the complainant may all be part of this assessment.[8]

Conduct which might not be insulting to one person may be extremely insulting to another because of that person's age, race, ethnic or cultural background, physical features, personal attributes, personal relationships or past history. [Refer to special characteristics of the defendant raised on the evidence and relevant to the assessment of the wrongful act or insult.]

In considering whether the defendant was in fact deprived of the power of self-control by the wrongful act or insult, you must view the conduct or the words in question as a whole in light of any history or dispute between the defendant and the complainant. Particular acts or words which, considered separately, could not amount to provocation, may, in combination or cumulatively, be enough to cause the defendant to lose self-control in fact.

Also, the wrongful act or insult must have <u>in fact induced the assault</u>. A deliberate act of vengeance, hatred or revenge may not have in fact been induced by the wrongful act or insult despite the fact that such an act or insult was offered.

---

7 See *Stingel* at 326.

8 See *Stingel* at 326.

Acting while provoked

Provocation only applies if the defendant has, in response to the provocation, acted on the sudden and before there is time for his/her passion to cool – before there is time for him/her to think about his/her response.

Disproportionate force

The force used by the defendant must not be disproportionate to the provocation.

The question of whether force was disproportionate depends on all the circumstances of the case, including the physical attributes of the person offering the provocation, the nature of the attack, whether a weapon was used, what type of weapon and whether the person was alone or in company.

To recap:

The defendant is not criminally responsible for the assault committed upon the complainant if the complainant gave the defendant <u>provocation</u> for the assault and –

- **the defendant was in fact deprived by the provocation of the power of self-control; and**
- **acted upon it on the sudden and before there was time for his/her passion to cool; and**
- **if the force used by the defendant was not disproportionate to the provocation [**and is not intended, or is not such as is likely to cause death or grievous bodily harm.**]**[9] (An example may be useful to explain the concept of force being disproportionate, e.g. a push or punch as provocation where a person responds by shooting the other)**.**

The focus is on serious provocation, which would cause a sudden and proportionate response to it.

As I have said, there is no burden on the defendant to satisfy you that he was provoked. The onus is on the prosecution to satisfy you beyond reasonable doubt that provocation does not apply. .

[9] Section 269(1) *Criminal Code*. In most, or in many cases, there will be no evidentiary basis for considering whether death or grievous bodily harm might have eventuated.

Has provocation been excluded by the prosecution?

Provocation will be excluded by the prosecution, and the assault will be unlawful, if the prosecution satisfies you beyond reasonable doubt of any of the following:

1. **that the accused was <u>not</u> the subject of wrongful act or insult by the complainant; or**

2. **that there was <u>no provocation</u>, bearing in mind how an ordinary person would be likely to react to the wrongful act or insult; or**

3. **that the defendant was in fact <u>not deprived</u> by the provocation of the power of self-control; or**

4. **the defendant <u>did not act upon the sudden</u> and before there was time for his passion to cool; or**

5. **the force used by the defendant was <u>out of proportion</u> to the provocation; or**

6. **[**Where appropriate**] that the force used was intended and was likely to cause death or grievous bodily harm.**

Prevention of Repetition of Insult – s 270

Our law says:

> **"It is lawful for any person to use such force as is reasonably necessary to prevent the repetition of an act or insult of such a nature as to be provocation to the person for an assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm."**

Having been raised on the evidence the onus is on the prosecution to prove to you that the defence does not apply.

The first issue you need to consider is whether there has been an act or insult by the complainant towards the accused of such a nature as to be provocation to the accused for an assault.

Provocation here means the same as in relation to the actual defence of provocation.

> *"Provocation means and includes any wrongful act or insult of such a nature as to be likely when done to an ordinary person, to deprive the person of the power of self control, and to induce the person to assault the person by whom the act or insult is done or offered."*[1]

Here the defence say the wrongful act or insult is the action of ( ) by the complainant. The first issue you must determine is whether that action, if you are satisfied that it occurred, was of such a nature as to be provocation to the defendant for an assault.

If you are of the view that it was not of such a nature – in other words that the prosecution have satisfied you beyond a reasonable doubt that the act or insult was not of such a nature as to amount to provocation in the way that I have explained, then this defence does not arise.

If however, you are satisfied that there was a wrongful act or insult sufficient to amount to provocation or you are left with a reasonable doubt about the matter, you must go on to consider some other matters to determine whether the defendant's action is excused by this defence.

---

[1] See Provocation – Benchbook - 91

The accused must have used such force as was reasonably necessary to prevent a repetition of the act or insult. That is an objective test. You must look at what force was reasonably necessary in the circumstances. Issues of proportionality are important. Was the act of ( ) reasonably necessary to prevent a repetition of the act or insult?

The force must also have been used to prevent the repetition of the act or insult. To negative the defence, the prosecution must prove beyond reasonable doubt that, based on an objective analysis of the circumstances revealed by the evidence, there was no reasonable possibility of the provocative act or insult being repeated (this does not require evidence that the person threatened to repeat the insult or act)[2]

The force used must not have been intended or not such that it was likely to cause death or grievous bodily harm.

Grievous bodily harm means any bodily injury of such a nature that if left untreated would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health. The fact that death or grievous bodily harm did result is not determinative of this issue. You must examine the evidence as to the force used by the accused in the circumstances and determine whether or not it was intended or likely to cause death or grievous bodily harm.

I remind you again that it is for the prosecution to prove to you beyond reasonable doubt that the defence does not apply.

It is sufficient for the prosecution to succeed on the issue of "prevention of repetition of insult" if it proves beyond reasonable doubt one of the matters I've just referred to.

Therefore:

If you are satisfied beyond reasonable doubt that the act or insult done or offered by the complainant was not of such a nature as to be provocation to the accused for an assault then the assault by the accused would be unlawful.

---

[2] *R v Major* [2015] 2 Qd R 307. That case also confirmed that s270 may be invoked in a charge of manslaughter. See also *R v Sleep* [1966] Qd R 47 at 54.

Or

If you are satisfied beyond reasonable doubt that the force used was not such as was reasonably necessary in the circumstances then the assault would be unlawful.

Or

If you are satisfied beyond reasonable doubt that the force used was not used to prevent the repetition of the act or insult then the assault would be unlawful.

Or

If you are satisfied beyond reasonable doubt that the force used was intended or was such as was likely to cause death or grievous bodily harm then the assault would be unlawful.

Criminal Negligence s 289 (In Charge of Dangerous Things)

It is the duty of every person who has [in his charge or] under his control[1] **anything … of such a nature that, in the absence of care or precaution in its use or management, the life, safety or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid that danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.**

To establish that the defendant is guilty of [manslaughter or other offence] through criminal negligence, the prosecution must therefore prove, beyond reasonable doubt, that the defendant

1. **owed the prescribed duty of care;**
2. **omitted to perform that duty; and**
3. **thereby caused the [death or other event].**

These three matters require elaboration.

First, was the duty owed by the defendant?

You may be satisfied beyond reasonable doubt that the defendant had such a thing, namely (insert description**) [in his charge or] under his control when (**viz insert material time**), and that it was of such a nature that,**[2] **in the absence of care or precaution in its use or management, the life, safety or health of a person may be endangered. If so, turn to consider the second issue: whether the defendant is shown beyond reasonable doubt to have omitted to perform his duty to use reasonable care to avoid danger to life, safety or health. And in considering whether he omitted to perform such a duty when, if you find it to be so, he (describe material act or omission), have regard to such things as the nature and extent of the risk to life, safety or health of which the defendant was aware or should reasonably have foreseen.**[3]

---

1 *R v Stott & Van Embden* [2002] 2 Qd R 313; [2001] QCA 313 at [20], [22].

2 As to what constitutes a dangerous thing for this purpose see *Stott & Van Embden* at [23].

3 In cases where serious harm is alleged; it is not necessary that the precise result be foreseen or foreseeable but the defendant could not be found criminally negligent unless at least some serious harm was reasonably foreseeable by him: *R v Hodgetts and Jackson* [1990] 1 Qd R 456 at 463, 464.

You may have heard of people being compensated for personal injury, property damage or other loss by reason of another's negligence. In such civil cases, negligence is a basis for monetary compensation. In civil cases, to establish negligence the claimant must prove that it is more probable than not that loss was sustained through a breach of a duty of care owed to the claimant. In this criminal case, you cannot convict unless you are satisfied that the defendant breached the duty mentioned. In this, there is a similarity to civil negligence. But that is where the similarity ends.

To establish criminal negligence requires much more than is needed to establish a right to compensation in a civil claim.

First, the prosecution must prove its case beyond reasonable doubt.

Secondly, the lack of care which suffices to establish liability in a civil case is not enough here. A very high degree of negligence is required before a defendant may be found guilty of criminal negligence. To convict, you must be satisfied beyond reasonable doubt that his conduct in (describe act or omission**), if you find that act or omission proved, so far departed from the standard of care incumbent upon him to use reasonable care to avoid a danger to life, health and safety, as to amount to conduct deserving of punishment.**[4]

Since we are in a criminal court, we are concerned with whether there was a departure from those standards which is serious enough for the State to intervene and punish the person on the basis that he behaved with so little regard for the safety of others that he deserves to be punished as a criminal, not merely made to pay compensation.

The notion of criminal negligence involves a large or serious departure from reasonable standards of conduct, by which is meant the standard of conduct that a reasonable member of the community would use in the same circumstances. It must go substantially beyond a case where payment of compensation is adequate punishment. It must be in a category of behavior where the only adequate punishment is for his lack of care to be branded as criminal and for him to be punished by the State for it.

---

[4] The term "reckless" ought not to be used when giving a direction in respect of criminal negligence. See *R v BBD* [2007] 1 Qd R 478.

Before you can convict on the basis of criminal negligence, you must be satisfied that there has been a very serious departure from reasonable standards of care. Because it involves an assessment of what standard of care a reasonable member of the community would use in similar circumstances and the seriousness of the degree of departure from it by the accused, it is for you, as representatives of the community in this trial, to make up your minds whether you are satisfied beyond reasonable doubt that his conduct was criminally negligent or whether it falls short of the degree of deviation from proper standards necessary to prove criminal negligence.

If you are satisfied beyond reasonable doubt that the defendant was criminally negligent, next consider whether you are satisfied beyond reasonable doubt, that criminal negligence caused the (death or other event**).**

To conclude that the defendant's failure to perform the duties incumbent upon him resulted in the (death or other event**), it is not essential that you find that his failure was the sole cause. You are entitled to conclude that the (**death or other event**) resulted from an omission to perform the duty if that omission contributed substantially or significantly to the (**death or other event**).**[5] **Whether an act or omission that you regard as a breach of the prescribed duty resulted in the (**death or other event**) is a matter of causation. Causation is not a philosophical or scientific question. Whether such an act or omission resulted in the (**death or other event**) is determined by applying your commonsense to the facts as you find them, keenly appreciating, however, that the purpose of your inquiry is to attribute legal responsibility in a criminal matter.**[6]

---

5 *Royall v The Queen* (1991) 172 CLR 378 at 387; cf *R v Sherrington & Kuchler* [2001] QCA 105 at [4].

6 *Sherrington & Kuchler* at [4].

Self-Defence: Overview and s 271(1)

General Commentary on Self-Defence

In *Palmer v The Queen* [1971] AC 814, the Privy Council stated:[1]

> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances."

The Criminal Code allows for some use of force in self-defence, in defence of other persons and in defence of real and moveable property.

Speaking generally, the self-defence (or similar) provisions of the Code (sections 271, 272 and sections 270, 273, 273, 274, 275, 276, 277 and 278) each contain, as a key element, a requirement of reasonable necessity, with additional elements limiting the use of permissible force in various circumstances. [See also sections 266 and section 31(1)(c).]

There has been criticism of the defensive force provisions of the Code for their complexity and obscurity – see for example *R v Gray* (1998) 98 A Crim R 589 and *R v Messent* [2011] QCA 125.

Insofar as the defence of self-defence to assaults are concerned, the Code distinguishes between self-defence to provoked and unprovoked assaults.

The Code also distinguishes between self-defence to assaults which cause a reasonable apprehension of death or grievous bodily harm and those which do not cause such a reasonable apprehension.

It may be noted that section 271 incorporates the phrase "it is lawful for", yet section 272 uses the phrase "a person is not criminally responsible for". It has been suggested that the phrase "it is lawful" reflects the idea of a "strong" defence, in which the use of force is justified, but the use of the phrase "is not criminally responsible for" reflects the "weaker" idea that the conduct is excused: see *R v Prow* (1989) 42 A Crim R 343. A defendant who initially provokes an assault may be regarded as partially responsible for any retaliation to it, and of deserving no more than an "excuse" for their use of defensive force.

In relation to the defence of self-defence to an *unprovoked* assault, section 271(1) states:

> [I]t is lawful for [the defendant] to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

The test as to whether the force used was reasonably necessary or not is objective.

Force which may cause death or grievous bodily harm (sometimes called "lethal force") may be lawfully used in self-defence where the assault upon the defendant is of such a nature as to cause a reasonable apprehension of death or grievous bodily harm: see section 271(2).

Thus, if an assault upon a defendant is *unprovoked*, a defendant may use such force as is reasonably necessary to make an effectual defence against the assault – which can include

[1] [1971] AC 814 at 831.

lethal force *if* the assault is such as to cause reasonable apprehension of death or grievous bodily harm.

If the defendant was the original aggressor or the person who provoked the assault upon themselves, the defendant can lawfully use such force as is reasonably necessary to preserve himself or herself from death or grievous bodily harm only *if* the assault upon them caused a reasonable apprehension of death or grievous bodily harm *and* the defendant *believed on reasonable grounds* that it was necessary to so act.

However, this is not the case where the defendant began the assault on the other person with an intention to kill or do grievous bodily harm or where the defendant endeavoured to kill or do grievous bodily harm to the other person before the necessity for self-defence arose: see section 272.

The two limbs of s 271 are more commonly raised than any other section.

Preliminary question - which limb or limbs of the defences **in sections 271 or 272** should be considered by the jury?

In *R v Bojovic* [2000] 2 Qd R 183, it was said:

> Sometimes both limbs of s. 271 will be appropriately left to the jury. But more often than not the consequence of summing-up on both limbs may be confusion which detracts from proper consideration of the true defence. Speaking very generally, in homicide cases the first limb of s. 271 seems best suited for cases where the deceased's initial violence was not life-threatening and where the reaction of the [defendant] has not been particularly gross, but has resulted in a death that was not intended or likely; in other words cases where it can be argued that the unlikely happened when death resulted. The second limb seems best suited for those cases where serious bodily harm or life-threatening violence has been faced by the [defendant], in which case the level of his or her response is not subject to the same strictures as are necessary under the first limb. The necessity for directions under both limbs may arise in cases where the circumstances are arguably but not clearly such as to cause a reasonable apprehension of grievous bodily harm on the part of the [defendant]. In cases where the [deceased's] initial violence is very serious, most counsel will prefer to rely upon s. 271(2) alone… It is only cases in the grey area where it is arguable but not sufficiently clear that the requisite level of violence was used by the deceased person that directions under both subsections will be desirable.
>
> The above general statements are not intended to paraphrase the meaning of the subsections. They are given with a view to identifying the broad streams of cases under which one or other or both of these defences may be appropriate.[2]

Thus, the evidence in a particular case, for example in a one punch case, may require directions in relation to both s 271(1) and s 271(2).[3]

The following observations were made by McPherson JA in *R v Young* (2004) 142 A Crim R 571, [2004] QCA 84 about section 271:

> [6] Both subsections of s 271 are predicated upon the happening of an unlawful assault, and both make it "lawful" (and as such not criminal) to use force as a defence against the assailant, although the extent of the force that is authorised under s 271(1) differs from that permitted under s 271(2). In the case of the former,

---

2 *R v Bojovic* [2000] 2 Qd R 183, 186.

3 *R v Beetham* [2014] QCA 131.

> it is limited to such force "as is reasonably necessary to make effectual defence against the assault", and the force used must not be intended or likely to cause death or bodily harm. The standard adopted is objective and it does not depend on the impression formed by the person assaulted about the degree of force needed to ward off the assailant. If an honest and reasonable mistake is made about it, the exculpatory provisions of s 24 of the Code are doubtless available in appropriate circumstances.
>
> [7] Section 271(2), on the other hand, is concerned with a different state of affairs. It authorises the use of more extreme force by way of defence extending even to the infliction of death or grievous bodily harm on the assailant. It is available where the person using such force cannot otherwise save himself or herself from death or grievous bodily harm, or believes that he or she is unable to do so except by acting in that way. The belief must be based on reasonable grounds; but, subject to that requirement, it is the defender's belief that is the definitive circumstance...

Where there is a conflict in the evidence about

- who was the aggressor – that is, who was responsible for the initial assault, or
- whether there was provocation by the defendant for the assault upon him/her,

it may be necessary to give the jury an alternative direction under section 272.

Generally speaking a defence under section 272 helps a defendant who has started a fight with another person, who then retaliates with such violence as to cause in the defendant a reasonable apprehension of death or grievous bodily harm.

In *R v Lacey; ex parte A-G* (Qld) (2009) 197 A Crim R 399, [2009] QCA 274 the Court of Appeal held that sections 271, 272 and 273 were intended to define comprehensively the circumstances in which the defence can operate. Where the specific provisions of the Code concerning self-defence arise for the jury's consideration, there is no scope, on the same facts, for the operation of s 25 (extraordinary emergency).

Discussion with counsel and common sense will often narrow the defence down to sensible limits and avoid the highly confusing exercise of multiple alternative directions under sections 271(1), 271(2) and 272. But there will be rare cases where all three will be necessary.

Self-defence is recognised as a difficult area in which to direct a jury – which is sometimes further complicated by reliance upon mistake of fact (section 24).

A judge should endeavour to lay out a logical and coherent pathway for the jury e.g. by written aids, flow charts etc.[4]

---

[4] *R v Messent* [2011] QCA 125.

Section 271(1) – Self-defence against unprovoked assault

Sample Directions

I must now give you instructions on the law about self-defence. The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive, especially when their safety is threatened by someone else. Sometimes an attacker may come off second best but it does not follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself.

You will appreciate from what I have said earlier about the prosecution bearing the onus of proof that the defendant does not have to satisfy you that this defence applies. The prosecution must exclude or negate it, beyond reasonable doubt, to satisfy you that the defendant acted unlawfully.

And if the prosecution cannot exclude, beyond reasonable doubt, the possibility that [e.g. the wounding or injury] occurred in self-defence, as the law defines it, then that is the end of the case. The defendant's use of force would be lawful and you must find him not guilty.[5]

You should appreciate that the law of self-defence is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the common sense and community perceptions that juries bring into court.

[Read the sub-section and consider providing a copy of it to the jury:

271(1): **When** a person has been **unlawfully assaulted**

and has **not provoked** the assault,

it is lawful for the person to use such force to the assailant as is **reasonably necessary** to make effectual defence against the assault,

if the force used is **not intended, and is not such as is likely**, to cause death or grievous bodily harm.].

---

[5] The following cases may be of assistance: *R v Bojovic* [2000] 2 Qd R 183; *R v Gray* (1998) 98 A Crim R 589; *R v Prow* [1990] 1 Qd R 64; *R v Muratovic* [1967] Qd R 15; *Marwey v The Queen* (1977) 138 CLR 630; *Zecevic v DPP (Vic)* (1987) 162 CLR 645 (re requirements in a common law summing-up).

You will see from the section that there are four matters you must consider in respect of this defence.

They are –

1. **whether there has been an unlawful assault on the defendant;**
2. **whether the defendant has provoked that assault;**
3. **whether the force used by the defendant upon the complainant was reasonably necessary to make effectual defence against the assault; and**
4. **whether the force used was intended, or such as was likely, to cause death or grievous bodily harm.**

The burden remains on the prosecution at all times to prove that the defendant was *not* acting in self-defence (that is, that the defendant was acting unlawfully), and the prosecution must do so beyond reasonable doubt before you could find the defendant guilty.

Taking those matters one by one:

<u>An unlawful assault?</u>

The first matter is whether the defendant was unlawfully assaulted by [the complainant/deceased]. If you conclude that [the complainant/deceased] did not first unlawfully assault the defendant, this defence is not open.

[If necessary, define assault: see section 245. Note that the definition of assault includes a situation in which violence is *threatened* so long as the assailant has an actual or apparent present ability to implement the theat.]

[If appropriate, direct the jury**]: It is common ground [**or the evidence suggests**] that the [complainant/deceased] unlawfully assaulted the defendant, and that on that basis the first part of the section is satisfied in the defendant's favour.**

<u>A provoked assault?</u>

The second matter that arises is, if there was such an assault, whether the defendant provoked it.

"Provocation" means any wrongful act or insult, of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.[6]

[It has been suggested[7] that a jury should treat an assault as *unprovoked* unless they decide beyond reasonable doubt that the assault was provoked by the defendant. If there is an issue on this first point, deal with the competing contentions and then proceed.]

If you conclude that the defendant provoked the assault, then this particular defence is not open to him/her. On this basis the prosecution has properly excluded the defence and you need not consider it further.[8]

If you do not conclude that the defendant provoked the assault – that is, you are satisfied that the assault upon the defendant was unprovoked, then you will go on to consider these further matters.

Reasonably necessary force?

The third matter is whether the force used by the defendant was reasonably necessary to make effectual defence against that assault.

Whether the degree of force used was reasonably necessary to make effectual defence against an assault is a matter for your objective consideration and does not depend on the defendant's state of mind about what he/she thought was reasonably necessary.

In considering whether the force used by the defendant was reasonably necessary to make effectual defence, bear in mind that a person defending himself/herself cannot be expected to weigh precisely the exact amount of defensive action that may be necessary. Instinctive reactions and quick judgments may be essential. You should not judge the actions of the defendant as if he/she had the benefit of safety and leisurely consideration.

---

6 In *R v Dean* [2009] QCA 309 the Court of Appeal held that a trial judge should have directed the jury as to the meaning of provoked as outlined in *R v Prow* [1990] 1 Qd R 64.

7 *R v Kerr* [1976] 1 NZLR 335 at 342 citing the unreported case of *R v Sampson* (Wellington, 25 July 1972, 61/72).

8 On this basis, then s 271(2) is not open either. But it might be necessary in an appropriate case to give directions under s 272.

[Here an example might help e.g. if the assault is a push or a punch, a person may not be justified in shooting the other person who pushed or punched him**.]**

Whether the force used was intended to, or was such as was likely to, caused death or grievous bodily harm?

The fourth matter to consider is whether the force the defendant used was not intended and was not such as was likely to cause death or grievous bodily harm.

"Grievous bodily harm" means any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health.[9]

The fact that the force used did cause death or grievous bodily harm is not the point. The question is whether it was likely to happen in all the circumstances.[10]

[In appropriate cases**]: And there remains the question whether the prosecution has satisfied you that the defendant intended to kill the complainant or to do him grievous bodily harm?[11]**

To re-state all of that briefly, you will appreciate that, to prove the [first] element of the offence charged – that the defendant acted unlawfully – the prosecution must negate or overcome this defence, beyond a reasonable doubt,.

The prosecution will negate this defence (or satisfy you that it does not apply) if it is able to satisfy you, beyond reasonable doubt, of any one of the following:

1. **That the defendant was <u>not</u> unlawfully assaulted by the [complainant/deceased]; or**

---

9 Note that the expanded definition of grievous bodily harm under the Code means that the defendant may be disqualified from the protection of s 271(1) because he or she intended to cause 'the loss of a distinct part or an organ of the body; or serious disfigurement': s 1. Whether disfigurement is serious is a matter for the jury: *R v Collins* [2001] QCA 547.

10 "Likely" is a word in common use, and it should not ordinarily be necessary to elaborate on its meaning. If any explanation is needed, it is sufficient to say that what is required is a 'real or substantial' likelihood, without adding glosses such as 'more likely than not', 'more than a 50% chance' or 'odds on chance': *Boughey v The Queen* (1986) 161 CLR 10. The standard is a higher one than that for the 'possible consequence' relevant to accident: *R v Hung* [2013] 2 Qd R 64.

11 *R v Gray* (1998) 98 A Crim R 589; *R v Greenwood* [2002] QCA 360 at [20]. This does not often arise as a separate issue under s 271(1), because in cases where this is likely counsel usually opt for a direction under s 271(2).

2. **That the defendant gave <u>provocation</u> to the [complainant/deceased] for the assault; or**

3. **That the force used was <u>more than was reasonably necessary</u> to make effectual defence; or**

4. **That the force used was either <u>intended or was likely to cause death or grievous bodily harm</u>.**

It is critical that you appreciate that there is no burden on the defendant to satisfy you that he/she was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that he/she was not.

Section 271(2) – Self-Defence against unprovoked assault when there is death or GBH

Further commentary on section 271(2)

In *R v Wilmot* [2006] QCA 91, McMurdo P explained (footnotes omitted) –

> [4] In *Gray*, McPherson JA agreed with the approach of Gibbs J in *Reg v Muratovic* (approved in *Marwey v The Queen*): s 271(2) requires that if the jury consider the nature of the assault on the defendant was such as to cause reasonable apprehension of death or grievous bodily harm and the defendant believed, on reasonable grounds, that they could not otherwise defend themselves from death or grievous bodily harm, or if the jury are left in doubt on those matters, the defendant must be acquitted; s 271(2) does not require the defendant's act causing death or grievous bodily harm to be objectively necessary.
>
> [5] In *Vidler*, this Court considered [that]:
>
> > "The effect of *Gray* is that the critical point for the jury to consider is whether the defendant's actual state of belief, based on reasonable grounds, was that the defender could not preserve himself otherwise than by doing what he did. If that is made clear to the jury, *Gray* considers that further directions on the question whether the force was necessary for defence are otiose, and worse still, positively erroneous if they are seen as creating a further requirement of objective necessity."
>
> Whilst recognising that *Allwood* and *Julian* demonstrate that other views may be reasonably open, until the matter is reconsidered the ratio in *Gray* is binding on this Court so that s 271(2) requires that the defendant's belief set out above be on reasonable grounds but does not require that force used by the defender be reasonably necessary.

In *R v Saxon* [2020] QCA 85, Davis J (with whom Sofronoff P and Boddice J agreed) said at [17] – [20]-–

> It has been clear since *R v Muratovic* [1967] Qd R 15 at 19 and *Marwey v The Queen* (1977) 138 CLR 630 at 637 that there are four, not five, elements to the defence [created by s 271(2)].
>
> Assuming an unlawful assault upon the person who made defence, and that is element 1, and assuming a lack of provocation by the person who made defence, and that is element 2, the two remaining elements are:
>
> 1. the nature of the assault must have been such as to cause reasonable apprehension of death or grievous bodily harm to the person who made defence; and
>
> 2. the person who made defence must have believed on reasonable grounds that he could not otherwise preserve himself or another person defended from death or grievous bodily harm.
>
> Because the onus of proof of unlawfulness of the killing is on the Crown, the Crown must disprove beyond reasonable doubt one of the four elements.

It is not an element of the defence of self-defence created by s 271(2) that the force used was objectively necessary to make defence. See *R v Muratovic* [1967] Qd R 15 at 19 and *Marwey v The Queen* [1977] 138 CLR 630 at 637. Therefore, a direction to the effect that the Crown will disprove self-defence by proving that the force was objectively unnecessary is a misdirection. See *R v Gray* (1998) 1 Crim R 589, *R v Vidler* (2000) 110 A Crim R 77, and *R v Wilmot* (2006) 165 A Crim R 14).

_____

Sample Directions:

A defendant who has been the victim of an unprovoked assault may lawfully respond in self-defence with lethal force (that is, force which may kill or do grievous bodily harm) when the assault upon him/her was of such a nature as to cause reasonable apprehension of death or grievous bodily harm.

The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive, especially when their safety is threatened by someone else. Sometimes an attacker may come off second best but it does not follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself.

You will appreciate from what I have said earlier about the prosecution bearing the onus of proof that the defendant does not have to satisfy you that this defence applies. The prosecution must exclude or negate it, beyond reasonable doubt, to satisfy you that the defendant acted unlawfully.

And if the prosecution cannot exclude, beyond reasonable doubt, the possibility that [the killing or the GBH] occurred in self-defence, as the law defines it, then that is the end of the case. The defendant's use of force would be lawful and you must find him/her not guilty.[1]

You should appreciate that the law of self-defence is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the common sense and community perceptions that juries bring into court.

---

[1] The following cases may be of assistance: *R v Bojovic* [2000] 2 Qd R 183; *R v Gray* (1998) 98 A Crim R 589; *R v Prow* [1990] 1 Qd R 64; *R v Muratovic* [1967] Qd R 15; *Marwey v The Queen* (1977) 138 CLR 630; *Zecevic v DPP (Vic)* (1987) 162 CLR 645 (re requirements in a common law summing-up).

Speaking generally, you will not be surprised to know that if the violence of the attacker is such that the person defending himself/herself reasonably fears for his/her life or safety, then the justifiable (or lawful) level of violence which may be used by the person attacked in self-defence will be greater also.

The level of violence in self-defence that is justifiable, or lawful, depends on the level of danger created by the attacker and the reasonableness of the defendant's reaction to it.

[Read the first part of s 271(1) (that is, finishing at "effectual defence against the assault"), and all of s 271(2) to the jury. You may wish to also provide them with a copy of those sections.]

Several matters arise for your consideration.

They are –

1. **whether there has been an unlawful assault upon the defendant;**

2. **whether the defendant has provoked that assault.**

3. **whether the nature of the assault was such as to cause reasonable apprehension of death or grievous bodily harm;**

4. **whether the defendant believed, on reasonable grounds, that he/she could not otherwise preserve themselves from death or grievous bodily harm, other than by acting as they did.**

The burden remains on the prosecution at all times to prove that the defendant was *not* acting in self-defence (that is, was acting unlawfully), and the prosecution must do so beyond reasonable doubt before you could find the defendant guilty.

Taking those matters one by one:

<u>An unlawful assault?</u>

The first matter is whether the defendant was unlawfully assaulted by [the complainant/deceased]. If you conclude that [the complainant/deceased] did not first unlawfully assault the defendant, this defence is not open.

[If necessary, define assault: see section 245. Note that the definition of assault includes a situation in which violence is *threatened* so long as the assailant has an actual or apparent present ability to implement the theat.]

[If appropriate, direct the jury**]: It is common ground [**or the evidence suggests**] that the [complainant/deceased] unlawfully assaulted the defendant, and on that basis the first part of the section is satisfied in the defendant's favour.**

A provoked assault?

The second matter that arises is, if there was such an assault, whether the defendant provoked it.

"Provocation" means any wrongful act or insult, of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered. [2]

[It has been suggested[3] that a jury should treat an assault as *unprovoked* unless satisfied beyond reasonable doubt that the assault was provoked by the defendant. If there is an issue on this first point, deal with the competing contentions and then proceed.]

If you conclude that the defendant provoked the assault, then this particular defence is not open to him/her and you do not need to consider it further.

Assault upon the defendant such as to cause reasonable apprehension of death or grievous bodily harm.

It is for you to evaluate the nature of the assault upon the defendant and whether it was such as to cause reasonable apprehension of death or grievous bodily harm.

"Grievous bodily harm" means any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health.[4]

Belief, on reasonable grounds, that he/she could not otherwise preserve himself/herself from death or grievous bodily harm

---

2 In *R v Dean* [2009] QCA 309 the Court of Appeal held that a trial judge should have directed the jury as to the meaning of provoked as outlined in *R v Prow* [1990] 1 Qd R 64.

3 *R v Kerr* [1976] 1 NZLR 335 at 342 citing the unreported case of *R v Sampson* (Wellington, 25 July 1972, 61/72).

4 Note that the definition of grievous bodily harm under the Code also includes 'the loss of a distinct part or an organ of the body; or serious disfigurement': s 1. Whether disfigurement is serious is a matter for the jury. All of the injuries in the definition are qualified by the words 'whether or not treatment is or could have been available': *R v Lovell; Ex-parte A-G (Qld)* [2015] QCA 136.

You will see from the section that if the nature of the assault upon the defendant is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm, it is lawful for the person to use such force as is necessary for defence, even though such force may actually cause death or grievous bodily harm.[5]

Thus, the fourth matter that arises is whether the defendant believed, on reasonable grounds, that he/she could not otherwise preserve himself/herself from death or grievous bodily harm than by using the force he or she in fact used.

The critical issues are whether the defendant believed on reasonable grounds that the force used was necessary for defence.[6]

The important issue is the state of mind or belief of the defendant. Did he/she *actually believe* that it was necessary to do what he/she did to save himself/herself from death or grievous bodily harm? And was his/her belief that the force was necessary based on reasonable grounds?

You will need to assess, looking at all the circumstances of the case, the level of physical menace which you think that the deceased [or complainant] was actually presenting before the fatal [or serious] force was used by the defendant.

Remember that a person defending himself cannot be expected to weigh precisely the amount of defensive action which may be necessary.

Instinctive reaction and quick judgment may be essential and you should not judge the actions of the defendant as if he had the benefit of safety and leisurely consideration.[7] [8]

---

[5] In "Battered Woman Syndrome" cases, expert evidence may be adduced as to the defendant's heightened awareness of danger, and the jury should be directed to its relevance to the defendant's belief as to the risk of grievous bodily harm or death. (General directions as to evidence of experts will be appropriate in such instances). Equally, the actual history of the relationship may require direction as going to the existence of reasonable grounds for any belief; *Osland* (1998) 197 CLR 316 at 337.

[6] *R v Wilmot* (2006) 165 A Crim R 14.

[7] *R v Gray* (1998) 98 A Crim R 589.

[8] The prosecution can no longer rely upon a submission that the force used by a defendant was not "necessary" for defence. Under section 271(2) the crucial factor is said to be the defendant's actual state of belief, and that it be based on reasonable grounds. For discussion see *Julian v The Queen* (1998) 100 A Crim R 430; *Corcoran v The Queen* (2000) 111 A Crim R 126, and *R v Wilmot* (2006) 165 A Crim R 14**.**

To re-state this, the prosecution will have negated or overcome this defence, and will have proved that the defendant acted unlawfully, if it is able to satisfy you, beyond reasonable doubt, of any one of the following:

1. **The defendant was <u>not</u> unlawfully assaulted by the [deceased/complainant]; or**
2. **The defendant <u>gave provocation</u> to the [deceased/complainant] for the assault; or**
3. **The nature of the assault was <u>not</u> such as to cause reasonable apprehension of death or grievous bodily harm; or**
4. **The defendant did <u>not</u> actually believe on reasonable grounds that he/she could not otherwise save himself from death or grievous bodily harm than by using the force which was used.**

If you are satisfied of any one of those matters, beyond reasonable doubt, then the defence has been negated or overcome by the prosecution.

Remember there is no burden on the defendant to satisfy you that he was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that he was not.

And I remind you that if the prosecution has failed to satisfy you beyond reasonable doubt that the defendant was not acting in self-defence, the defendant should be acquitted even though the force used actually caused [death or GBH].

Section 272 – Self-Defence against provoked assault, when death or grievous bodily harm occurs

Further commentary on section 272

Section 272 provides for more restrictive rights of self-defence for a defendant who started a fight with the deceased/complainant, or provoked the deceased/ complainant to assault him/her.

This section applies where the defendant was the first to assault, or has behaved in such a way as to lead to a response from the deceased/complainant in the form of an assault with the degree of violence referred to in section 272 (that is, such violence as to cause reasonable apprehension of death or grievous bodily harm).

The section places restrictions on the extent to which the defendant may resort to retaliatory force and reflects a policy which requires persons who initiate conflict to make some sacrifices to stop it.

A person who is subject to section 272(1) cannot use any defensive force unless the assault they have provoked is so serious as to raise a reasonable apprehension of death or grievous bodily harm and to induce a reasonable belief that a defendant has no other way of avoiding death or grievous bodily harm than their own resort to the lethal or near lethal force in fact used by them.

If a provoked assault is not that serious – then the person who provoked it must tolerate it.

The section is concerned with two states of mind of the defendant, namely –

i. their apprehension; and

ii. their belief that force is necessary.

Those states of mind are to be subjectively determined – but they must be objectively reasonable.

If those conditions are satisfied, then, subject to the proviso in section 272(2), a defendant is not criminally responsible for the force reasonably necessary for his or her preservation – including force which may cause death or grievous bodily harm.

In *R v Wilmot* [2006] QCA 91, Jerrard JA said:

[47] On the facts described herein, it would have been open to the jury to consider that s 272 applied, in that Mr Wilmot [the defendant] did provoke an assault upon him by Mr Norman [the deceased], who assaulted Mr Wilmot with sufficient violence or threats of violence as to cause a reasonable apprehension of at least grievous bodily harm. I consider Mr Norman's assault with the metal bar constituted by Mr Norman's producing it and threatening to use it on the aggressive and alcohol fuelled Mr Wilmot was an assault which a jury would properly consider lawful. That was why s 272 applied, if self-defence was available, when Mr Wilmot later brutally bludgeoned Mr Norman to death with the bar. Whether s 271(2) was available, or only s 272(1), it is significant in rebuttal of either defence that Mr Wilmot's subsequent explanation for what happened, given to the police, only attempted to justify one blow and not the six that were delivered, and that he attempted to prepare a false account of events and did dispose of the clothing which he was wearing. That conduct was inconsistent with a belief on reasonable grounds that the force he had used was necessary for his own self-defence.

[48] The remaining questions for the jury on a s 272(1) defence were whether Mr Norman's behaviour had caused Mr Wilmot to believe on reasonable grounds that it was necessary for him to use force in self-defence to preserve himself from death and grievous bodily harm, and whether the force Mr Wilmot actually used was reasonably necessary for his self-preservation. The learned judge actually put those very propositions to the jury, in the passages conceded to be misdirections for a defence relying on s 271(2), self-defence against unprovoked assault. The learned judge did not direct the jury on any of the requirements [of] s 272(2) which limit the availability of the plea of self-defence to a provoked assault.

[49] I consider the third obligation specified in s 272(2), namely that before the necessity for using potentially lethal force in self-defence [arose] the person using such force declined the conflict and quitted it or retreated from it as far as was practicable, applies only to the circumstances described in the two preceding clauses in that paragraph. That is, I agree with the view suggested by Hart J in *Muratovic* [at 28] that those two earlier clauses, respectively describing a person who used murderous violence in the first place or else before it was necessary, and who is thereby disqualified from the protection given by s 272(1), can re-qualify for that protection if that person has retreated before using lethal force. I therefore disagree with the suggestion by Stanley J in *Reg v Johnson* [1964] Qd R 1 at 14 that s 272(1) applies only if the defendant has

> declined further combat or retreated. Whichever view is correct, a view of the facts was open to the jury which would have entitled Mr Wilmot to plead s 272(1), namely that he had declined further conflict with Mr Norman and attempted to retreat from Mr Norman's assault before ultimately using lethal force …

Hart J's approach – which allows a defendant to "re-qualify" – was adopted by the Western Australian Court of Criminal Appeal in *Randle v The Queen* (1995) 15 WAR 26, in which Malcolm CJ said:

> … despite the fact that the first two clauses of the second paragraph of s 249 state cases where the protection would not be available in any event, the effect of the final clause is to qualify that absence of protection by stating particular circumstances under which the defence will nonetheless be available in either of those two cases.[1]

Sample direction:

> **The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive, especially when their safety is threatened by someone else. It does not always follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself.**
>
> **You will appreciate from what I have said earlier about the prosecution bearing the onus of proof that the defendant does not have to satisfy you that this defence applies. The prosecution must exclude or negate it, beyond reasonable doubt, to satisfy you that the defendant acted unlawfully.**
>
> **And if the prosecution cannot exclude, beyond reasonable doubt, the possibility that [the killing or the GBH] occurred in self-defence, as the law defines it, then that is the end of the case. The defendant's use of force would be lawful and you must find him/her not guilty.[2]**
>
> **You should appreciate that the law of self-defence is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular**

---

1 See *Kenny: Criminal Law in Queensland and Western Australia*, 9th Edition, J Devereux and M Blake, Sydney 2016.

2 The following cases may be of assistance: *R v Bojovic* [2000] 2 Qd R 183; *Gray* (1998) 98 A Crim R 589; *R v Prow* [1990] 1 Qd R 64; *R v Muratovic* [1967] Qd R 15; *Marwey v The Queen* (1977) 138 CLR 630; *Zecevic v DPP* (1987) 162 CLR 645 (re requirements in a common law summing-up).

situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the common sense and community perceptions that juries bring into court.

Speaking generally, you will not be surprised to know that if the violence of the attacker is such that the person defending himself/herself reasonably fears for his/her life or safety, then the justifiable (or lawful) level of violence which may be used by the person attacked in self-defence will be greater also.

The level of violence in self-defence that is lawful depends on the level of danger created by the attacker and the reasonableness of the defendant's reaction to it.

Section 272 of the Criminal Code excuses a person from using lethal or near lethal force in certain circumstances. By "lethal or near lethal" I mean force that kills or does grievous bodily harm.

This section may apply where the defendant had good reason to believe he/she was in serious danger of losing his/her own life, or suffering a very serious injury, even though he himself provoked the assault.

Section 272 of our *Criminal Code* reads [you may wish to provide a copy of the section to the jury**]:**

1. **"When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.**
2. **This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable."**

This section raises several matters for your consideration, namely:

1. **Whether the defendant unlawfully assaulted the deceased/complainant or provoked an assault from them?**

2. **Whether the response from the deceased/complainant was so violent as to cause reasonable apprehension of death or grievous bodily harm?**

3. **Whether the defendant <u>believed</u>, on <u>reasonable grounds</u>, that it was <u>necessary</u>, in order to preserve himself/herself from death or grievous bodily harm, to use force in self-defence?**

4. **Whether the force in fact used was such as was <u>reasonably necessary</u> for his/her preservation from death or grievous bodily harm?**

[If this is an issue, you may add:

You will see the proviso in section 272(2).

The defence does not apply where:

- **The defendant first began the assault with intent to kill or to do grievous bodily harm to the [deceased/complainant/some person]; or**

- **The defendant endeavoured to kill or to do grievous bodily harm to the [deceased/complainant] before the necessity of so preserving himself arose.**

<u>However:</u>

The defendant may "re-qualify" for the defence if, before such necessity of so preserving himself arose, the defendant declined further conflict and quitted it or retreated from it as far as was practicable.]

The burden remains on the prosecution at all times to prove that the defendant was *not* acting in self-defence (that is, was acting unlawfully), and the prosecution must do so, beyond reasonable doubt before you may find the defendant guilty.

So, if the prosecution satisfy you beyond reasonable doubt of any one of the following, the defence has been excluded:

1. **The assault by the other person was <u>not</u> of such violence as to cause reasonable apprehension of death or grievous bodily harm; or**
2. **That the assault did <u>not</u> induce the defendant to believe, on reasonable grounds, that it was necessary for his own preservation from death or grievous bodily harm to use the force used in self-defence; or**
3. **That the force used was <u>more</u> than was reasonably necessary to save the defendant from death or grievous bodily harm;**

   [if necessary, **or**

4. **That the defendant first began the initial assault with intent to kill or to do grievous bodily harm to some person; or**
5. **The defendant endeavoured to kill or do grievous bodily harm to some person before the necessity of so preserving himself arose;**

   unless

   In either case, before such a necessity for self-defence arose, the defendant declined further conflict, and quitted it, or retreated from it as far as practicable.][3]

Remember it is for the prosecution to satisfy you beyond reasonable doubt that self-defence does not apply. There is no burden on the defendant to satisfy you that he was acting in self-defence, or to establish any one of those things I have described to you. To exclude the defence, the prosecution must exclude any one of those, if it can, beyond reasonable doubt.

[3] On the question of retreat, contrast *R v Muratovic* [1967] Qd R 15 with *R v Johnson* [1964] Qd R 1 at 14.

Provocation: s 304 (for offences pre 4 April 2011)

With effect from 4 April 2011, s 304 of the *Criminal Code* was amended in several ways. The onus of proof was reversed so that for an alleged offence committed after then, it is for the defendant to prove that he or she was liable to be convicted of manslaughter only, by reason of provocation under this section. But cases involving offences committed before this date are governed by the previous terms of s 304.[1]

The term "provocation" was [and remains] undefined for s 304 of the *Criminal Code*. The word takes it meaning from the common law, and ss 268 and 269 of the *Criminal Code* apply only to offences of which an assault is a defined element.[2]

There are three questions of fact, namely:

1. Was there provocation by the person who was killed?

2. Was the defendant actually provoked?

3. Was the defendant still provoked when doing that which caused death?

The onus of proof is on the prosecution to negative the availability of the defence. If the prosecution proves, beyond reasonable doubt, that:

1. there was no provocation by the person who was killed.

2. the defendant was not actually provoked, or

3. the defendant was not still provoked, when doing that which caused the victim's death,

then the prosecution will have negatived the defence.

The content and gravity of the provocative conduct must be understood and assessed from the viewpoint of the particular defendant.[3] With that assessment of the victim's conduct towards the defendant, what must then be considered is whether the conduct was something which could or might deprive an ordinary person of the power of self-control and cause the defendant to do what he or she did.[4]

This is an objective test of what would be the possible effect of the victim's conduct, understood from the viewpoint of the particular defendant, upon the power of self-control of the hypothetical ordinary person.[5]

Provocation in this sense is not confined to the loss of self-control arising from anger or resentment, but extends to a sudden and temporary loss of self-control due to emotions such as fear or panic, as well as anger or resentment.[6] In any case where the jury may take the

---

1 *Criminal Code* s 728(3).

2 *R v Buttigieg* (1993) 69 A Crim R 21; *R v Pangilinan* [2001] 1 Qd R 56 at 64.

3 *Stingel v The Queen* (1990) 171 CLR 312 at 326.

4 *Stingel* at 331; the Court there considered the provisions of the Tasmanian Code, which referred to the relevant conduct as something "of such nature as to be sufficient to deprive an ordinary person of the power of self-control", and remarked that the terms of that code did not differ significantly from the provocation provisions of the Queensland Code (at 320).

5 *Stingel* at 327.

6 *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 168; *R v Pangilinan* [2001] 1 Qd R 56 at 64.

view that the defendant is immature, by reason of his or her youthfulness, it is appropriate to attribute the age of the defendant to the hypothetical ordinary person in the objective test, or in other words, to apply the test to a hypothetical ordinary person of the defendant's age.[7]

The "ordinary person" question is a threshold question, logically falling to be answered before it becomes necessary to consider whether the defendant was, in fact, deprived of his or her self-control.[8]

It is sufficient to raise a case of provocation for consideration by the jury, if there is some evidence which might induce a reasonable doubt as to whether the prosecution has negatived the question of provocation.[9] A trial judge in determining this question must look at the version of events most favourable to the defendant which is open on the evidence.[10]

Various types of conduct have been held to be incapable of constituting provocation, such as provocation by mere words, except perhaps "in circumstances of a most extreme and exceptional character."[11]

Suggested directions are as follows:

> **The final thing that the prosecution must establish, in order to prove that the defendant is guilty of murder, is that he/she was not acting under provocation when he/she killed** [*V*]**.**[12] **It is not for the defendant to prove that he/she was acting whilst provoked; it is for the prosecution to prove to you, beyond reasonable doubt, that he/she was not doing so.**
>
> **Our law recognises that a person may be killed in circumstances where the defendant was so provoked by something done by that person as to lose the power of self-control, such that this provides an explanation for his/her actions which should be taken into account. You only need to consider the issue of provocation if you provisionally reach the view that the defendant had the necessary intent to kill or cause grievous bodily harm and that he/she would be guilty of murder.**
>
> **Under our law if a person acts under provocation, he/she is not guilty of murder but is guilty of manslaughter only. Provocation is therefore something which operates only as a partial defence, not a complete defence, because it reduces what otherwise would be a verdict of murder to one of manslaughter.**

---

7 *Stingel* at 331.

8 *Stingel* at 324.

9 *Van Den Hoek* at 162.

10 *Stingel* at 334.

11 *Buttigieg* at 37, citing *Moffa* (1977) 138 CLR 601 at 605.

12 The victim's name.

In this context, provocation has a particular legal meaning. It consists of conduct which causes a loss of the power of self-control on the part of the defendant and which might have caused an ordinary person to lose the power of self-control and to act in the way in which the defendant did.

There are three questions of fact that are involved here. They are:

1. **Was there any provocation by** [V] **towards the defendant?**

2. **Was the defendant actually provoked by** [V]**?**

3. **Was the defendant acting, whilst provoked, when he/she did the act** (or acts) **by which** [V] **was killed?**

The first question

You have to consider what the defendant argues was the provocation by [V] [detail here the defendant's argument and the evidence relevant to it]**. You have to consider whether that conduct occurred. You have assess the conduct of** [V] **from the viewpoint of the defendant. Unless you understand the defendant's personal circumstances and any history between the defendant and** [V]**, you may not understand how serious was the conduct of** [V] **from the defendant's perspective.** [Here refer to any relevant personal circumstances, such as personal relationships or past history.][13]

With that understanding of the conduct of [V] **towards the defendant, you have to ask whether that conduct could have caused an ordinary person to lose his/her self-control and act as he/she did. An ordinary person is simply a person who has the minimum powers of self-control expected of an ordinary citizen** [who is sober/not affected by drugs]. **An ordinary person has the ordinary human weaknesses and emotions which are common in the community.**

Particular conduct, when considered in isolation, might not amount to provocation but might, in combination with other conduct by the person who was killed, be enough to cause a loss of self-control.

[13] See *Stingel* at 326.

Was the defendant actually provoked?

You have to consider whether [V's] **conduct caused this person, the defendant, to lose his/her self-control and to** [here describe the fatal act and the alleged intention of the defendant]**. Again you have to consider the defendant's personal characteristics and any relevant history.**

Was the defendant acting while provoked at the time when he did the thing [or things] which caused [V's] death?

Provocation is not necessarily excluded simply because there is an interval between the provocative conduct and the defendant's emotional response to it.[14] **So you have to consider whether the defendant remained deprived of his/her self-control and killed** [V] **whilst still without that self-control.**

Onus of proof

As I have said, it is for the prosecution to satisfy you beyond reasonable doubt that the defendant did not act under provocation. The prosecution will have proved that matter if the prosecution satisfies you, beyond reasonable doubt, of any of these things:

1. **That the conduct upon which the defendant relies as provocation did not occur.**

2. **That the conduct upon which the defendant relies as provocation could not have caused an ordinary person** [where relevant: **of the defendant's age**] **to lose his/her self-control and to act as the defendant did, with an intent to cause death or grievous bodily harm.**

3. **That the conduct on which the defendant relies did not cause the defendant to lose his/her self-control**.

4. **That when the defendant killed** [V]**, he/she was still deprived of his/her self-control, by** [V's] **provocative conduct.**

If you are satisfied beyond reasonable doubt as to any of those matters, then the prosecution has proved that the defendant did not kill [V] **under provocation, and**

---

[14] *Pollock v The Queen* (2010) 242 CLR 233 at [51]-[52].

if you are satisfied beyond reasonable doubt as to all of the elements of murder, to which I have earlier referred, then the appropriate verdict is "guilty of murder".

If, however, you are left with a reasonable doubt as to provocation, you must acquit the defendant of murder. In that event, you would convict him/her of manslaughter, if satisfied beyond reasonable doubt of all of the elements of manslaughter to which I have referred. The next question you must consider is whether the defendant was in fact provoked by the conduct of [V]**. In doing that, again you would consider all of the defendant's circumstances, and any history of disagreement between the defendant and** [V]**. Against that background, you have to ask whether, more probably than not, the defendant did lose his/her self-control as a result of what was done by** [V] **towards him/her. And doing so, again you have to consider the defendant's personal circumstances** [such as, in this case, his/her race]**, to assess the likelihood that what was done by** [V] **did cause him to lose his power of self-control and act as he/she did.**

For this defence to apply it must be caused by a "sudden" provocation. But there may a sudden provocation in this sense although there is an interval between the provocative conduct and the defendant's response to it [where appropriate, add this: **the loss of self-control can develop after a lengthy period of abuse, and without the necessity for a specific triggering incident**].

As I have said, it must also be shown that the defendant did the act which killed [V] **before there was time for his/her self-control to be regained.**

Provocation: s 304 (for offences post 4 April 2011)

The 2011 Amendments

With effect from 4 April 2011, s 304 of the *Criminal Code* was amended in three respects, namely:

1. The onus of proof is placed on the defendant to prove that the defendant is liable to be convicted of manslaughter only, under this section.

2. Other than in circumstances of "a most extreme and exceptional character", the section is not to apply if the provocation is based on words alone.

3. Save in circumstances of "a most extreme and exceptional character", s 304 does not apply where a domestic relationship existed between two persons, one of whom unlawfully killed the other, and the provocation is based on anything done by the deceased, or anything the defendant believed the deceased had done, to end the relationship, change the nature of the relationship or indicate that the relationship may, should or would end, or that there may, should or will be a change to the nature of the relationship. This is so even if the relationship ended before the provocation and killing happened.

In the proof of "circumstances of a most extreme and exceptional character" (within either of 2 and 3 above) regard could be had to any history of violence that was relevant in all the circumstances.

The amendments applied where the act or omission the subject of the offence happened after 4 April 2011.[1]

Section 304 was also amended in 2012, to redefine a "domestic relationship", according to the terms of the *Domestic and Family Violence Protection Act* (Qld) by s 217 of that Act.

The 2017 Amendments

With effect from 30 March 2017, the present subsections (4), (8) and (11) were added, in order to provide another category of case in which s 304 will not apply except in circumstances of "an exceptional character".[2] This category is where the provocation is based on "an unwanted sexual advance" to the defendant, a term which is defined as a sexual advance that is unwanted by the defendant, and, if it involves touching, only "minor touching". By subsection (8), for the proof of circumstances of an exceptional character, regard may be had to any history of violence, or of sexual conduct, between the defendant and the deceased that is relevant in all the circumstances.

At the same time, the references to "circumstances of a most extreme and exceptional character", which applied to provocation by words alone or in the context of a domestic relationship, were changed in each case to "circumstances of an exceptional character".

---

1 *Criminal Code* s 728(3).

2 These amendments apply to a proceeding for an offence only if the offence was committed after 30 March 2017: *Criminal Law Amendment Act* 2017 (Qld) s 12 and see *R v Thompson* [2019] QCA 29.

The term "provocation" was [and remains] undefined for s 304 of the *Criminal Code*. The word takes it meaning from the common law, and ss 268 and 269 of the *Criminal Code* apply only to offences of which an assault is a defined element.[3]

There are three questions of fact, namely:

1. Was there provocation by the person who was killed?

2. Was the defendant actually provoked?

3. Was the defendant still provoked when doing that which caused death?

The onus is on the defendant to prove that this defence applies. The defendant must prove that, more probably than not:

1. There was provocation by the person who was killed,

2. The defendant was actually provoked, and

3. The defendant was still provoked, when doing that which caused the victim's death.

The content and gravity of the provocative conduct must be understood and assessed from the viewpoint of the particular defendant.[4] With that assessment of the victim's conduct towards the defendant, what must then be considered is whether the conduct was something which could or might deprive an ordinary person of the power of self-control and cause the defendant to do what he or she did.[5]

This is an objective test of what would be the possible effect of the victim's conduct, understood from the viewpoint of the particular defendant, upon the power of self-control of the hypothetical ordinary person.[6]

Provocation in this sense is not confined to the loss of self-control arising from anger or resentment, but extends to a sudden and temporary loss of self-control due to emotions such as fear or panic, as well as anger or resentment.[7] In any case where the jury may take the view that the defendant is immature, by reason of his or her youthfulness, it is appropriate to attribute the age of the defendant to the hypothetical ordinary person in the objective test, or in other words, to apply the test to a hypothetical ordinary person of the defendant's age.[8]

The "ordinary person" question is a threshold question, logically falling to be answered before it becomes necessary to consider whether the defendant was, in fact, deprived of his or her self-control.[9]

---

3 *R v Buttigieg* (1993) 69 A Crim R 21; *R v Pangilinan* [2001] 1 Qd R 56 at 64.

4 *Stingel v The Queen* (1990) 171 CLR 312 at 326.

5 *Stingel* at 331; the Court there considered the provisions of the Tasmanian Code, which referred to the relevant conduct as something "of such nature as to be sufficient to deprive an ordinary person of the power of self-control", and remarked that the terms of that code did not differ significantly from the provocation provisions of the Queensland Code (at 320).

6 *Stingel* at 327.

7 *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 168; *R v Pangilinan* [2001] 1 Qd R 56 at 64.

8 *Stingel* at 331.

9 *Stingel* at 324.

When two or more persons unlawfully kill another, the fact that one of them is guilty of manslaughter under s 304 does not affect the question of whether the killing amounted to murder in the case of the other person or persons.[10]

A question may arise as to whether the evidence sufficiently raises a case of provocation for the jury to be asked to consider it. Because the onus of proof is upon the defendant, the question will be whether there is evidence from which a jury could be satisfied, on the balance of probabilities, that the defendant is guilty of manslaughter only by the operation of s 304.

Suggested directions are as follows:

> **If you are satisfied that the defendant killed** [V][11] **with an intention to kill or do grievous bodily harm** [or in circumstances which would constitute murder, identifying them in the particular case], **then there would be another subject which you would have to consider in this case, which is called provocation.**
>
> **Our law recognises that a person may be killed in circumstances where the defendant was so provoked by something done by that person as to lose the power of self-control, such that this provides an explanation for his/her actions which should be taken into account.**
>
> **Under our law if a person acts under provocation, he/she is not guilty of murder but is guilty of manslaughter only. Provocation is therefore something which operates only as a partial defence, not a complete defence, because it reduces what otherwise would be a verdict of murder to one of manslaughter.**
>
> **In this context, provocation has a particular legal meaning. It consists of conduct which causes a loss of the power of self-control on the part of the defendant and which might have caused an ordinary person to lose the power of self-control and to act in the way in which the defendant did.**
>
> **There are three questions of fact that are involved here. They are:**
>
> 1. **Was there any provocation by** [V] **towards the defendant?**
> 2. **Was the defendant actually provoked by** [V]**?**
> 3. **Was the defendant acting, whilst provoked, when he/she did the act (or acts) by which** [V] **was killed?**
>
> **The defendant must satisfy you that, more probably than not:**

[10] *Criminal Code* s 304(8).

[11] The name of the victim.

1. **There was provocation by** [V] **towards the defendant,**

2. **The defendant was provoked by** [V] **and**

3. **The defendant was acting, while still provoked, when he/she did the** act (or acts) **by which** [V] **was killed.**

The first question

You have to consider what the defendant argues was the provocation by [V] [detail here the defendant's argument and the evidence relevant to it]**. You have to consider whether that conduct occurred. You have assess the conduct of** [V] **from the viewpoint of the defendant. Unless you understand the defendant's personal circumstances and any history between the defendant and** [V]**, you may not understand how serious was the conduct of** [V] **from the defendant's perspective.** [Here refer to any relevant personal circumstances, such as personal relationships or past history.][12]

With that understanding of the conduct of [V] **towards the defendant, you have to ask whether that conduct could have caused an ordinary person to lose his/her self-control and act as he/she did. An ordinary person is simply a person who has the minimum powers of self-control expected of an ordinary citizen** [who is sober/not affected by drugs]. **An ordinary person has the ordinary human weaknesses and emotions which are common in the community.**

Particular conduct, when considered in isolation, might not amount to provocation but might, in combination with other conduct by the person who was killed, be enough to cause a loss of self-control.

[In a case where the provocation is based on words alone,[13] the following direction should be added:

In this case, the defendant says that he/she was provoked by [V's] **words, and nothing else. The law is that this defence of provocation does not usually apply in a case where the provocation is based on words alone, because usually an ordinary person would not lose self-control, and act with an intention to kill or do grievous bodily harm, in response to mere words. However, the defence can be available if you are satisfied that circumstances of this case are exceptional. To**

---

12 See *Stingel* at 326.

13 s 304(2).

decide that, you have to consider all of the circumstances, including any history of violence between the defendant and [V]**.**[14] **Although, in an ordinary case, mere words could not provoke a person to act with an intention to kill or do grievous bodily harm, were the circumstances in this case exceptional, in that these words used by** [V] **towards the defendant could have caused an ordinary person** [where appropriate, add "**of the defendant's age**"] **to lose self-control and respond as the defendant did?**]

[In a case where provocation was based upon something done by the deceased, or believed to have been done by him/her, in respect of a domestic relationship,[15] the following direction could be given:

In this case, the defendant says that he/she was provoked by something done by [V] (or believed to have been done by [V]) **in respect of their domestic relationship. You have evidence that the defendant and** [V] **were in a domestic relationship** [describe the relationship]**. The defendant says that he/she was provoked by** [eg. V ending the relationship]. **The law is that this defence of provocation does not usually apply where the provocation is based on something done by the person who was killed to** [end a domestic relationship between them], **because usually an ordinary person would not lose self-control, and act with an intention to kill or do grievous bodily harm, in response to that conduct. However, the defence is available here if you are satisfied that the circumstances of this case are exceptional. To decide that, you have to consider all of the circumstances, including any history of violence between the defendant and** [V].[16] **Although, in an ordinary case, acting to end a domestic relationship could not provoke a person to act with an intention to kill or do grievous bodily harm, were circumstances in this case exceptional, so that the conduct of** [V] **towards the defendant could have caused an ordinary person to lose self-control and respond as the defendant did?**]

[In a case where the provocation is based on an unwanted sexual advance by the person who was killed to the defendant,[17] the following may be added:

In this case, the defendant says that he/she was provoked by an unwanted sexual advance made by [V] **towards him/her. The law is that this defence of provocation**

---

14 See *R v Thompson* [2019] QCA 29.

15 s 304(3).

16 Ibid.

17 s 304(4).

does not usually apply in a case where the provocation is based on an unwanted sexual advance, because usually an ordinary person would not lose self-control and act with an intention to kill or do grievous bodily harm, in response to an unwanted sexual advance. An unwanted sexual advance means a sexual advance that is unwanted and, if it involves touching, involves only minor touching.[18] In this case the evidence of the sexual advance is [describe]**. If you find that the conduct by** [V] **was an unwanted sexual advance, then the defence is available if you are satisfied that the circumstances of this case are exceptional. To decide that, you have to consider all of the circumstances** [including any history of violence, or of sexual conduct, between the defendant and [V]][19]. **Although, in an ordinary case, an unwanted sexual advance could not provoke an ordinary person to act with an intention to kill or do grievous bodily harm, were these circumstances exceptional, in that the advance by** [V] **towards the defendant could have caused an ordinary person** [where appropriate, add **"of the defendant's age"**] **to lose self-control and respond as the defendant did?**]

Was the defendant actually provoked?

You have to consider whether [V's] **conduct caused this person, the defendant, to lose his/her self-control and to** [here describe the fatal act and the alleged intention of the defendant]**. Again you have to consider the defendant's personal characteristics and any relevant history.**

Was the defendant acting while provoked at the time when he/she did the thing** [or things] **which caused** [V's] **death?

Provocation is not necessarily excluded simply because there is an interval between the provocative conduct and the defendant's emotional response to it.[20] So you have to consider whether the defendant remained deprived of his/her self-control and killed [V] **whilst still without that self-control.**

Onus of proof

---

18 Where relevant, refer to the examples at the end of s 304(11).

19 Ibid.

20 *Pollock v The Queen* [2010] 242 CLR 233 at [51]-[52].

As I have said, it is for the defendant to satisfy you that, more probably than not, the defendant acted under provocation in the legal sense. The defendant must satisfy you that, more probably than not:

1. **The conduct upon which the defendant relies as provocation did occur.**

2. **The conduct upon which the defendant relies as provocation could have caused an ordinary person** [where relevant: **of the defendant's age**] **to lose his/her self-control and to act as the defendant did, with an intent to cause death or grievous bodily harm.**

[2A. That although the provocation is based upon words alone,[21] the other circumstances here are exceptional].

3. **The conduct on which the defendant relies caused the defendant to lose his/her self-control.**

4. **When the defendant killed** [V] **he/she was still deprived of his/her self-control, by** [V's] **provocative conduct.**

If you are not satisfied of each of those matters, then the defendant has not proved that the defendant killed [V] **under provocation, and if you are satisfied beyond reasonable doubt as to all of the elements of murder, to which I have earlier referred, then the appropriate verdict is "guilty of murder".**

If, however, you are satisfied that the defendant killed [V] **under provocation, you must acquit the defendant of murder. In that event, you would convict him/her of manslaughter, if satisfied beyond reasonable doubt of all of the elements of manslaughter to which I have referred.**

[21] Or refer to the exception in s 304 which is relevant in the case.

Killing for preservation in an abusive domestic relationship: s 304B

A provision of our law concerning killing in an abusive domestic relationship provides that if a person unlawfully kills another under circumstances that would constitute murder, and if:

the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and

the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that cause the death; and

the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case

then that person is guilty of manslaughter only.[1]

The defence therefore operates as a partial defence, not a complete defence, because if it applies its effect is to reduce what would otherwise be a verdict of murder to one of manslaughter. You only need to consider this defence if you provisionally reach the view that the defendant had the necessary intent to kill, or cause grievous bodily harm, and that the killing was unlawful (but for this defence) so that the defendant would be guilty of murder.

A matter for your consideration in considering this defence is whether the deceased committed acts of serious domestic violence against the defendant in the course of an abusive domestic relationship.[2] **An abusive domestic relationship is a domestic relationship existing between two persons in which there is a history of acts of serious domestic violence**[3] **committed by either person**

---

1 See s 304B(1).

2 See s 304B(1)(a). This requirement may be satisfied even if the defendant has sometimes committed acts of domestic violence in the relationship: see s 304B(6).

3 By s 304B(7) "domestic violence" means domestic violence as defined under s 11 of the *Domestic and Family Violence Protection Act* 1989, which defines domestic violence as "any of the following acts that a person commits against another person if a domestic relationship exists between the 2 persons—

(a) wilful injury;
(b) wilful damage to the other person's property;
(c) intimidation or harassment of the other person;
(d) indecent behaviour to the other person without consent;
(e) a threat to commit an act mentioned in paragraphs (a) to (d)."

Section 11(2) provides that the person committing the domestic violence need not personally commit the act or threaten to commit it.

against the other.[4] **A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.**[5]

As mentioned, a further matter for consideration is the requirement that "the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death".[6] **This concerns the defendant's actual belief (not that of some hypothetical person) as to whether the act or omission was necessary to preserve the defendant from death or grievous bodily harm.**

In considering the additional issue of whether the defendant had reasonable grounds for that belief, you should have regard to the evidence as you find it of an abusive domestic relationship and all the circumstances of the case, including acts of the deceased that were not acts of domestic violence.[7]

The defence may apply even if the act or omission causing the death of the deceased (the *response*) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.[8]

It is not for a defendant to prove that this partial defence applies, rather the onus is on the prosecution to exclude the defence. The defence is excluded if the prosecution satisfies you beyond reasonable doubt that:

1. **the deceased did not commit acts of serious domestic violence against the defendant in the course of an abusive domestic relationship; or**
2. **the defendant did not believe it was necessary for the defendant's preservation from death or grievous bodily harm to do the act or make the omission that caused the death of the deceased; or**
3. **if the defendant had such a belief, the defendant did not have reasonable grounds for the belief, having regard to the abusive domestic relationship and all the circumstances of the case.**

---

4 See s 304B(2)

5 See s 304B(3).

6 See s 304B(1)(b).

7 See s 304B(6).

8 See s 304B(4).

If you come to consider this defence, because you provisionally reach the view that the defendant unlawfully killed the deceased such that the defendant would be guilty of murder, but the prosecution does not satisfy you beyond reasonable doubt that this defence is excluded, then the defendant would be not guilty of murder, but guilty of manslaughter.

Diminished Responsibility: s 304A

During the trial you have heard the words diminished responsibility used on a number of occasions. The ordinary meaning of these words is that a person's responsibility for their actions is less than it would otherwise be. In our criminal law it means that, in the circumstances of the case, what would otherwise be a verdict of guilty of murder becomes a verdict of manslaughter. So we speak of the defence of diminished responsibility to a charge of murder.

Before it becomes necessary to consider the defence of diminished responsibility, the prosecution must have proved beyond reasonable doubt the elements of murder which I have already outlined. Providing you are satisfied beyond reasonable doubt of those elements, it falls to the defendant to show that his responsibility is diminished. He does not have to satisfy you beyond reasonable doubt of that, but he does have to satisfy you that it is more probable than not that when he killed (X) his mental responsibility for his actions was substantially impaired.

To discharge this burden, the defendant must show three things: -

1. **That at the time he did the things which constitute this charge he suffered from abnormality of mind.**
2. **This abnormality of mind arose from a condition of arrested or retarded development of mind or from an inherent cause or was induced by disease or injury.**
3. **This abnormality of mind must have substantially impaired the defendant's capacity to understand what he was doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission.**

Acts Intended to Cause Grievous Bodily Harm and Other Malicious Acts – s 317[1]

Section 317 makes criminal any of the variety of acts described in s 317(e)-(k), if done with any of the variety of intents described in s 317(a)-(d). The following suggested directions cover only part of the large number of possible offences.

Read the relevant part of the section to the jury.

> **The prosecution must prove that the defendant actually had a subjective intent to achieve the described result. [Tell the jury what that result is]. Intention is a purpose or design to bring about the particular result, and that is what the prosecution must prove.[2]**
>
> **To maim means to deprive a person of the use of a limb or part of the body, to mutilate or cripple the person.[3]**
>
> **To disfigure is to do some external injury which detracts from another's personal appearance. To disable is to do something which creates a disability, whether temporary or permanent.[4]**
>
> **A substance which in itself is not a noxious thing may be a noxious thing if administered in sufficient quantity; it is a question of fact and degree in all the circumstances whether the thing is noxious.[5]**

Attempted Striking with Intent to Resist Arrest

The following is a suggested direction for attempted striking with intent to resist arrest. It should be modified accordingly if the alleged intent is to prevent lawful arrest or detention, or where the act is actual striking. The direction is formulated on the interpretative premise that in s 317(1)(f):

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 This direction accords with the majority decision in *R v Reid* [2007] 1 Qd R 64 at [48]-[49] and [90], [93]-[95]. See also *Zaburoni v The Queen* [2016] HCA 12, (2016) 256 CLR 482, 490 at [14], "Where proof of the intention to produce a particular result is made an element of liability for an offence…the prosecution is required to establish that the accused meant to produce that result by his or her conduct…[K]nowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the Code."

3 See *R v Woodward* [1970] QWN 30.

4 This definition of "disable" follows the suggestion in *R v James and James* (1980) Cr App R 215; the definition of "disfigure" is taken from the footnotes in *Carter's Criminal Code*.

5 See *R v Marcus* (1981) 73 Cr App R 49; *R v Hennah* (1877) 13 Cox CC 547; *R v Craikip* (1880) 5 QBD 307; *R v Turner* (1910) 3 Cr App R 203.

- the word “unlawfully” applies to qualify both an act of striking and an act of attempted striking;
- the words “capable of achieving the intention” apply to qualify both the nature of the projectile and the nature of anything else used to attempt to strike.)

The defendant is charged with attempted striking with intent to resist arrest. [If charged as an alternative, specify that: That offence is charged in count 2 as an alternative to count 1, the charge of … . You will only be required to return a verdict on count 2 in the event that you return a verdict of not guilty on count 1.]

It is an offence for anyone, with intention to resist the lawful arrest of any person, to unlawfully attempt in any way to strike any person with any kind of projectile or anything else capable of achieving the intention.

That offence requires proof beyond reasonable doubt of the following <u>four</u> elements:

1. **The defendant attempted to strike a person with a projectile (or something else); and**

2. **The attempt to strike was unlawful; and**

3. **The defendant committed the intended striking with intent to resist the arrest of the defendant (or the arrest of another); and**

4. The projectile (or other thing) was capable, had it struck the person, of achieving the intention to resist arrest.

The prosecution must prove <u>all</u> of these elements beyond a reasonable doubt. If it fails to prove any one of these elements you must find the defendant not guilty of the charge of attempted striking with intent to resist arrest.

In discussing these elements, I will on occasion refer to the defendant’s intention or belief. Those words carry their ordinary meaning, so that a person’s intention is what the person means to occur and a person’s belief is what the person thinks to be so. What a person intends or believes is part of the person’s individual thought processes. A defendant’s intention or belief may be inferred or deduced from the circumstances in which the alleged offence was committed and from the conduct of the defendant before, at the time of, or after the defendant allegedly committed the offence. And, of course,

whatever a defendant has said about the defendant's intention or belief may be looked at for the purpose of deciding what that intention or belief was at the relevant time.

Element 1 requires that the defendant attempted to strike a person with a projectile (or something else). Here the prosecution alleges the defendant attempted to strike [A - describe the person(s)] with a [X - specify the nature of the projectile or other thing with which the defendant is alleged to have struck the person e.g. bullet, rock]. The act by which the defendant is alleged to have made that attempt is the act of [specify the act(s) e.g., pulling the trigger, throwing the rock]. To prove this element, the prosecution must prove beyond reasonable doubt that the defendant committed that act and did so intending that it would cause the [X] to strike [A]. [Address any relevant issues in contention].

Element 2 requires that the attempt to strike was unlawful. The attempted application of any force to any person without their consent, including by striking them, is unlawful unless some legal defence applies to relieve the person from criminal responsibility. In the event you are satisfied that there was an attempted striking, to prove the attempted striking was unlawful the prosecution must prove beyond reasonable doubt that it was done without [A]'s consent and, if a legal defence potentially applies, it must exclude the defence beyond a reasonable doubt. [Address whether consent is in issue and, if it is, address the relevant issues in contention. Address whether any defences have potential application and, if they do, address the defences and any relevant issues in contention].

Element 3 requires that the defendant committed the attempted striking with intention to resist the arrest of the defendant (or the arrest of another). One cannot arrive at an intention to resist an event without first believing the event is going to happen. Proof of a defendant's intention to resist arrest therefore also requires proof that the defendant believed an arrest was going to occur. In the event you are satisfied the defendant attempted to strike [A] in the manner I have discussed, element 3 requires the prosecution to prove beyond reasonable doubt that, at the time of committing the alleged offence, the defendant believed the defendant [or another] was going to be arrested and that the defendant intended, by attempting to strike [A] with [X], to resist the carrying out of that arrest. [Address any relevant issues in contention].

Element 4 requires that the [X] was capable, had it struck [A], of achieving the intention to resist arrest. This element introduces an additional objective element for your consideration, even if you are satisfied the defendant unlawfully attempted to strike [A] with the [X] and that the defendant did so intending to resist arrest. Element 4 requires

you to be satisfied beyond reasonable doubt that [X] was a projectile [or thing] of such a nature that it was actually capable, if used to strike in the manner attempted, of achieving the intention of resisting arrest. [Address any relevant issues in contention].

If the prosecution has proved all four of the elements we have discussed, beyond a reasonable doubt, then your verdict on the charge of attempted striking with intent to resist arrest would be guilty. If it has failed to prove any one or more of those elements beyond a reasonable doubt, your verdict on that charge would be not guilty.

Administering a Stupefying or Overpowering Drug or Thing with Intend: s 316

The prosecution must prove that:

1. **The defendant administered, that is, gave, supplied or provided the stupefying or overpowering drug or thing[1] to the complainant;**
2. **The defendant knew it was a stupefying or overpowering drug or thing[2];**
3. **The defendant intended the complainant to take it;**
4. **The defendant did so with intent:[3]**
   - **(a) to commit or to facilitate the commission of an indictable offence; or**
   - **(b) to facilitate the flight of an offender after the commission or attempted commission of an indictable offence.**

The offence alleged is an indictable offence.

---

[1] This is a question of fact and will often depend on expert opinion evidence based on given facts. A thing which stupefies by intoxicating is a stupefying thing.

[2] The word "administer" includes conduct which, not being the application of direct physical force to the victim, nevertheless brings the noxious thing into contact with the victim's body. Thus it would be apt in law to encompass the spraying of ZS gas from a canister into the face of the victim. See *R v Gillard* (1988) 87 Cr App R 189. In *R v Murphy* [1996] QCA 256 the majority of the court held that for the purpose of "administering", it is insufficient if no more is done than to give, supply or provide a stupefying drug to a person who, knowing its effects, voluntarily inhales it.

[3] See notes to Intention.

Administering poison with intent to harm: s 322

The prosecution must prove that:

1. **The defendant caused a poison or another noxious thing to be:**

   (a) administered[1] to; or

   (b) taken by,

   (c) any person

2. **The defendant did so unlawfully i.e. it was not authorised, justified or excused by law; and**

3. **The defendant did so with intent[2] to**

   (a) injure, or

   (b) annoy

   (c) another person.

4. **Circumstance of aggravation**

   That the poison or other noxious thing endangered the life of, or did grievous bodily harm to, the person to whom it was administered or by whom it was taken.

---

[1] The word "administer" includes conduct which, not being the application of direct physical force to the victim, nevertheless brings the noxious thing into contact with the victim's body. Thus it would be apt in law to encompass the spraying of ZS gas from a canister into the face of the victim. See *R v Gillard* (1988) 87 Cr App R 189. In *R v Murphy* [1996] QCA 256 the majority of the court held that for the purpose of "administering", it is insufficient if no more is done than to give, supply or provide a stupefying drug to a person who, knowing its effects, voluntarily inhales it.

[2] See notes to Intention.

Arson s 461

The prosecution must prove that:

1. **The defendant set fire[1] to the property;[2]**

2. **The defendant did so wilfully;**

   That is, the defendant either had an actual intention to set fire to the property or deliberately did an act aware at the time he did it that the property's catching fire was a likely consequence of his act and that he did the act regardless of the risk.[3]

3. **The defendant did so unlawfully.**

   An act which causes injury to the property of another, and which is done without the owner's consent, is unlawful unless it is authorised or justified or excused by law.[4]

---

1 ie. s/he caused some actual burning of the property. Mere scorching or charring is not sufficient. In *R v Joinbee* [2013] QCA 246 it was held that the expression "'sets fire to' in s 461 of the Code refers to conduct which causes the building being set on fire. It is not limited to conduct involving physically igniting the building" at [76]. See also *R v Cormack* [2013] QCA 342.

2 See s 458(2) where the defendant possesses or has a part interest in the property, s 459(1) where an otherwise lawful burning is done with an intent to defraud any person and s 459(2) where the defendant owns the property.

3 See *Lockwood; ex parte A-G* [1981] Qd R 209; *T v The Queen* [1997] 1 Qd R 623; Intoxication is relevant to whether the defendant had the necessary intention: *R v Eustance* [2009] QCA 28.

4 s 458(2) – it is immaterial that the person who does the injury is in possession of the property injured, or has a partial interest, or an interest in it as a joint or part owner or owner in common. s 458(3) – a person is not criminally responsible for an injury caused to property by the use of such force as is reasonably necessary for the purpose of defending/protecting himself or any other person, or any property from injury which the person believes, on reasonable grounds, to be imminent.

Endangering Particular Property by Fire[1]: s 426

The prosecution must prove that:

1. **The defendant set fire to a thing situated so that the building (or other form of property mentioned in s461(a)-(d)) was likely to catch fire from it.**

2. **The defendant did so wilfully; that is, when he set fire to the thing, he intended that the building would catch fire; or, alternatively, he deliberately lit the thing, realising that it was likely that the building would catch fire, and acting in reckless disregard of that risk.**[2] [3]

3. **The defendant set the fire to the thing unlawfully.**

   If the prosecution shows that if the building had caught fire it would have been without the owner's consent[4], the defendant's act is unlawful unless it is authorised or justified or excused by law.[5] [6]

---

1 Section 462 was amended with effect from 1.12.08. The practical result of the amendment was to remove the offence of attempted arson as a separate substantive offence.

2 *Lockwood; ex parte A-G* [1981] Qd R 209.

3 In *R v Webb, ex parte Attorney-General* [1990] 2 Qd R 275 the Court of Criminal Appeal considered whether "wilfully and unlawfully" applied to the action of setting fire to the original object or to the prospect of the building (or other s461 property) catching fire. It concluded in favour of the second, the offence being complete if there were an objective likelihood that the building would catch fire as a result of the defendant's act. The offence then appeared as s 462(b), under the heading "Attempts to commit arson"; it remains to be seen whether the change of heading is considered to alter the section's construction.

4 See also s458(2), where the defendant is in possession of or has a part interest in the property, and s 459, which renders an otherwise lawful act causing injury to property unlawful where it is done with intent to defraud, regardless of whether the property belongs to the offender.

5 See *R v Webb* at 279 at 286-287.

6 See s458(3) which creates an excuse for injury to property by use of force reasonably necessary for defence of person or property.

Assault s 335

Legislation

Criminal Code s 245:

> ***Definition of* assault**
>
> *(1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture[1] attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an* ***assault****.*
>
> *(2) In this section—*
>
> ***applies force*** *includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.*

Criminal Code s 246:

> ***Assaults unlawful***
>
> *(1) An assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.*
>
> *(2) The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.*

Criminal Code s 335:

> ***Common assault***
>
> *(1) Any person who unlawfully assaults another is guilty of a misdemeanour, and is liable, if no greater punishment is provided, to imprisonment for 3 years.*
>
> *(2) The* Penalties and Sentences Act 1992*, section 108B states a circumstance of aggravation for an offence against this section.*

Commentary

It may be proper to lay one charge, notwithstanding that a series of assaults is relied upon by the prosecution: see *R v Morrow*[2] and *R v Chen*[3] where the court said, at 4-6:

> *There are no doubt cases in which, notwithstanding that offences could be charged separately, it is nevertheless permissible and even appropriate to prefer only one*

---

1 See *R v Agius* [2015] QCA 277 for a discussion as to whether there is a relevant bodily act or gesture for the second limb of the definition.

2 [1991] 2 Qd R 309.

3 [1997] QCA 355.

> *charge. One obvious class of such cases is that where the offence may be constituted by continuing conduct. But also where one act constitutes a number of offences (stealing a number of articles at one time) or where there are a number of similar acts, each constituting a separate offence, but in a short space of time — a flurry of blows, whether with or without a weapon, or a succession of shots — there is, in most cases, little practical advantage in separating them and no loss of fairness to an accused in failing to do so … Courts have never managed to produce a technical verbal formula of precise application which constitutes an easy guide in cases such as this and the question will always be one of fact and degree for decision in each case.*

See also *R v Fowler*; *R v Aplin*[4] for an illustration of a case where the indictment was held to be duplicitous because a series of incidents should have been separately charged.

Consent may be tacit or implied: *Horan v Ferguson.*[5] See also *R v Gee*,[6] dealing with an assault on an infant.

The commentary in Carter's *Criminal Law of Qld* for ss 335-340 includes helpful summaries of the elements of this and other assault-related offences.

Directions

It will often be sufficient to pose the following questions, depending on the issues in the case:

1. **Did the defendant punch** [or specify the act alleged by the prosecution, being an act within the definition found in s 245A]**?**
2. **Was that act done without A's consent?**
3. **Was that act unlawful? Unlawful means not authorised, justified or excused by law.** [See s 246]

In a case where it is alleged the defendant applied force indirectly to the complainant, the following questions might be put to the jury, depending on the issues in the case:

1. **Did the defendant …** [specify the act alleged by the prosecution]**?**
2. **Did the defendant thereby apply force indirectly to A?**
3. **Was that done without A's consent?**
4. **Was that unlawful? Unlawful means not authorised, justified or excused by law.** (See s 246)

In a case where it is alleged the defendant assaulted the complainant by threatening to apply force, the following questions might be put to the jury, depending on the issues in the case:

1. **Did the defendant …** [specify the act alleged by the prosecution]**?**

---

4 [2012] QCA 258.

5 [1995] 2 Qd R 490.

6 [2016] 2 Qd R 602.

2. **Did the defendant thereby threaten to …** [describe the threatened means of applying force to the complainant]**?**

3. **Did the defendant at that time have, or apparently have, the ability to…** [again, describe the threatened means of applying force to the complainant]**?**

4. **Was that done without A's consent?**

5. **Was that unlawful? Unlawful means not authorised, justified or excused by law.** [See s 246]

Relevant evidence and/or admissions should be identified for each question posed for the jury. It will often be convenient to provide a short summary of the arguments of the parties in relation to each question.

Assault Occasioning Bodily Harm: s 339

The prosecution must prove that:

1. **The defendant assaulted the complainant;**

   Any person who strikes, touches or moves or otherwise applies force of any kind to the person of another,[1] either directly or indirectly, without that person's consent is said to assault that other person;[2]

2. **The assault was unlawful, that is not authorised, justified or excused by law;[3]**

3. **The defendant thereby did the complainant bodily harm;[4] that is, any bodily injury which interferes with health or comfort;[5]**

4. **Refer to any circumstance of aggravation.[6]**

   It is a circumstance of aggravation if the offence is committed in a public place while the person was adversely affected by an intoxicating substance.[7]

---

[1] Attempts or Threats to Apply Force: Any person who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another is said to assault that person under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect that person's purpose – s 245(1). See *R v Fowler; R v Aplin* (2012) 225 A Crim R 226 for an illustration of a case where the indictment was held to be duplicitous because a series of incidents should have been separately charged.

[2] Section 245(1).

[3] Section 246(1). See notes to Provocation, Self-defence, etc.

[4] Definition s 1.

[5] Section 245(2) sets out a number of examples of application of force which include applying heat, light, electrical force etc. A sensation of pain alone without the infliction of an identified bodily injury is not sufficient to constitute 'bodily harm': *Scatchard* (1987) 27 A Crim R 136.

[6] Section 339(3); See Benchbook Direction No. 99.

[77] s 108B Penalties and Sentences Act 1992. See s 365C Criminal Code for circumstances in which a person is taken to be adversely affected by an intoxicating substance. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Assault on Police Officer in Execution of His Duty (Serious Assault): s 340(1)(b)

The prosecution must prove that:

1. **The defendant assaulted the complainant.**

   A person who strikes or otherwise applies force of any kind to the person of another without the other person's consent is said to have assaulted that person;[1]

2. **That the complainant was a police officer;**

3. **That the complainant was then acting in the due execution of his duty;**[2]

   It is not a defence that the defendant did not know the person assaulted was a police officer.[3]

4. **Refer to any circumstances of aggravation.**[4]

---

[1] Attempts or threats to apply force: Any person who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another is said to assault that person under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect that person's purpose – s 245(1).

[2] In *R v Reynhoudt* (1962) 107 CLR 381 the High Court (by a majority) approved the following statement: "The charge was not assaulting them knowing them to be in execution of their duty, but assaulting them being in the execution of their duty", 395, 397. In *R v K sub nom Director of Public Prosecutions* (No 1 of 1993); *R v K* (1993) 118 ALR 596 it was held:

> "(i) A police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to case to be acting therein"

If a police officer is exceeding his duty, resistance to him is not an assault. When a police officer illegally arrests a person, he is not engaged in the discharge of his duties. It is sufficient for the police officer to touch the person to be arrested and at the same time tell him that he is under arrest and where possible state the act for which arrest is made. If the defendant is touched there is an arrest even though the defendant is not grasped and even though the defendant is stronger than the police officer arresting him and succeeds in making off. *Dellit v Small* [1978] Qd R 303. It may be necessary in a case in which the validity of arrest is an issue, to tell the jury that they can only be satisfied that the police officer was acting in the execution his duty if satisfied beyond a reasonable doubt that the arrest was lawful. If the police officer uses excessive force he is not acting in the execution of his duty.

[3] In some cases a defence of honest and reasonable mistake in relation to whether the officer was acting in the execution of his duty may be open. Eg if the defendant acted under an honest and reasonable but mistaken belief that the person assaulted was in the act of committing a felony or breach of the peace: *R v Mark* [1961] Crim Law Review 173 at 398.

[4] s 340(a) *Criminal Code*. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

It is a circumstance of aggravation if the offender assaults a police officer in any of the following circumstances:

(a) the offender bites or spits on the police officer or throws at, or in any way applies to, the police officer a bodily fluid or faeces;

(b) the offender causes bodily harm to the police officer;

(c) the offender is, or pretends to be, armed with a dangerous or offensive weapon or instrument.

It is a circumstance of aggravation for any offence in s 340(i)(b) if the offence is committed in a public place while the person was adversely affected by an intoxicating substance.[5]

[5] s 108B *Penalties and Sentences Act 1992*. See s 365C Criminal Code for circumstances in which a person is taken to be adversely affected by an intoxicating substance.

Attempt[1] to Pervert the Course of Justice s 140[2]

The prosecution must prove that:

1. **The defendant did the conduct alleged in the indictment;**

2. **That the conduct alleged in the indictment had the tendency to pervert the course of justice,[3] i.e., turn it aside from its proper course;**

   The prosecution does not have to prove that the course of justice was perverted or would have been perverted. It is sufficient that the prosecution established that there was a real risk that injustice might result;[4]

3. **That the defendant intended to pervert the course of justice by his actions.[5]**

---

1 See footnotes to Attempts.

2 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

3 An act done before the commencement of judicial proceedings may constitute an offence of intending to pervert the course of justice where it is done with intent to frustrate or deflect the course of judicial proceedings that the defendant contemplates may possibly be instituted (*R v Beckett* [2015] HCA 38). The "course of justice" commences when the jurisdiction of the court is invoked. The "course of justice" is synonymous with the "administration of justice (*R v Rogerson* (1992) 174 CLR 268 at 276 per Mason CJ) but the offence can be committed when no curial proceedings are on foot (*Rogerson* per Mason CJ at 277 ("…action taken before curial or tribunal proceedings commence may have a tendency and be intended to frustrate or deflect the course of curial or tribunal proceedings which are imminent, probable or even possible") and Brennan and Toohey JJ at 283-284 ("Although police investigation into possible offences against the criminal law or a disciplinary code do not form part of the course of justice, an act calculated to mislead the police during investigations may amount to an attempt to pervert the course of justice")). See too *R v Murphy* (1985) 158 CLR 596 at 618.

4 The suggested direction is based on the judgment of the High Court in *Meissner v The Queen* (1995) 184 CLR 132 which in turn adopted the statements of principle in *Rogerson* (ibid) 275-276, 279 and 277. In *Rogerson* (280) Brennan and Toohey JJ said: "The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case: *R v Todd* [1957] SASR 305 at 328.

5 See footnotes to Intention.

Bomb Hoaxes – 1
s 321A(1)

The prosecution must prove that:

1. **The defendant placed the article [or substance] in the place; OR Sent the article (or substance) in any way;**

2. **The defendant intended[1] to induce in another person a belief that the article (or substance) was likely to explode (or ignite or discharge a dangerous or noxious substance).**

It is not necessary that the prosecution prove that some particular person was intended to be induced to the belief. It is sufficient that the defendant intended any other person or persons to be induced to that belief.

It is immaterial that the article (or substance) was not in fact likely to explode (or ignite or discharge a dangerous or noxious substance[2]).

---

1 See Intention.

2 A substance which is itself is not noxious may be a noxious thing in sufficient quantity: *Hennah* (1877) 13 Cox CC 547, *R v Cramp* (1880) 5 QBD 307, *R v Barton* (1931) 25 QJPR 81.

Bomb Hoaxes – s 321A(2)

The prosecution must prove that:

1. **The defendant made a statement [or conveyed information] to another person;**
2. **The defendant knew (or believed) this statement (or information) to be false;**
3. **The defendant intended[1] that the person would be induced by the statement to believe that an explosive [or noxious substance[2] or acid or other thing of a dangerous or destructive nature] was presenting or at some place in Queensland.**

It is immaterial that the defendant was not in Queensland when he made the statement.

---

1 See Intention.

2 A substance which is itself not noxious may be a noxious thing in sufficient quantity: *Hennah* (1877) 13 Cox CC 547, *R v Cramp* (1880) 5 QBD 307, *R v Barton* (1931) 25 QJPR 81.

Burglary s 419;[1] Entering s 421

The prosecution must prove that:

1. **The defendant entered**[2] **the dwelling**[3] **[**or, for offence under s 421, premises[4]**] of [**the complainant**];**
2. **At the time the defendant entered the dwelling house he intended**[5] **to commit an indictable offence, namely [**name indictable offence**].**

[The named offence**] is an indictable offence.**[6]

Direct on any relevant circumstances of aggravation: [7]

1. **Break.**[8]

   A person who breaks any part, whether external or internal of a dwelling or any premises or opens by unlocking, pulling, pushing, lifting or any other means whatever, any door, window, shutter, cellar, flap or other thing, intended to close an opening in a dwelling or premises, or an opening giving passage from one part of the dwelling or premises to another, is said to break the dwelling or premises.

2. **"In the night" means between 9 pm and 6 am.**[9]
3. **"Uses or threatens to use actual violence".**

   Actual violence means no more than physical force which is real and not merely threatened or contemplated. [10]

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 See s 418(2). A person is said to enter a dwelling as soon as any part of the person's body or any part of any instrument used by the person is in the dwelling.

3 See definition in s 1 *Criminal Code*.

4 "Premises" includes a building or structure or part thereof, a tent, caravan, vehicle or similar place: s 418(4) *Criminal Code*. It is a narrower definition than that contained in s 1, and does not include the land or water on which a building or other structure is situated: *R v Smith* [2009] 1 Qd R 239.

5 See notes on Intention.

6 The prosecution need not plead the specific indictable offence or offences: *Borland* (1907) 10 GLR 241.

7 The further opening of an already partly opened garage door did not constitute a "breaking": *R v Gibb* [2018] QCA 120 at [92]-[96].

8 See definition in s 418(1) *Criminal Code*.

9 See s 1 *Criminal Code*.

10 *R v De Simoni* (1981) 147 CLR 383.

4. Armed.

To be armed with a weapon means that the defendant must be in possession of a weapon and the weapon must be available for immediate use as a weapon.[11]

5. "In company".

Being 'in company' requires proof that the defendant and one or more other person or persons be physically present for the common purpose of entering the dwelling or premises.[12]

[11] *Miller v Hrvojevic* [1972] VR 305.

[12] *R v Brougham* (1986) 43 SASR 187; *R v Leoni* [1999] NSWCCA 14.

Carnal Knowledge s 215

The prosecution must prove that:

1 The defendant had carnal knowledge of the complainant.[1]

Carnal knowledge means the insertion of the defendant's penis into the genitalia (or anus) of the complainant;

a. the offence is complete upon penetration;

b. penetration to the slightest degree is sufficient;

c. ejaculation is not necessary.

2 The carnal knowledge was unlawful. I.e. not authorised, justified or excused by law.[2]

3 That the complainant was under 16.[3]

4 Refer to any circumstances of aggravation.[4]

Consent to carnal knowledge by the complainant is irrelevant.

---

1 The term "carnal knowledge" is defined in s 6(2) *Criminal Code* as including anal intercourse.

2 Section 215(5) *Criminal Code* provides that if the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years. If the circumstance of aggravation in s 215(4A) is alleged, it is a defence to the circumstance of aggravation to prove that the accused believed on reasonable grounds that the child was not a person with an impairment of the mind: s 215(5A).

3 As at footnote 2 above. See also s 229 *Criminal Code* which provides that, "[e]xcept as otherwise expressly stated, it is immaterial…that the accused did not know the person was under [the specified age] or believed that the person was not under that age."

4 Section 215(3),(4) and (4A) *Criminal Code*. See also Circumstances of Aggravation in Sexual Offences. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Choking, suffocation or strangulation in a domestic setting s 315A

The prosecution must prove that:

1. **The defendant unlawfully choked/ suffocated/ strangled the complainant.**
2. **The choking/ suffocation/ strangulation was unlawful. Unlawful means not justified authorised or excused by law.[1]**
3. **The complainant did not consent.**
4. **The defendant and the complainant were in a domestic relationship[2] with each other.**

Section 1 of the *Criminal Code* 1899 provides that "domestic relationship" means a relevant relationship under section 13 of the *Domestic and Family Violence Protection Act* 2012.

Section 13 of the *Domestic and Family Violence Protection Act* 2012 provides

"A relevant relationship is-

(a) an intimate personal relationship; or

(b) a family relationship; or

(c) an informal care relationship"

Section 14 and 15 of the *Domestic and Family Violence Protection Act* 2012 define "an intimate personal relationship".

OR

5. **The choking/ suffocation/ strangulation is associated domestic violence under the *Domestic and Family Violence Protection* Act 2012[3]**

Section 9 of the *Domestic and Family Violence Protection Act* 2012 provides that "associated domestic violence means behaviour mentioned in section 8(1) by a respondent towards-

(a) a child of an aggrieved; or

(b) a child who usually lives with an aggrieved; or

(c) a relative of an aggrieved; or

---

1 Refer to any relevant issue raised on the evidence.

2, 3 It will be necessary to point out the basis for the allegation of being in "a domestic relationship" or the allegation that the act is "associated domestic violence" within the meaning of the Domestic and Family Violence Protection Act 2012. See also the Domestic and Family Violence Protection Act 2012 Benchbook.

(d) an associate of an aggrieved"

Assault is not an element of the offence.[4]

[4] Provocation is only available in relation to "an offence of which assault is an element", see section 268(1) of the *Criminal Code* 1899.

Involving a child in making child exploitation material s 228A[1] (commencement date: 4 April 2005)

The prosecution must prove that:

1. The defendant involved a child in the making of child exploitation material.

[Relevant definitions below are found in s 207A and s 228A(4) of the *Code*]

"Child exploitation material" means material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person, or a representation of a person who is, or who apparently is, a child under 16 years –

(a) in a sexual context, including for example, engaging in a sexual activity; or

(b) in an offensive or demeaning context; or

(c) being subjected to abuse, cruelty or torture.

"Involving a child in the making of child exploitation material" includes –

(a) in any way concerning a child in the making of child exploitation material; and

(b) attempting to involve a child in the making of child exploitation material [s 228A(4)]**.**

"Someone", in the context of a description or depiction, includes the body parts of someone, including for example, someone's breast or genitalia.

"Material" includes anything that contains data from which text, images or sound can be generated.

See s 228E for defences available to a person charged with this offence. The onus of proving the defence is on the defendant.

See s 228F for the requirement for the exclusion of non-essential persons from the courtroom when material alleged to be child exploitation material is on display.

See s 228G for the power to order the forfeiture of child exploitation material.

[1] The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Making child exploitation material[1] s 228B (Commencement Date: 4 April 2005)

The prosecution must prove that:

1. The defendant made child exploitation material;[2]

See s 228E for defences available to a person charged with this offence. The onus of proving the defence is on the defendant.

See s 228F for the requirement for the exclusion of non essential persons from the courtroom when material alleged to be child exploitation material is on display.

See s 228G for the power to order the forfeiture of child exploitation material.

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 Child exploitation material means material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person, or a representation of a person who is, or who apparently is, a child under 16 years –

(a) in a sexual context, including for example, engaging in a sexual activity; or
(b) in an offensive or demeaning context; or
(c) being subject to abuse, cruelty or torture (s 207A).

"Someone", in the context of a description or depiction, includes the body parts of someone, including for example, someone's breast or genitalia (s 207A).

"Material" includes anything that contains data from which text, images or sound can be generated (s 207A).

By the *Classification of Computer Games Act* 2013 (assent 26 February 2013) the definition was extended to include a representation of a person.

Distributing child exploitation material s228C[1] (Commencement date: 4 April 2005)

The prosecution must prove that:

1. The defendant distributed[2] child exploitation material;[3]

See s 228E for defences available to a person charged with this offence. The onus of proving the defence is on the defendant.

See s 228F for the requirement for the exclusion of non essential persons from the courtroom when material alleged to be child exploitation material is on display.

See s 228G for the power to order the forfeiture of child exploitation material.

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 Distribute child exploitation material includes –

(a) communicate, exhibit, send, supply, transmit child exploitation material to someone, whether a particular person or not; and
(b) make child exploitation material available for access by someone, whether by a particular person or not; and
(c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and
(d) attempt to distribute child exploitation material(s 228C(2)).

3 Child exploitation material means material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person, or a representation of a person who is, or who apparently is, a child under 16 years –

(a) in a sexual context, including for example, engaging in a sexual activity; or
(b) in an offensive or demeaning context; or
(c) being subject to abuse, cruelty or torture (s 207A).

"Someone", in the context of a description or depiction, includes the body parts of someone, including for example, someone's breast or genitalia (s 207A).

"Material" includes anything that contains data from which text, images or sound can be generated (s 207A).

By the *Classification of Computer Games Act* 2013 (assent 26 February 2013) the definition was extended to include a representation of a person.

Possessing child exploitation material s 228D (Commencement date: 4 April 2005)

The prosecution must prove that:

1. The defendant possessed child exploitation material.

Child exploitation material means[1] material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person, or a representation of a person, who is, or apparently is, a child under 16 years—

(a) in a sexual context, including for example, engaging in a sexual activity; or

(b) in an offensive or demeaning context; or

(c) being subjected to abuse, cruelty or torture.

In this case, the child exploitation material the subject of the charge is [describe the material].[2]

Possession[3] includes having the material in a person's possession or custody, or under control.[4]

2. The defendant knowingly possessed the material.

It is necessary for the prosecution to prove that the defendant knew that he had the material in his possession, that is, a guilty knowledge of having possession of the offending material is an essential element of the offence.[5]

3. Circumstance of aggravation

Refer to any circumstance of aggravation.[6]

---

1 The definition is set out in s 207A.

2 As to the need to specify the material, see *R v Campbell* [2009] QCA 128 at [51],[54],[60]-[63].

3 See definition in s 1.

4 See *R v Campbell* [2009] QCA 128 at [57],[58].[61] and [63]. When joint possession is not alleged, the jury should be directed that proof of possession requires proof that others were or could be excluded from control of the thing in question: *R v Campbell* [2009] QCA 128 at [63].

5 See *R v Shew* [1998] QCA 333 at [18]; *R v Campbell* [2009] QCA 128 at [57].

6 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Defences

The available defences are set out in s 228E Criminal Code.

The onus of proving a defence is on the defendant.

Exclusion of non-essential persons when child exploitation material is displayed.

See s 228F Criminal Code.

Forfeiture of child exploitation material

See s 228G Criminal Code.

Carnal Knowledge of a person with an impairment of the mind: s 216

The prosecution must prove that:

1. The complainant was a person with an impairment of the mind at the relevant time.

A person with an impairment of the mind means a person with a disability that -

(a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and

(b) results in –

(c) a substantial reduction of the person's capacity for communication, social interaction or learning; and

(d) the person needing support.[1]

2. The defendant had carnal knowledge of the complainant.[2]

Carnal knowledge means the insertion of the defendant's penis into the genitalia of the complainant;

(a) the offence is complete upon penetration;

(b) penetration to the slightest degree is sufficient;

(c) ejaculation is not necessary.

---

1 See s 1, for the meaning of a person with an impairment of the mind.

2 The term "carnal knowledge" is defined in s 6 as including sodomy. However, that definition is subject to s 216(5) which provides that "carnal knowledge" does not include sodomy.

Abduction of child under 16 s 363A

The prosecution must prove that:

1. **The defendant took[1] an unmarried child under the age of 16 years.[2]**
2. **Out of the custody or protection of the child's father, mother or person having the lawful care or charge of the child.**
3. **Against the will of the father, mother or other person.**
4. **The taking was unlawful. That is, not authorised, justified or excused by law.**

It is immaterial that the child was taken with the consent of or at the suggestion of the child (s 363A(3)). It does not matter that, at the moment the child is abducted, the child is in the physical possession of some other person.[3]

---

1 As to the meaning of "took", the defendant must have in some way contributed to the child's leaving or arranged or actively participated in the child's leaving the custody or protection of the parent or other person. *R v Johnson* [1957] St R Qd 594; *R v Mejac* [1954] Tas SR 26. The taking may be a temporary taking only: *R v Baille* (1859) 8 Cox 238; *R v Timmins* [1860] Bell 276.

2 It is immaterial that the defendant believed the child to be of or above the age of 16 (s 363A(2)).

3 *R v Beble* [1979] Qd R 278

Child Stealing s 363

A. (s363(1)(a))

The prosecution must prove that:

1. **The defendant took[1] or enticed away or detained[2] the child.**

   Entice away means simply to take away by means of deception rather than by force.

2. **The taking or enticing or detaining was forcible or fraudulent.[3]**

   The word fraudulent refers to the means used to take, entice away or detain. The means used must involve some deception or false pretence or some other trickery.

3. **The child was at the time under 16 years.**

4. **The defendant intended to:**

5. **deprive the parent,[4] guardian or other person who had lawful care of the child or possession of the child; or**

6. **steal any article upon or about the person of the child.**

Child stealing is an offence against the possessory rights of a parent or other person having the lawful care of the child. There must be an intention to deprive the parent or other person of the possession of the child. It is not necessary that the defendant intended to permanently deprive the parent of possession. It would be sufficient to intend to only temporarily deprive the parent of possession of the child[5].

B. (s363(1)(b))

The prosecution must prove that:

---

[1] As to the meaning of "took", the defendant must have in some way contributed to the child's leaving the possession of the parent or arranged or actively participated in the child's leaving: See *R v Johnson* [1957] St R Qd 594; *R v Timmins* (1860) Bell CC276.

[2] The term "detain" should be given its ordinary and natural meaning. It has a variety of meanings including "keep in confinement", "hold back, delay, stop". See *R v Awang* [2004] 2 Qd R 672 per Williams JA.

[3] Force or fraud may be practiced on the child or parent or guardian: *R v Bellis* (1893) 62 LJMC 155.

[4] s363(2) provides that "parent" includes adoptive parents to the exclusion of any natural parent.

[5] *R v Baille* (1859) 8 Cox CC 238; *R v Timmins* (1860) Bell CC 276

1. **The defendant received or harboured**

2. **A child under 16 years**

3. **Knowing the child to have been so taken or enticed away or detained.**

4. **The defendant intended to:**

   (a) deprive the parent[6], guardian or other person who had lawful care of the child of possession of the child; or

   (b) steal any article upon or about the person of the child.

It is a defence to either A or B above to prove that the defendant claimed in good faith a right to the possession of the child, or, in the case of a child, not being an adopted child, whose parents were not married to each other at the time of conception and have since not married each other, to prove that the defendant is the child's mother or claimed in good faith to be the child's father (s363(3)).

Subsection (3) provides a defence where the onus is on the defendant to prove the defence on the balance of probabilities*: R v Seery* [1995] QCA 389. It is suggested that the authorities on the interpretation of s22 may be applicable to the interpretation of s363(3): *R v Campbell* [2009] QDC 61 (McGill DCJ). The defendant must prove that at the relevant time he or she in good faith believed he or she had a right to take possession of the child. In this context the term "in good faith" simply means honestly. The term "claimed" does not mean that that the defendant has to make an express claim out loud at the time.

[6] s363(2) provides that "parent" includes adoptive parents to the exclusion of any natural parent.

Taking child for criminal purposes s 219[1]

The prosecution must prove that:

1. **The defendant took[2] or enticed away or detained[3] a child under the prescribed age.[4]**
2. **The taking or detention was done forcibly.**
3. **For the purpose of any person doing a proscribed act in relation to the child.**

A proscribed act is an act defined to constitute an offence in s 208 (sodomy), s 210 (indecent treatment of children under 16) or s 215 (carnal knowledge with or of children under 16).

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 As to the meaning of "took", the defendant must have in some way contributed to the child's leaving the possession of the parent or arranged or actively participated in the child's leaving: see *R v Johnson* [1957] St R 594; *R v Timmins* [1860] Bell 276.

3 The term "detain" should be given its ordinary and natural meaning. It has a variety of meanings including "keep in confinement" and "hold back, delay, stop". See *R v Awang* [2004] 2 Qd R 672 per Williams JA.

4 "Prescribed age for a child" means:

(a) for an offence defined in s208 – 18 years;

(b) for an offence defined in s210 or 215 - 16 years (s 219(6)).

Section 219(4) provides that if the proscribed act is one defined to constitute an offence defined in s 208 and the child is of or above 12 years, it is a defence to prove that the defendant believed, on reasonable grounds, the child was of or above 18 years. Section 219(5) provides that if the proscribed act is one defined to constitute an offence defined in s 210 or s 215 and the child is of or above 12 years, it is a defence to prove that the defendant believed, on reasonable grounds, the child was of or above 16 years.

If the child was at least 12 years when the crime was alleged to have been committed, it is a defence to prove the defendant believed on reasonable grounds the child was at least the prescribed age (s 229B(5)).

See also s 229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

Cruelty to children under 16 s 364

The prosecution must prove that:

1. **The defendant had the lawful care or charge of the child, who was under 16 years.**

2. **He caused harm[1] to the child by failing to provide the child with adequate food (or clothing, medical treatment, accommodation or care).[2]**

3. **The defendant was able, from his own resources, to provide food.[3]**

4. **The defendant knew, or ought reasonably to have known, that failing to provide the child with adequate food would be likely to cause the child harm.**

---

[1] Any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing, whether temporary or permanent: s 364(2).

[2] Section 364(2).

[3] Where the defendant does not have the resources to provide adequate food (or clothing, medical treatment, accommodation or care) the charge is one of failing to take all lawful steps to obtain it. Other forms of prescribed conduct under s 364(2) are deserting the child and leaving the child without means of support.

Circumstances of Aggravation (Robbery, Assault, Burglary)

Armed:

The weapon must be in the possession of the defendant and available for immediate use as a weapon.

Offensive Weapon:

- **Anything that is not commonly used except as a weapon.**
- **Anything capable of being used and intended by the defendant to be used for offensive purposes [even though it is also capable of being used for innocent purposes].**[1]

In company:

Being "in company" requires proof that [the complainant] was confronted by the combined force or strength of two or more persons including the defendant or the force of two or more persons including the defendant must be deployed against [the complainant].

It is not necessary that more than one participant actually strike the victim. It is sufficient that the defendant and one or more other person or persons be physically present for the common purpose of [assaulting, robbing] [the complainant] and of physically participating as required.[2]

Wounding or using person violence to any other person.

Wounding – see unlawful wounding.

Personal violence means bodily violence.[3,4]

Serious Organised Crime

The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

---

1 In many cases this will not be an issue. If the weapon or thing is one capable of being used for normal purposes e.g. a knife, the prosecution must prove that the defendant was armed with it with the intention of using it for an aggressive or offensive purpose: *Miller v Hrvojevic* [1972] VR 305.

2 *R v Brougham* (1986) 43 SASR 187 at 191 per King CJ; *R v Leoni* [1999] NSWCCA 14.

3 *R v De Simoni* (1981) 147 CLR 383. The same incident of actual violence which constitutes an element of the offence may also constitute the circumstance of aggravation of personal violence.

4 See Robbery.

Circumstances of Aggravation in Sexual Offences

"Under his or her care":[1]

The prosecution must prove that the defendant had the child under his care at the time of the alleged indecent dealing, that is, he was looking after the child at the time. The prosecution does not have to prove that he was the only person looking after the child at the relevant time.

OR: A person has a child in care if he/she is responsible for keeping the child safe and healthy in the circumstances. It is not necessary for the prosecution to establish that the defendant was the only person who had the child under his/her care at the time.

"Under the age of 12":

This is not disputed.

OR: The uncontested evidence from the child's mother [or from the birth certificate – exhibit -- **] is that the child was born on [**date**] so at all material times he/she would have been under 12.**

"Lineal Descendant":

The prosecution has to prove that the child was a direct descendent from the defendant [e.g. A granddaughter is a lineal descendant of her grandfather.]

"Under Guardianship":

The prosecution must prove that the defendant had the right or duty of protecting the complainant in the sense that he was required to protect her property or rights in circumstances in which the complainant was not capable of managing her affairs because of her age or other disability.

"A Person with an Impairment of the Mind":

The prosecution must prove that the complainant was a person with an impairment of the mind. (See the definition in Section 1, *Criminal Code*.)

[1] In *R v FAK* [2016] QCA 306 the Court of Appeal discussed aspects of what is involved in having a child under care: at [64]-[87]; [129]-[138]; [144]-[149]. The expression "under care" means having responsibility for the control and supervision of the child.

"Serious Organised Crime":

Some sexual offences are prescribed offences under s 161Q of the *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

See directions at 72.1.

Corruption of a Witness s 127[1]

The prosecution must prove that:

1. **The defendant gave (or conferred or procured or promised or offered to give, confer, procure or attempt to procure) property or benefit to a person;**
2. **Upon any agreement or understanding;[2]**
3. **That any person called (or to be called) as a witness;[3]**
4. **In a judicial proceeding;**
5. **Would give false testimony or withhold true testimony.[4]**

OR

1. **The defendant attempted;[5]**
2. **To induce any person;**
3. **To give false testimony or withhold true testimony;**
4. **The person was to be called as a witness;**
5. **In a judicial proceeding.[6]**

OR

1. **The defendant asked for (received, obtained or agreed or attempted to obtain) any property or benefit for himself or another;**
2. **Upon any agreement or understanding;**
3. **That any person as a witness;**
4. **In any judicial proceeding;**

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 The offence is corrupting a witness by entering into an understanding or agreement and the offence is complete whether or not true testimony was in fact withheld: *R v Danahay* [1993] 1 Qd R 271.

3 A person who was the complainant in relation to certain alleged offences and had been served with a subpoena to attend at the committal proceedings is a person "to be called as a witness": *Danahay* (ibid).

4 An agreement or understanding that a person would not present himself as a witness at a judicial proceeding when required was an agreement or undertaking to withhold true testimony: *Danahay*. Also per Williams J: an offence against s 127(1) could be made out without proof that the testimony to be withheld was in fact true.

5 See footnotes to "Attempts" s 4. The prosecution does not have to prove that true testimony was in fact withheld or would have been withheld.

6 "Judicial proceeding" includes any proceeding had or taken in or before any court, tribunal or person in which evidence might be taken: s 119.

5. Would give false testimony or withhold true testimony.

Damaging Evidence with Intent s 129

The prosecution must prove that the defendant:

1. knowing that the [relevant thing] may be needed in evidence in a judicial proceeding:

   (a) 'judicial proceeding'[1] includes any proceeding before any court, tribunal or person, in which evidence may be taken on oath;

   (b) in this context, "knowing" means "believing"; and

   (c) it is sufficient to prove that the defendant believed that the [relevant thing] might be required (that is, there is a realistic possibility) in evidence in a possible future proceeding (that is, there does not have to be a proceeding on foot at the time);[2]

2. damaged the [relevant thing]:

   (a) the word "damage" bears its natural and ordinary meaning,[3] namely, "injury or harm that impairs value or usefulness";[4]

   (b) a thing may be said to be damaged even though the injury to the thing is not permanent but is remediable; a thing is damaged if it is rendered imperfect or inoperative;[5]

   (c) damage may be caused by either physical harm to the relevant thing (rendering it imperfect), or interference with the functionality of the relevant thing (rendering it inoperative, or unable to be used for its ordinary functions), even if that is for a period of time, while the imperfection or inoperability is being eliminated.[6]

3. with the intention of stopping the [relevant thing] being used in evidence.[7]

---

1 See the definition in s 119 of the Criminal Code.

2 *R v Ensbey* [2005] 1 Qd R 159 at [15] and [16] per Davies JA and at [48] per Jerrard JA.

3 Enlarged as relevant and appropriate by the definition of "damage, in relation to a document", in s 1 of the Criminal Code.

4 *Prime Infrastructure (DBCT) Management Pty Ltd v Vero Insurance Limited* [2005] QCA 369 at [31].

5 *R v Zischke* [1983] 1 Qd R 240 at 246D.

6 *Hammond v The Queen* (2013) 85 NSWLR 313 at [42]-[69], in particular [50] and [69].

7 See direction on intention at Bench Book No. 59.

Dangerous Operation of a Motor Vehicle s 328A

The prosecution must prove that the defendant:

1. **Operated, or in any way interfered with the operation of, a motor vehicle[1].**
2. **In a place,[2] namely: …….**
3. **Dangerously.**
4. **[The defendant was adversely affected by an intoxicating substance].[3]**
5. **[At the time of committing the offence the defendant was excessively speeding or taking part in an unlawful race or unlawful speed trial].**
6. **[If it has been alleged that the defendant has been previously convicted of any of the offences referred to in s 328A(3) this circumstance of aggravation must be pleaded and proved.]**

The term "operates a motor vehicle dangerously" means "operates a vehicle at a speed or in a way that is dangerous to the public having regard to all the circumstances" including:

1. **"the nature, condition and use of the place; and**
2. **the nature and condition of the vehicle; and**
3. **the number of persons, vehicles or other objects that are, or might reasonably be expected to be, in the place; and**
4. **the concentration of alcohol in the operator's blood; and**
5. **the presence of any other substance in the operator's body."**

---

1 "Operated" is not defined in the *Code*, but in most cases it will be sufficient to read out to the jury such parts of the definition of "operates … a vehicle dangerously" in sub-section (6) as are relevant to the facts of the case. If it is alleged that the defendant was not the driver, then the prosecution would have to plead "dangerously interfered with the operation of a vehicle". If it is alleged that the defendant was the driver, then proof of that fact will be sufficient to satisfy the requirement that the defendant "operated" a motor vehicle. The Macquarie Dictionary defines the term as "to work or use a machine".

2 The 1997 amendments provide that the offence can occur in "any place" (other than a place being used to test vehicles from which other traffic is excluded at the time), whereas previously the offence was confined to "on a road or in a public place".

3 In *R v Anderson* [2006] 1 Qd R 250 Keane JA, with whose reasons Williams JA agreed, approved at [70] a direction to the jury which explained "adversely affected by alcohol" as meaning some material influence upon the person from the consumption of alcohol; Keane JA added at [71] that the trial judge was referring to a material detraction in the driver's ability to control a vehicle in consequence of the driver's consumption of alcohol, and that that was a correct understanding of the words.

The operation of a vehicle includes the speed at which the vehicle is driven and all matters connected with the management and control of the vehicle by the driver, such as keeping a lookout, turning, slowing down and stopping.

The expression "operates a vehicle dangerously" in general does not require any given state of mind on the part of the driver as an essential element of the offence. A motorist may believe he or she is driving carefully yet be guilty of operating a vehicle dangerously. "Dangerously" is to be given its ordinary meaning of something that presents a real risk of injury or damage. The ordinary meaning of 'dangerous' is 'fraught with or causing danger; involving risk; perilous; hazardous; unsafe'. It describes, when applied to driving, a manner or speed of driving which gives rise to a risk to others, including motorists, cyclists, pedestrians and the driver's own passengers.[4]

The prosecution must prove that there was a situation which, viewed objectively, was dangerous.[5] **For the driving to be dangerous, there must be some feature which is identified not as a mere want of care, but which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle, including driving by a person who may, on occasions, drive with less then due care and attention.**[6]

Momentary lapses of attention on the part of the driver, if they result in danger to the public, are not outside the ambit of the offence of dangerous operation of a motor vehicle merely because they are brief or momentary. If a driver adopts a manner of driving which is dangerous in all the circumstances of the case to other road users it does not matter whether they are deliberately reckless, careless, momentarily inattentive or even doing their incompetent best. However, the prosecution must prove that there was some serious breach of the proper conduct of the vehicle upon the roadway, so serious as to be in reality, and not speculatively, potentially dangerous to others.[7]

---

4 *King v The Queen* (2012) 245 CLR 588.

5 *R v Jiminez* (1992) 173 CLR 572 at 583; *R v McBride* (1966) 115 CLR 44 at 50-51.

6 *R v Jiminez* (1992) 173 CLR 572 at 579. The jury need not be told that fault is an element of the offence. That is not to say that in establishing the offence a consideration of the offender's mental state must necessarily be disregarded; the provisions of Ch 5 Criminal Code, eg ss 23,24,25,and 31 may be raised: see *R v Wilson* [2009] 1 Qd R 476 at [15]. See also *R v Grimaldi* [2011] QCA 114. In relation to the defence of mistake of fact in s 24 see also *R v Plath* [2003] QCA 567 at [7] and *R v Perham* [2016] QCA 123 at [34].

7 See *McBride* (1966) 115 CLR 44 at 49-50. When it is alleged that the manner of operation was dangerous because the defendant was tired or drowsy, regard should be had to *Jiminez* (at 579- 580) where it was held

The consequences of the defendant's acts or omissions cannot add to the criminality of his driving. The quality of being dangerous to the public does not depend on the resultant damage. Whilst the immediate result of driving may afford evidence from which the quality of the driving may be inferred, it is not the result which gives that quality.[8]

If the defendant was adversely affected by alcohol, that fact is a circumstance relevant to the issue as to whether the defendant operated the vehicle dangerously.

CIRCUMSTANCE OF AGGRAVATION

(A) *ADVERSELY AFFECTED BY AN INTOXICATING SUBSTANCE*

The law provides that the certificate blood alcohol analysis is conclusive evidence as to the blood alcohol concentration of the defendant at the time the sample blood was taken and at the time the offence is said to have occurred.

Where the certificate indicates a blood alcohol concentration equal to or exceeding .150 it shall be conclusive evidence that the person was adversely affected by liquor at the relevant time.

Whilst the fact that a person is adversely affected by alcohol is a circumstance relevant to the issue as to whether a person was operating a vehicle dangerously, the evidence concerning his blood alcohol concentration is not conclusive proof that he was driving dangerously.

(B) *EXCESSIVELY SPEEDING OR TAKING PART IN AN UNLAWFUL RACE OR UNLAWFUL SPEED TRIAL*

See subsection (6) for the meaning of "excessively speeding".

See subsection (6) for the meanings of "unlawful race" and "unlawful speed trial".

---

that the issue is not whether there was or was not a warning as to the onset of sleep, but as to whether the driver was so tired that, in all the circumstances, the driving was dangerous to the public. 'If the jury is satisfied beyond reasonable doubt that the driving was objectively dangerous to the public, then they must consider whether they were satisfied beyond reasonable doubt that the accused when doing so was not momentarily and suddenly asleep. If so his actions whilst asleep would be involuntary and could not amount to dangerous operation of a motor vehicle': *R v Kuruvinakunnel* [2012] QCA 330.

8 *McBride v The Queen* (1966) 115 CLR 44 at 50.

Dangerous Operation of a Motor Vehicle causing Death or Grievous Bodily Harm: s 328A(4)

The prosecution must prove that the defendant:

1. **Operated, or in any way interfered with the operation of, a motor vehicle**[9]**;**
2. **In a place, namely……...;**
3. **Dangerously; and**
4. **That the defendant thereby caused the death of the deceased, or grievous bodily harm to the complainant.**
5. **[At the time of committing the offence the defendant was:**
6. **adversely affected by an intoxicating substance; or**
7. **excessively speeding; or**
8. **taking part in an unlawful race or unlawful speed trial].**[10]
9. **[The defendant left the scene of the incident, other than to obtain medical or other help for the other person, before a police officer arrived, knowing or that he or she ought reasonably to have known that the other person had been killed or injured].**

It is not necessary for the prosecution to prove that the dangerous operation of the motor vehicle was the sole cause of the deceased's death or complainant's grievous bodily harm. It is sufficient for it to show that the dangerous driving was a substantial or significant cause of that result.[11]

---

9 "Operated" is not defined in the *Code*, but in most cases it will be sufficient to read out to the jury such parts of the definition of "operates … a vehicle dangerously" in sub-section (6) as are relevant to the facts of the case. If it is alleged that the defendant was not the driver, then the prosecution would have to plead "dangerously interfered with the operation of a vehicle". If it is alleged that the defendant was the driver, then proof of that fact will be sufficient to satisfy the requirement that the defendant "operated" a motor vehicle. The Macquarie Dictionary defines the term as "to work or use a machine".

10 See subsection (6) for the meanings of "excessively speeding", "unlawful race" and "unlawful speed trial".

11 *R v Cheshire* [1991] 3 All ER 670 "It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the accused's acts can fairly be said to have made a significant contribution to the victim's death. See also *Royall v The Queen* (1991) 172 CLR 378.

Deprivation of Liberty s 355

The prosecution must prove that:

1. **The defendant:**

   (a) **confined[1] or detained[2] another in any place against the other person's will; or**

   (b) **otherwise deprived[3] another of the other person's personal liberty.[4]**

2. **The defendant did so unlawfully. That is, not authorised, justified or excused by law.**

Detain means keep in confinement or under restraint. Restraint can be exercised by threats. The defendant does not have to use force or physical restraints. If the defendant compels the person by threats to remain in a place against that person's will, that is sufficient. Depriving of liberty simply means taking away the free choice of a person to move about as he or she wants.

---

1 In *R v Awang* [2004] 2 Qd R 672, Williams JA stated that the terms "confines", "detains", "deprives" and "liberty" should be given their ordinary and natural meaning. He stated that the most apposite meaning of "liberty" was "The condition of being able to act in any desired way without restraint; power to do as one likes". "Deprive" includes the denial of enjoyment of something and "detain" has a variety of meanings including "keep in confinement", "hold back, delay, stop". McMurdo P noted that a person may be deprived of their liberty not only against their will but also where the deprivation was achieved by fraud, done without knowledge or where the victim lacks capacity.

2 See footnote 1 above.

3 See footnote 1 above.

4 See footnote 1 above.

Drugs: Possession – *Drugs Misuse Act* 1986

It is a crime unlawfully to have possession of a dangerous drug. (Insert name of drug**) is a dangerous drug. If the defendant had possession of that drug, that possession was not lawful. The central issue in the case therefore concerns possession.**

In cases where s 129(c) Drugs Misuse Act 1986 does not apply:

Possession denotes a physical control or custody of a thing with knowledge that you have it in your control or custody. You do not possess a thing unless you know you have it or else can actually exercise dominion over it.

It is for the prosecution to prove, beyond reasonable doubt, the defendant's knowledge of (here insert fact, eg. presence of the things containing the drugs). However, it is not necessary for the prosecution to establish that the defendant knew that the substance was (describe drug). In other words, the prosecution does not bear the burden of showing that the defendant knew the nature of the substance in his control or custody. It is enough for the crown to prove, directly or by inference, that the defendant knowingly possessed a thing or substance or object which was in fact a dangerous drug.[1]

If you are satisfied beyond reasonable doubt that the defendant had the requisite degree of control or custody to constitute possession, he is guilty unless he has proved that he then believed, honestly and reasonably, that the (containers**) did not contain a dangerous drug.[2] If you are persuaded of that, the defendant is not guilty. The standard of proof concerning this issue is not proof beyond reasonable doubt. The defendant need only prove that it is more probable than not that he believed, honestly and reasonably, that the (**containers**) did not contain (insert name of drug).**

---

1 *R v Tabe* (2003) 139 A Crim R 417 at [8]; upheld by the majority in *Tabe v The Queen* (2005) 225 CLR 418. So far as knowledge is concerned, it is not necessary that the defendant knew that the property was a dangerous drug. It suffices that he possessed the substance which is in fact a dangerous drug: *Clare* [1994] 2 Qd R 619. And generally as to the operation of s 57(c) of the *Drugs Misuse Act* 1986, see E. Barnett, "*Presumption of Possession: s 57 …*", (1998) 18 QL 123; P. Franco, "*Share and Share Alike*", (1999) 20 QL 21; *Jenvey v Cook* (1997) 94 A Crim R 392. A person charged as an accessory will also be guilty of possession of dangerous drugs, if it is established that the accessory aided the principal offender to secure possession of something which is in fact a dangerous drug or dangerous drugs, whether or not the crown can establish that the accessory believed it contained a dangerous drug or dangerous drugs. See *R v Tabe* [2003] QCA 356 at [17], in the judgment of the Chief Justice with whom Davies JA agreed.

2 See s 129(1)(d) *Drugs Misuse Act*; and *R v Myles* [1997] 1 Qd R 199 at 200, 210.

If you are so persuaded, you must return a verdict of not guilty (in respect of the charge of possession of the dangerous drugs).

In cases where s 129(1)(c) Drugs Misuse Act 1986 is relevant:

A provision [of the *Drugs Misuse Act* s 129] arises here for your consideration. It provides:

"proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession, unless the person shows that he or she then neither knew or had reason to suspect that the drug was in or on that place"

The effect of this provision is that if the prosecution satisfies you beyond reasonable doubt that the defendant was an occupier of, or a person concerned in the control and management of, the place where the drugs were found, he is fixed with possession of those goods in law and will be guilty of the offence of possession unless he satisfies you that he did not know of, or have reason to suspect, the presence of those drugs. The burden of proof in this respect lies on the defendant, although it is sufficient if he satisfies you that it is more probable than not that he neither knew of, nor had reason to suspect, the presence of the drugs.

The occupier of a place is someone who is in occupation of it. This is a question of fact for you. A person who occupies a place will usually do so under some legal right but a squatter may also be an occupier. To be in occupation involves exercising some degree of control over, or management of, the relevant place. An occupier will be able to exclude others. He will usually be physically present at the place, either constantly or from time to time but he may exercise occupation through another or others as his agent or agents. A person may jointly occupy a place with another or others.

Similar considerations apply when you are considering whether the person is concerned in the management or control of a place. Consideration will primarily focus upon the power of such person to exercise control over the place and the

extent to which he does so and his power to make decisions concerning the place and carry them out or have them carried out.[3]

It is for you to say if you are satisfied beyond reasonable doubt by the evidence of the defendant's alleged relationship with the place, where the drugs were found, his alleged activities on or in relation to it, and the extent of the control alleged to have been exercised by him over it, whether he is someone to whom the section applies. If so, you will convict him unless you are persuaded that it is more probable than not that he neither knew of, nor suspected, the presence of the drugs in or at that place. And if so persuaded, you will find him not guilty.

For a dangerous drug that is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1, part 2 (a ***part 2 drug***), a reference in subsection (1) to the quantity of the thing is a reference to the whole weight of all the part 2 drugs (whether of the same or different types) that the person is convicted of unlawfully possessing.[4]

[3] Being "concerned in the management or control of a place" requires more than bare ownership. Some interest in or personal involvement in the control or management of a place must be shown: *R v Smythe* [1997] 2 Qd R 223 at 226.

[4] Safe Night Out Legislation Amendment Act 2014 part 6 amendment of Drugs Misuse Regulation 1987.

Trafficking in a Dangerous Drug

It is a crime to carry on a business of unlawfully trafficking in a dangerous drug (heroin is a dangerous drug)**. "Trafficking" includes selling.**[1] **Here there is no suggestion that the defendant was selling** (heroin or other drugs) **lawfully. So the critical question is whether the defendant was carrying on a business of selling** (heroin) **at some time between the dates, and at the place, mentioned in the indictment.**

What does the expression "carrying on a business" connote in this context?

Generally speaking, a single sale may be proved to have been carried out in such circumstances as to show that it was a part of the carrying on of a business. However, mere occasional sales of the drug could not amount to the carrying on of a business of selling it. "Carrying on a business" for present purposes signifies much more than a few isolated transactions.[2] **The expression connotes a continuous course of conduct engaged in to obtain a reward of a commercial character. Proof of the carrying on of a business therefore requires the prosecution to establish several transactions done for gain over more than a brief interval. Repetition of acts, and activities of a commercial nature possessing something of a permanent character, are hallmarks of a business being carried on. But the person need not intend to trade indefinitely before that person can be said to be carrying on a business. Nor must the venture be profitable before it may fairly answer the description "business".**

The reward need not be money. For example, an addict could carry on a business though the only reward is drugs for personal consumption. And it is scarcely to be expected that a person who carries on an illicit trade (in heroin) would establish shop premises, have business cards, or advertise. It is not essential to the identification of a venture as a business that it have more than one customer. Some businesses of their nature will have more than one customer: for example, the local grocer. Others may not.

---

1 Typically, the trafficking will be selling. But "trafficking" is of wider import, meaning "knowingly engaging in the movement of drugs from source to ultimate user": *R v Elhusseini* [1988] 2 Qd R 442 at 450.

2 To establish trafficking it is necessary to show a regularity of drug dealing sufficient to establish that it occurred in the course of a business which might be regarded as trafficking: *Martin v Osborne* (1936) 55 CLR 367 at 376; *R v Kelly* [2005] QCA 103 at [7].

Escape from Lawful Custody[1] s 142

The prosecution must prove that the defendant:

1. Was in lawful custody.

A person is in lawful custody if he has been arrested and detained or imprisoned in a manner that has been authorised by law.[2,3]

It will be necessary to direct the jury either:

(a) There is no other evidence to suggest that the defendant was not in lawful custody as stated. In those circumstances the jury must proceed on the basis that the prosecution have proved this element of the offence, or

(b) There is evidence to suggest that the defendant was not in lawful custody at that time. The defendant has the responsibility of proving on the balance of probabilities that he was not in lawful custody.

2. Escaped from that lawful custody.

To escape is to gain freedom from the person or place that has restricted or controlled that freedom. The prosecution must prove that the defendant was aware that he was not free to leave[4] and that he acted deliberately to withdraw from actual custody.[5]

---

1 Section 142 *Code*. The direction is to be modified if the offence is aiding to escape: s 141; for "harbouring", *Darch v Weight* [1984] 1 WLR 659

2 The appropriate direction will depend on the evidence. See s 145B *Code* which facilitates proof of lawful custody for the purposes of offences in this Chapter. For the distinction between a person in the Chief Executive's (Corrective Services) custody and a person in the custody of the Commissioner of Police, see ss (7)- (8) *Corrective Services Act* 2000 (opn 1. 7. 2001).

3 If it is alleged that the defendant was in lawful custody whilst detained after arrest, or for investigation or questioning, or whilst being transported by police to a corrective services facility, or in a watch-house facility it will be necessary to direct the jury to the relevant evidence, and to explain the legislation or court order under which the defendant was detained.

If it is alleged that the defendant was in lawful custody because he is detained under the authority of the Chief Executive (Corrective Services), it will be necessary to direct the jury to the evidence of the relevant witness authorised by the Chief Executive pursuant to s 145B *Code* to give evidence.

4 The lawfulness of a detention may fluctuate with the circumstances but if the defendant understood that he was under arrest in order to be taken before a court the position was the same as if he had been arrested: *Michaels* (1995) 184 CLR 117 at 126.

5 To continue the crime of escape there must be a conscious and intentional act of withdrawal from actual custody: *R v Scott* [1967] VR 276.

Extortion[1] s 415(1)(a) (Before 1 December 2008)

The prosecution must prove that:

1. **The defendant intended[2] to extort (or gain property, or benefit or the performance of service) from a person.**
2. **The defendant caused the person to receive a document.**
3. **The defendant knew the contents of the document.**
4. **The document demanded property (or benefit or the performance of services) from the person;[3]**
5. **The document contained threats of injury or detriment[4] to be caused to the person[5], or another person[6], if the demand was not complied with.**
6. **The demand was without reasonable or probable cause.[7]**

---

1 The direction refers only to demanding property but the offence includes demanding benefits on performance of service. This direction deals with written demands. If the demand is oral the offence is established by s 415(1)(b). See direction on s 415(1)(b).

2 See notes on Intention.

3 See s415(1)(a)(ii):

4. that anything be done (or omitted to be done or be procured) by any person,
5. and containing any threat of injury or detriment to be caused to the person, or another person, or to the public (or any member or members of the public) or any property
6. by the offender or another, if the demand is not complied with.

4 The question of whether particular conduct and statements are a threat is a question of fact. A statement by a defendant that he would withhold evidence advantageous to a person in a committal proceedings, unless the person paid a sum of money demanded, was capable of constituting 'threat of detriment': *R v Jessen* [1997] 2 Qd R 213 at 218-220.

5 A person is not criminally responsible for the offence if the injury or detriment is threatened to himself only, or to any other person or the public, or to property of which the person is the sole owner: s 415(2).

6 It does not matter if the threat does not specify the injury or detriment that is to be caused, or the person or persons to whom or the property to which injury or detriment is to be caused. Self help, ie using threats for example in an attempt to recover a civil debt, is not condoned by the law. The defence of "reasonable and probable cause" relates to the justification of such a claim, rather than to the appropriateness of offering violence to recover a civil debt: per Dowsett J in *R v Kelly, Baker and Perry* [1991] CCA 198, CA 144, 147 and 155 of 1991, 29.8.91.

7 In *R v Campbell* [1997] QCA 127, CA 379 of 1996, 16 May 1997, where the court said: "….it seems that there cannot be reasonable and probable cause to make a demand 'containing threats of injury or detriment' which would involve the commission of a criminal offence". The Court also remarked that it was not obvious that the word "probable" added to the phrase. Perhaps the phrase requires some reasonable and just grounds for making the demand (*Reg v Miard* 1 Cox CC 22 at 24), such as furtherance or promotion of the lawful interests of the accused (*Thorne v Motor Trade Association* [1937] AC 797).

It is not for the defendant to prove that he acted with reasonable and probable cause; it is for the prosecution to prove he did not.[8,9]

[8] For example, there may be evidence that the defendant was acting pursuant to an honest and reasonable belief as to a state of things: s 24, but see the obiter remarks as to the availability of a defence under s 24 in *Campbell.*

[9] *R v Johnson and Edwards* [1981] Qd R 440. It is for the person charged to raise the question whether there was a reasonable or probable cause for the demand which was made and that, once that has been made an issue, it is for the prosecution to negative the existence of the cause.

Extortion s 415(1)(b) (Before 1 December 2008)

The prosecution must prove that:

1. **The defendant intended[10] to extort (or gain property or benefit or the performance of service) from a person.**

2. **The defendant orally demanded any property (or benefit or the performance of services) from another person; OR**

   that anything be done (or omitted to be done or be procured) by any person.

3. **The demand threatened injury or detriment[11] to be caused to that person (or to the public or any member / members of the public or to property[12]) by the defendant (or any other person) if the demand is not complied with.[13]**

4. **The demand was without reasonable or probable cause.[14]**

It is not for the defendant to prove that he acted with reasonable and probable cause, it is for the prosecution to prove he did not[15,16].

---

[10] See notes on Intention.

[11] The question of whether particular conduct and statements are a threat is a question of fact. A statement by a defendant that he would withhold evidence advantageous to a person in a committal proceedings, unless the person paid a sum of money demanded, was capable of constituting 'threat of detriment'*: R v Jessen* [1997] 2 Qd R 213 at 218-220.

[12] A person is not criminally responsible for the offence if the injury or detriment is threatened to himself only, or to any other person or the public, or to property of which the person is the sole owner: s 415(2).

[13] It does not matter if the threat does not specify the injury or detriment that is to be caused, or the person or persons to whom or the property to which injury or detriment is to be caused. Self help, i.e. using threats for example in an attempt to recover a civil debt, is not condoned by the law. The defence of "reasonable and probable cause" relates to the justification of such a claim, rather than to the appropriateness of offering violence to recover a civil debt: per Dowsett J in *R v Kelly, Baker and Perry* [1991] QCA 198, CA 144, 147 and 155 of 1991, 24.8.91.

[14] In *Campbell* [1997] QCA 127, CA 379 of 1996, 16.5.97 where the Court said; "… it seems that there cannot be reasonable and probable cause to make a demand 'containing threats of injury or detriment' which would involve the commission of a criminal offence". The court also remarked that it was not obvious that the word "probable" added to the phrase. Perhaps the phrase requires some reasonable and just grounds for making the demand (*Reg v Miard* 1 Cox cc 22 at 24), such as furtherance or promotion of the lawful interest of the accused (*Thorne v Motor Trade Association* [1937] AC 797)

[15] For example, there may be evidence that the defendant was acting pursuant to an honest and reasonable belief as to a state of things: s 24, but see the obiter remarks as to the availability of a defence under s 24 in *Campbell.*

[16] *R v Johnson and Edwards* [1981] Qd R 440. It is for the person charged to raise the question whether there was a reasonable or probable cause for the demand which was made and that, once that has been made an issue, it is for the prosecution to negative the existence of the cause.

Extortion s 415(1)[1] (From 1 December 2008)

The prosecution must prove that:

1. **The defendant made a demand[2] with intent[3] to gain a benefit for any person, whether the defendant or someone else (or to cause a detriment to any person other than the defendant).**

2. **The demand was made with a threat[4] to cause a detriment to any person other than the defendant.[5]**

3. **The demand was made without reasonable cause.[6]**

   It is not for the defendant to prove that he acted with reasonable cause; it is for the prosecution to prove he did not.[7]

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 Making a demand includes causing someone to receive a demand: s 415(3).

3 See notes on intention.

4 A reference to a threat to cause a detriment includes a statement that gives rise to a threat of detriment: s 415(4). A statement by a defendant that he would withhold evidence advantageous to a person in a committal proceedings, unless the person paid a sum of money demanded, was capable of constituting 'threat of detriment': *R v Jessen* [1997] 2 Qd R 213 at 218-220.

5 It does not matter that the demand or threat is made at large rather than to a particular person; that it does not specify the detriment to be caused, or to whom it is to be caused; or that the detriment is to be caused by someone other than the defendant: s 415(2).

6 The defence, formerly expressed as "reasonable and probable cause" relates to the justification of such a claim, rather than to the appropriateness of offering violence to recover a civil debt: per Dowsett J in *R v Kelly, Baker and Perry* [1991] CCA 198, CA 144, 147 and 155 of 1991, 24.8.91. In *R v Campbell* [1997] QCA 127, CA 379 of 1996, 16 May 1997, the court, observing that "probable" did not seem to add anything, went on: "….it seems that there cannot be reasonable and probable cause to make a demand 'containing threats of injury or detriment' which would involve the commission of a criminal offence". Perhaps the phrase requires some reasonable and just grounds for making the demand (*Reg v Miard* 1 Cox CC 22 at 24), such as furtherance or promotion of the lawful interests of the accused (*Thorne v Motor Trade Association* [1937] AC 797). There may be evidence that the defendant was acting pursuant to an honest and reasonable belief as to a state of things: s 24; see the obiter remarks as to a s 24 defence in *Campbell.*

7 *R v Johnson and Edwards* [1981] Qd R 440. It is for the person charged to raise the question whether there was a reasonable cause for the demand which was made and that, once that has been made an issue, it is for the prosecution to negative the existence of the cause.

False Statement Under Oath s 193

The prosecution must prove that:

1. **On an occasion on which the defendant was making a statement touching on any matter which statement was required by law to be made on oath.**[1]
2. **The defendant made a statement touching such matter.**
3. **The statement contained a material particular which was false.**
4. **A particular is material if it was of such significance that it was capable of affecting the decision of a person who would be acting on the statement.**[2] **The trial judge should direct as to whether a particular is material or not.**
5. **The defendant knew it was false at the time.**
6. **The defendant verified the statement on oath etc.**

The defendant cannot be convicted upon the uncorroborated testimony of one witness.[3]

---

1 Or other sanction, affirmation or declaration etc (s 193(1)).

2 The prosecution does not have to show that the defendant knew that the particular was material, his or her belief in that regard is irrelevant. It is for the judge to decide that issue: *R v Millward* [1985] QB 519; (1985) 80 Cr App R 280; *R v Traino* (1987) 27 A Crim R 271. But see *R v Davies* (1974) 7 SASR 375, in which case there is discussion as to whether the rule appropriate to perjury applies with respect to this particular offence.

3 Section 195, but see s 195A.

Forgery s 488[1]

The prosecution must prove that:

1. The defendant forged a document.

The word "forge" is defined in s 1. To forge a document means to make, alter or deal with the document so that the whole of it or a material part of it -

(a) purports to be what, or of an effect that, in fact it is not; or

(b) purports to be made, altered or dealt with by a person who did not make, alter or deal with it or by or for some person who does not, in fact exist; or

(c) purports to be made, altered or dealt with by authority of a person who did not give that authority; or

(d) otherwise purports to be made, altered or dealt with in circumstances in which it was not made, altered or dealt with.

The word "document" is defined in s 1. It includes -

(a) anything on which there is writing; and

(b) anything on which there are marks, figures, symbols, codes, perforations or anything else having a meaning for a person qualified to interpret them; and

(c) a record.

The word "record" is also further defined in s 1.

It does not matter whether the document is complete or if the document is not, or does not purport to be, binding in law (s 488(2)).

2. The forgery must have been done with intent to defraud.

"Intent to defraud" means an intent to practise a fraud on another person, it being sufficient if anyone may be prejudiced by the fraud. If, therefore, there is an intention to deprive another person of a right or to cause him or her to act in any way to his or her detriment or prejudice or contrary to what would

[1] The definition of "forge" in s 1 was changed by the 1997 amendments; as was the definition of forgery in s 488. The 1997 amendments have included the element of an intent to defraud. For offences occurring prior to 1 July 1997, refer to repealed s 488.

otherwise be his or her duty, an intent to defraud is established notwithstanding that there is no intention to cause pecuniary or economic loss.[2]

It is not necessary to prove an intent to defraud any particular person (s 643).

[2] *Welham v DPP* [1961] AC 103; [1960] 1 All ER 805. An intent to defraud and an intent to deceive are distinguishable: *Tan v The Queen* [1979] WAR 149. See *R v Birt* (1899) 63 JP 328 and cf *Re London and Globe Finance Corp* [1903] 1 Ch 728 where the difference is explained by Buckley J: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

Fraud s 408C

The prosecution must prove:

1.

(a) The defendant applied to his or her own use

(i) property belonging to another; [1] or

(ii) property belonging to the defendant, or which is in the defendant's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person.

"Applied" means taking or using another's property for the defendant's own purposes.[2]

OR

(b) The defendant obtained property from any person.

"Obtain" includes to get, gain, receive or acquire in any way (s 408C(3)(e)).

OR

(c) The defendant induced any person to deliver property to any person.

(d) The defendant gained a benefit or advantage, pecuniary or otherwise, for any person.

(e) The defendant caused a detriment, pecuniary or otherwise, to any person.

(f) The defendant induced any person to do an act which the person was lawfully entitled to abstain from doing.

(g) The defendant induced any person to abstain from doing an act which the person was lawfully entitled to do.

---

1 See definition in s 408C(3)(a) and (d).

2 See the comments of Macrossan CJ in *R v Easton* [1994] 1 Qd R 531 at 534-5. At 535 the Chief Justice said: "… before an item of property will be 'applied' there has to be a mental element, an intention held in relation to the thing, and also there has to be some implementation of that intention."

(h) The defendant made off:-

(i) knowing that payment on the spot was required or expected for property lawfully supplied or returned or any service lawfully provided;

(ii) without having paid; and

(iii) with intent to avoid payment.

2. The action of the defendant must have been done dishonestly.

To prove that the defendant acted dishonestly the prosecution must prove that what the defendant did was dishonest by the standards of ordinary honest people.[3]

See specific provisions in s 408C(3)(b) and (c) in relation to whether an act or omission is dishonest.

3. Direct on any circumstances of aggravation.[4]

---

[3] In *R v Dillon; Ex parte Attorney-General (Qld)* [2015] QCA 155, the Court of Appeal held that the term "dishonestly" requires the prosecution to prove only that what the accused person did was dishonest by the standards of ordinary honest people. To secure a conviction, the prosecution do not have to prove that the accused person must have realised that what he or she was doing was dishonest by those standards. However, where there is evidence that the accused person had an honest belief that he or she was entitled to act as he or she did, to secure a conviction, the prosecution must disprove that honest belief beyond reasonable doubt in order to negative the defence of honest claim of right under s 22(2).

[4] Section 408C(2). Note that in relation to s 408C(2)(a) and (b), the jury should be directed that they need to be satisfied that the corporation or employer was a victim of the fraud: *R v Bailey* [2003] QCA 506. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Going Armed in Public s 69

The prosecution must prove that the defendant:

1. **Went armed:.**

   Going armed does not require actual movement by the defendant[1]

2. **In public**[2],[3]**;**

3. **In such a manner as to cause fear to (a person or persons).**[4]

4. **Without lawful occasion.**[5]

---

1 See *R v Hildebrandt* [1964] Qd R 43, where it was held that where the accused sat in an aircraft and brandished a firearm, he was going armed in public. "Going" refers to the manner of going and not to the progression with reference to the position of other people. The word "armed" means possessing an object which is available and capable of causing fear. It is the manner in which the object is used that is relevant: *Miller v Hrvojevic* [1972] VR 305; *Ashcroft* (1989) 38 A Crim R 327.

2 It is not necessary for the offence to be committed in a public place, but only that the offender go armed in public: per Muir J in *R v Bennett* [1998] QCA 393, CA No. 211 of 1998, 24 November 1998.

3 A useful concept from the Macquarie Directory is "open to public view".

4 It is not necessary that any person should give evidence that he/she was actually put in fear: *Sharp*; *Johnson* [1957] 1 QB 552.

5 The expression "without lawful occasion" is not confined to self-defence and has a wider application depending on the circumstances of the case: per Muir J *Bennett* (ibid). It means there was no good and lawful reason for what the defendant did.

Grievous Bodily Harm s 320

Legislation

Criminal Code s 320: Grievous bodily harm

(1) Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 14 years.

(2) [subs (2) rep Act 62 of 2016 s 112, effective 9 December 2016.]

(3) [subs (3) rep Act 62 of 2016 s 112, effective 9 December 2016.]

(3A) The *Penalties and Sentences Act 1992*, sections 108B and 161Q state a circumstance of aggravation for an offence against this section. [subs (3A) insert Act 42 of 2014 s 15, effective 1 December 2014; am Act 62 of 2016 s 112, effective 9 December 2016.]

(4) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

Criminal Code s 1: Grievous bodily harm

grievous bodily harm means—

(a) the loss of a distinct part or an organ of the body; or

(b) serious disfigurement; or

(c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available.

Penalties and Sentences Act 1992: ss 108B, 161Q

108B: When community service order must be made

(1) It is a circumstance of aggravation for a prescribed offence that the offender committed the offence in a public place while the offender was adversely affected by an intoxicating substance.

(2) If a court convicts an offender of a prescribed offence with the circumstance of aggravation mentioned in subsection (1), the court must make a community service order for the offender whether or not the court also makes another order under this or another Act.

(2A) However, subsection (2) does not apply if the court is satisfied that, because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with a community service order.

(3) Subsection (2) is subject to sections 121(4), 125(8) and 126(6B).

161Q: Meaning of serious organised crime circumstance of aggravation

(1) It is a circumstance of aggravation (a **serious organised crime circumstance of aggravation**) for a prescribed offence of which an offender is convicted that, at the time the offence was committed, or at any time during the course of the commission of the offence, the offender—

(a) was a participant in a criminal organisation; and

(b) knew, or ought reasonably to have known, the offence was being committed—

(i) at the direction of a criminal organisation or a participant in a criminal organisation; or

(ii) in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course of the commission of the offence, participants ina criminal organisation, or

(iii) for the benefit of a criminal organisation.

(2) For subsection (1)(b), an offence is committed for the benefit of a criminal organisation if the organisation obtains a benefit, directly or indirectly, from the commission of the offence.

(3) To remove any doubt, it is declared that a criminal organisation mentioned in subsection (1)(b) need not be the criminal organisation in which the offender was a participant.

Additional references

For "public place", see s 108A of the PSA.

For "criminal organisation", see s 161O(1)-(2) of the PSA.

For "engage" in serious criminal activity, see s 161O(3) of the PSA.

For "serious criminal activity", see s 161N of the PSA.

For "participant", see s 161P of the PSA.

For the exclusion of s 24 in relation to the circumstance that the defendant was adversely affected by an intoxicating substance, and related matters of proof, see ss 365A-365C of the Criminal Code.

Commentary

If the act of the defendant, mediately or immediately, effects grievous bodily harm to another, the defendant does grievous bodily harm to that person: see *R v Knutsen*,[1] per Philp J. In the same case, Stanley J considered the defendant to be liable for an injury which a reasonable person in the position of the defendant would have regarded as likely to result from the defendant's act.[2]

---

1 [1963] Qd R 157, 164.

2 *Knutsen* 175-176.

Causation is a question of fact. The defendant's act or omission need not be the sole cause of the injury. The defendant's conduct must be a significant or substantial cause of the injury: *Royall v The Queen*.[3]

All that the word "unlawfully" in this section requires the Crown to prove is that the doing of the grievous bodily harm was contrary to law and not excused.[4]

Provocation does not apply as a defence.[5]

A disfigurement which is remedied by medical treatment is capable of amounting to a serious disfigurement.[6]

"Likely" is a word that is used every day and its meaning may depend on its context. In this context it means a substantial chance. That is a real and not remote chance: more than a mere possibility.[7]

It is a circumstance of aggravation if the defendant was a participant in a criminal organisation and had, or ought reasonably have had, knowledge of the kind identified in s 161Q of the PSA.

It is a circumstance of aggravation if the offender committed the offence in a public place while the offender was adversely affected by an intoxicating substance.

Questions for consideration

In an appropriate case, the following questions might be posed for the consideration of the jury:

(1) Did the defendant ... (specify the defendant's conduct alleged by the prosecution, as the basis for the charge)?

(2) Did the defendant's conduct cause A to suffer (e.g., specify the injury to A alleged by the prosecution)?

(3) If left untreated, was there a substantial chance that that injury would cause permanent injury to A's health?

(4) Has the prosecution proven that the defendant's conduct did not occur by accident, or independently of the defendant's will? (Or where there is an issue about the unlawfulness of the defendant's conduct, formulate another question appropriate to the case.)

---

3 (1991) 172 CLR 378.

4 See *Knutsen* per Philp J at 162-163; and see *Houghton v. The Queen* 28 WAR 399; (2004) 144 A Crim R 343, 352, 366.

5 *Kaporonovski v The Queen* (1973) 133 CLR 209.

6 *R v Lovell; Ex parte Attorney-General (Qld)* [2015] QCA 136.

7 *Boughey v The Queen* (1986) 161 CLR 10, 21; *R v Crossman* [2011] 2 Qd R 435. 'Likely' and 'probable' when used in the Criminal Code are not interchangeable.

Directions

In relation to counts [ ] charging grievous bodily harm, the prosecution must prove beyond a reasonable doubt -

First, the defendant did the act [or omission] relied on as constituting the offence.

The act [or omission] relied on is [ ].

Secondly, that act [or omission] caused [or was a substantial cause of] grievous bodily harm to the complainant.

The injury relied on as constituting grievous bodily harm is [ ].

"Grievous bodily harm" is relevantly defined as:

1. **the loss of a distinct part or an organ of the body; or**
2. **serious disfigurement; or**
3. **any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;**

whether or not treatment is or could have been available.

You must have regard to the nature of the injury itself, and must disregard whether or not medical treatment is or could have been available.

"Likely" is a word that is used every day and its meaning may depend on its context. In this context, it means a substantial chance. That is, a real and not remote chance; more than a mere possibility.

Thirdly, that the act [or omission] relied on to constitute the offence was unlawful.

"Unlawful" means not authorised, justified or excused by law.

If you find the prosecution has proved the first two elements, the defendant does not contend that the act [or omission] was lawful. That is, was authorised, justified or excused by law.

OR

The evidence of [ ] is capable of raising the defence of [ ] for your consideration. [Direct on relevant defence or excuse].

If the prosecution pleads the circumstance of aggravation under s 108B of the PSA, insert before the third element:

Thirdly, the [place where the act relied on to constitute the offence occurred] is a public place and the defendant was adversely affected by an intoxicating substance.

"Public place" means—

1. **a place, or part of a place, that the public is entitled to use, is open to members of the public or is used by the public, whether or not on payment of money; or**
2. **a place, or part of a place, the occupier of which allows, whether or not on payment of money, members of the public to enter.**

An "intoxicating substance" would include alcohol or the drug [ ].

If the prosecution pleads the circumstance of aggravation under s 320(2) of the Criminal Code, insert before the third element:

Thirdly, that at the time the defendant did the act relied on to constitute the offence, the defendant was a participant in a criminal organisation; and the complainant is a police officer acting in the execution of his duty.

A "criminal organisation" means:

A group of 3 or more persons, whether arranged formally or informally—

1. **who engage in, or have as their purpose (or 1 of their purposes) engaging in, serious criminal activity; and**
2. **who, by their association, represent an unacceptable risk to the safety, welfare or order of the community.**

It does not matter whether—

First, the group of persons — has a name; or is capable of being recognised by the public as a group; or has an ongoing existence as a group beyond the serious criminal activity in which the group engages or has as a purpose; or has a legal personality.

OR

Secondly, the persons comprising the group — have different roles in relation to the serious criminal activity; or have different interests in, or obtain different benefits from, the serious criminal activity; or change from time to time.

"Engage", in serious criminal activity, includes each of the following—

1. **organise, plan, facilitate, support, or otherwise conspire to engage in, serious criminal activity;**
2. **obtain a material benefit, directly or indirectly, from serious criminal activity.**

"Serious criminal activity" means conduct constituting an indictable offence for which the maximum penalty is at least 7 years imprisonment. The offence of [ ] is an indictable offence for which the maximum penalty is at least 7 years imprisonment.

A person is a "participant", in a criminal organisation, if—

1. **the person has been accepted as a member of the organisation and has not ceased to be a member of the organisation (a person may be accepted as a member of a criminal organisation—informally; or through a process set by the organisation, including, for example, by paying a fee or levy); or**
2. **the person is an honorary member of the organisation; or**
3. **the person is a prospective member of the organisation; or**
4. **the person is an office holder of the organisation; or**
5. **the person identifies himself or herself in any way as belonging to the organisation; or**
6. **the person's conduct in relation to the organisation would reasonably lead someone else to consider the person to be a participant in the organisation.**

A police officer is "acting in the execution of the officers duty" from the moment they embark upon a lawful task connected with their functions as a police officer, and continues to act in the execution of that duty for as long as they are engaged in pursuing the task and until it is completed, provided that they do not in the course of the task do anything outside the ambit of their duty so as to case to be acting therein: see *R v Reynhoudt* (1962) 107 CLR 381.

If a police officer is exceeding their duty or a police officer illegally arrests a person, they are not engaged in the discharge of their duties.

The above direction will need to be modified if the prosecution pleads a serious organised crime circumstance of aggravation under s 161Q of the PSA:

> **Thirdly, at the time the offence was committed [or at any time during the course of the commission of the offence] the defendant— was a participant in a criminal organisation; and knew, or ought reasonably to have known, the offence was being committed—**
>
> **1. at the direction of a criminal organisation or a participant in a criminal organisation; or**
>
> **2. in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course of the commission of the offence, participants in a criminal organisation; or**
>
> **3. for the benefit of a criminal organisation.**
>
> **An offence is committed for the benefit of a criminal organisation if the organisation obtains a benefit, directly or indirectly, from the commission of the offence.**

Grooming Children under 16 s 218B

1. **The prosecution must prove the defendant engaged in any conduct.**

2. **The prosecution must prove that the defendant is an adult, namely a person of or above the age of 18 years old.[1]**

3. **The prosecution must prove that the person was under 16 years (or 12 years, as the case may be), or, the prosecution must prove that the defendant believed that the person was under 16 years (or 12 years, as the case may be).**

4. **The prosecution must prove the defendant engaged in the conduct with intent to:**

   (a) facilitate the procurement of the person to engage in a sexual act either in Queensland or elsewhere;

   A person engages in a sexual act if the person —

   (a) allows a sexual act to be done to the person's body; or

   (b) does a sexual act to the person's own body or the body of another person; or

   (c) otherwise engages in an act of an indecent nature.[2]

   or;

   (b) expose, without legitimate reason, the person to indecent matter,[3] either in Queensland or elsewhere.

"Procure" means knowingly entice or recruit for the purposes of sexual exploitation.

"Expose" means show.

---

1 See s 1 of the Criminal Code

2 Section 218B(3).

3 Section 1 provides that indecent matter includes indecent film, videotape, audiotape, picture, photograph or printed or written matter.

The word "indecent" bears its ordinary everyday meaning. That is, what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecent must always be judged in light of time, place and circumstance.

The law leaves it to the good sense of the jury as representatives of the community to decide whether the defendant acted without legitimate reason.[4] A legitimate reason could include for the benefit of the person's sexual education.

5. (In relation to the offence in s 218B(1)(a))

It is not necessary to prove that the adult intended to facilitate the procurement of the person to engage in any particular sexual act.

6. (In relation to the offence in s 218B(1)(a))

It does not matter that, by reason of circumstances not known to the adult, it is impossible for the person to engage in the sexual act.

7. (In relation to the offence in s 218B(1)(a))

It does not matter when the adult intended the person would be procured to engage in a sexual act.

8. (In relation to the offence in s 218B(1)(b))

The onus of proof is on the prosecution to prove beyond reasonable doubt that the defendant did not have a legitimate reason. There is no onus on the defendant to prove he did have a legitimate reason.

9. It does not matter that the child is a fictitious person represented to the defendant as a real person, provided the prosecution prove beyond reasonable doubt that the defendant believed the fictitious person was a real person under 16.

---

[4] The phrase "legitimate reason" is derived from the *Protection of Children Act* 1978 (UK).

Lord Scarman said during the debate on the Act; "This phrase really embraces a question of fact on which courts and juries are well able to reach a sensible decision in determining the meaning."

10. **Evidence that the person was represented to the defendant as being under the age of 16** (or 12, as the case may be) **is, in the absence of evidence to the contrary, proof that the defendant believed the person was under that age.** [Where the child is a fictitious person, or a real person over 16] **evidence to the contrary includes evidence that the defendant did not believe the representation that the person was under 16; or the defendant had no belief either way whether the person was under or over 16. It is for you the jury to assess the credibility of any explanation the defendant has given as to not believing the representation, and for you to decide whether the prosecution have disproved that explanation beyond reasonable doubt. No offence against s 218B is committed unless the defendant is proved to have intended to facilitate the procurement of a person the defendant believed to be under 16** (or 12, as the case may be) **to engage in a sexual act** (or expose a person he believed to be under 16 to any indecent matter)**.**

11. [Where the child is under 16 (or 12, as the case may be)] **it is a defence for the defendant to prove on the balance of probabilities that the defendant believed on reasonable grounds the person was at least 16** (or 12, as the case may be)**.**[5]

12. **Direct on any circumstances of aggravation.**[6]

---

[5] These directions in 9 and 10 derive from the decision in *R v Shetty* [2005] 2 Qd R 540; the Benchbook Committee considers the words in plain type within the square brackets are supported by that decision.

[6] Section 218B(2). It is a circumstance of aggravation if the person was under 12 years or the defendant believed the person was under 12 years. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Imposition s 29B *Crimes Act* 1914 (Cth) - Repealed[1]

The prosecution must prove that:

1. **The defendant imposed or endeavoured to impose.**

   "Imposed" means "to place a burden upon", "to inflict something on or upon", "to levy on", "to set on", "to put on", "to place an obligation upon",[2] or to deceive and trick.[3]

2. **Upon the Commonwealth or a public authority under the Commonwealth.[4]**

3. **By an untrue representation made in any manner whatsoever.[5]**

   An untrue representation is one that is untrue to the knowledge of the defendant.[6] The prosecution must prove that the defendant knew the representation was untrue.

4. **With a view to obtain money or any other benefit or advantage.[7]**

   It is not necessary for the prosecution to prove that the Commonwealth was defrauded or cheated, nor is it necessary for the prosecution to prove that the defendant in fact obtained money or advantage.[8]

---

1 Section 29B *Crimes Act* 1914 (as well as many other dishonesty offences in the *Crimes Act*) was repealed by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (No 137, 2000). This provision was replaced by provisions in the *Criminal Code Act* 1995 particularly s 135.1 general dishonesty and s 135.2 obtaining financial advantage. Those provisions commenced on 24 May 2001.

2 The terminology approved by the Victorian Court of Criminal Appeal in *R v Wescombe* [1987] VR 1012 at 1013; (1987) 25 A Crim R 337 at 338-9.

3 *Will v Borcherdt (No 2)* [1991] 2 Qd R 230 at 237-8.

4 Defined in s 3 *Crimes Act* 1914 (Cth) as "any authority or body constituted by or under the law of the Commonwealth or of a territory". See discussion by Higgins J in *Hall* (1992) 106 FLR 458. Note also that the Commonwealth Bank, as a result of privatisation is no longer a public authority under the Commonwealth.

5 *Jacobson v Piepers* [1980] Qd R 448 – representation by conduct.

6 *Bacon v Salamane* (1965) 112 CLR 85.

7 *Bacon v Salamane* at 92.

8 *Will v Borcherdt* (above).

Improper Interference with a Corpse: Code s 236(b)[1]

The defendant is also charged that on …… at ……. he improperly interfered with a dead human body. This charge is brought under s 236 of our *Criminal Code* which says*:*

> *'Any person who, without lawful justification or excuse, the proof of which lies on the person … improperly or indecently interferes with, or offers any indignity to, any dead human body … whether buried or not is guilty of a misdemeanour …'*

The charge against the defendant is that he improperly interfered with a human corpse, namely that of (*insert name of deceased)*. The principle underlying this part of our criminal law is that every civilised society imposes on its members an obligation to dispose decently of the dead. In our society the usual means are burial or cremation. The obligation falls primarily on family members but it extends to other people such as a hotel keeper or landlord of premises in which a person dies if there is no family or family can't be found. The obligation to dispose decently of the body means disposing of it intact. This is because it is recognised in all civilised societies that an insult or indignity inflicted on a dead body is an offence to the living.

There are, of course, some exceptions. The bodies of persons killed by suspected criminal activity are examined by medical specialists whose examination obviously required interference with the body. Another example is well known: there is in this country a program by which persons while alive indicate that after death they wish their organs to be available for transplant. The removal of organs for that purpose would not be improper.

The law does not offer any comprehensive statement of all the circumstances in which it is improper to interfere with a dead body. When a charge is brought under s 236 of the *Criminal Code* it is a question for the jury in each case to decide whether in the circumstances the interference was improper. It depends upon the jury's assessment of the conduct and the circumstances. The jury in this respect represents the standards of the community and says whether public morality or public decency has been offended by the manner in which the body was treated.

[1] See "The Law of Cadavers" by P E Jackson; *Re Gray* [2001] 2 Qd R 35.

It is a defence to provide that the interference was justified or excused by law. The two examples that of the organ donor and the pathologist conducting an autopsy are examples of lawful interference with a corpse.

The Crown must prove beyond reasonable doubt that the accused improperly interfered with the body; the *Criminal Code* requires the accused person to prove that the interference was lawful. That means that the onus of proof is on the accused, that is he must prove the lawful nature of the activity. However, the standard of proof is not that beyond reasonable doubt. It is enough if the accused satisfies you that it is more probable than not that the activity was lawful.

Incest s 222

The prosecution must prove that:

1. **The defendant had carnal knowledge[1] of complainant;**

   Carnal knowledge means the insertion of the penis into the genitalia (or anus)**. Penetration by the penis is required: *Holland v The Queen* (1993) 67 ALJR 946.**

   The offence is complete upon penetration;

   Penetration to the slightest degree is sufficient – there is no need for full penetration;

   Ejaculation is not necessary.

2. **There was a relationship between the defendant and the complainant of the type which is alleged** (offspring or other lineal descendant, or sibling, parent, grandparent, uncle, aunt, nephew or niece[2])**.**

---

1 "Carnal knowledge" includes sodomy (s 1) and is complete on penetration to any extent (s 6).

2 The scope of the offence of incest was considerably widened by the 1997 amendments to include incest by a woman and to extend the class of offspring or other lineal descendant. The legislative history of the section was examined by the Court of Appeal in *R v Rose* [2010] 1 Qd R 87. Section 222(5) states:

> "A reference in this section to an offspring or other lineal descendant, or a sibling or parent includes a relationship of that type that is a half, adoptive or step relationship."

Section 222(6) states:

> "For sub-section (5), a reference to a step relationship includes a relationship corresponding to a step relationship arising because of cohabitation in a de facto relationship or because of a foster relationship or a legal arrangement."

Section 222(7) states:

> "Also for subsection (5), a reference to a step relationship does not include a step relationship that first arose after the relevant persons became adults."

Section 222(8) states:

> "The section does not apply to carnal knowledge between persons who are-
>
> (a) lawfully married; or
>
> (b) if both persons are adults – entitled to be lawfully married."

Formerly s 222(8) provided that the section did not apply if the persons were lawfully married or entitled to be lawfully married. That provision was considered by the Court of Appeal in *R v Rose* [2010] 1 Qd R 87. The appellant was in a de facto relationship with the complainant's mother. The appellant was convicted of six counts of incest: three offences occurred when the complainant was 17 years old and three occurred when she was 18. At the hearing of the appeal, the Crown conceded that once the complainant turned 18, she and the appellant were "entitled to be legally married" and those convictions were quashed. The *Marriage Act* 1961 (Cth), s 12 enables a person between 16 and 18 years to apply to a judge or magistrate for an order authorising them to marry a particular person of marriageable age. The Court of Appeal held that s 222(8) applied to the offences that occurred when the complainant was 17 years old and those convictions were also quashed.

3. The defendant knew that there was that relationship, or a relationship of that type.[3]

Section 222(8) was amended by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act* 2013, Assent 29 April 2013 to confine the exclusion to adults who are lawfully entitled to be married. An adult is a person of or above the age of 18 years (Section 1).

[3] Where the prosecution relies upon the alternative within s 222(1)(b), namely a knowledge of "some relationship of that type", it will be necessary to explain that element by reference to the facts alleged in the prosecution case. The expression "some relationship of that type" in s 222(1)(b) appears to be related to the expression "a relationship of that type" in s 222(5). For example, where the complainant is the step-daughter of the defendant, the jury might be instructed that it must be proved that there was that relationship and that the defendant knew that there was a relationship of the type of father and daughter.

Indecent (Sexual) Assault[1] - s 352

The prosecution must prove that:

1. The defendant assaulted the complainant

"A person who strikes, touches or moves or otherwise applies force of any kind to the person of another either directly or indirectly without their consent is said to assault that other person and the act is called an assault".

"Consent" means consent freely and voluntarily given by a person with the ability to know and understand what s/he is doing in giving consent.[2] (Refer to any of the circumstances in s 348(2) which may be relevant as negating consent.**)**

[Note - Section 245 (Assault) does not provide an explanation of the meaning of "without the other person's consent". The definition of consent in s 348 applies to the element of assault in s 352.[3]

As was explained by Sofronoff P in *R v Sunderland* [2020] QCA 156 at [45], footnote 8: "In a case in which a complainant did not, as a matter of fact, intend to do anything to 'give' consent but in which the complainant's actions, or failures to act, reasonably imply a giving of consent, the jury will have to be instructed about s 24 of the *Code*" (mistake of fact). At [55], Sofronoff P set out directions that may have been adequate in that case, while emphasising that the "summing up must be tailor-made to fit the requirements of the case at hand."].

2. The assault was unlawful.

An assault is unlawful unless it is authorised, justified or excused by law.[4]

3. The assault was indecent.

---

1 Section 352 applies to offences committed on or after 27 October 2000. For offences prior to that date offences of sexual assault will come under s 337 (now repealed).

2 Section 348. See *R v Winchester* [2011] QCA 374 for a detailed examination of the subject of consent including whether consent is freely and voluntarily given where there is a promise of a gift.

3 *R v Sunderland* [2020] QCA 156 at [42].

4 Here refer to any defence raised on the evidence.

The word "indecent" bears its ordinary everyday meaning.[5] It is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.[6]

4. **That the indecent assault consists of [specify acts] (**refer to circumstances of aggravation**).**[7]

---

5 Reference should not be made to the dictionary meaning of "indecent" as ""unbecoming or offensive to common propriety", which sets the parameters of indecency too widely: *R v McBride* [2008] QCA 412.

6 For a case involving therapeutic treatment, see *R* v *BAS* [2005] QCA 97. In *R v Jones* [2011] QCA 19 the Court of Appeal held that in a case involving an ambulance officer found guilty of indecent assault while performing an ECG the trial judge erred in directing the jury that the appellant's motive was not relevant to whether the act was indecent. White JA said at [32] "The quality of 'indecency' is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision." See also *R* v *Rae* [2009] 2 Qd R 463, where it was held that a direction that the acts had to be accompanied by an intention to gain sexual gratification was not required in that particular case. In *R v McCallum* [2013] QCA 254 it was held that the decision in *Jones* did not require that a direction on the motive of the accused be given in every case where indecency is an element of the offence (at [31] - [40]).

7 See Circumstances of Aggravation (Sexual Offences). The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Indecent Dealing with a child under 16 s 210(1)(a)

The prosecution must prove that:

1. **The defendant dealt with the complainant.**[1]

   The term "deals with" includes a touching of the child.

   It does not have to be a touching of the child by the defendant's hand – it can be a touching of the child by any part of the defendant's body.

2. **The dealing was indecent. The word "indecent" bears its ordinary everyday meaning, that is what the community regards as indecent.**[2] **It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.**[3]

3. **The dealing was unlawful.**

   Unlawful means not justified authorised or excused by law.[4]

4. **The complainant was under 16 years.**[5]

---

1 Section 210(6) *Criminal Code* defines "deals with" in this section as doing any act which, if done without consent, would constitute an assault as defined by the *Code*. It is ordinarily unnecessary to inform the jury of this definition, as the issue is usually the truth and reliability of the complainant child. The expression "deals with" is capable of wide application and includes a situation in which a person at his own request has a complainant touch and suck his penis: *R v S* [1996] 1 Qd R 559. However now see s 210(1) (c).

2 The use of terms such as "moral turpitude" and an "offence against morality" as used by members of the Court of Criminal Appeal in *R v Bryant* [1984] 2 Qd R 545, are not essential to the meaning of "indecency". See *R v Schneiders* [2007] QCA 210. See also *Attorney-General v Huber* (1971) 2 SASR 142.

3 *R v Dunn* [1973] 2 NZLR 481. In *R v Jones* (2011) 209 A Crim R 379; [2011] QCA 19 ("*Jones"*) the Court of Appeal held that in a case involving an ambulance officer found guilty of indecent assault while performing an ECG the trial judge erred in directing the jury that the appellant's motive was not relevant to whether the act was indecent. White JA said at [32] "The quality of 'indecency' is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision." See also *R* v *Rae* [2009] 2 Qd R 463, where it was held that a direction that the acts had to be accompanied by an intention to gain sexual gratification was not required in that particular case. In *R v McCallum* [2013] QCA 254 it was held that the decision in *Jones* did not require that a direction on the motive of the accused be given in every case where indecency is an element of the offence (at [31] - [40]).

4 Refer to any relevant issue raised on the evidence.

5 Refer to relevant evidence e.g. birth certificate. If the offence is alleged to have been committed in respect of a child of or above 12 years, it is a defence to prove that the defendant believed, on reasonable grounds, that the child was of or above 16 years (s 210(5) *Criminal Code*). See also s 229 *Criminal Code* which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

5. Refer to any circumstance of aggravation:[6]

(a) The complainant was under the age of 12 years; or

(b) The complainant was, to the knowledge of the defendant, his or her lineal descendant;[7] or

(c) The defendant was the guardian of the child or, for the time being, had the child under his or her care;[8] or

(d) The child was a person with an impairment of the mind.[9]

---

6 See Benchbook Direction No 125 Circumstances of Aggravation in Sexual Offences. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

7 Lineal means being in the direct line of descent from an ancestor.

8 "Under his or her care" is an ordinary English expression. It means at the time alleged the defendant was responsible for the control and supervision of the child. It does not require any formal legal process to have occurred such as an order for custody. In determining that the jury should take into account such things as the age of the child, how the child came to be with the defendant and why the child was with the defendant. *See R v FAK* [2016] QCA 306.

9 The circumstance of aggravation was introduced by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act* 2013, assent 29 April 2013. "A person with an impairment of the mind" is defined in Section 1 *Criminal Code*. It is a defence to the circumstance of aggravation to prove the defendant believed on reasonable grounds that the child was not a person with an impairment of the mind (s 210(5A)).

Abuse of persons with an impairment of the mind s 216

The prosecution must prove that:

1. **The complainant was a person with an impairment of the mind at the relevant time.**

   A person with an impairment of the mind means a person with a disability that -

   (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and

   (b) results in –

   (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and

   (ii) the person needing support.[1]

2. **The defendant had (or attempted to have) unlawful carnal knowledge [2] of the complainant.**

   or

   The defendant dealt with the complainant.[3]

   The term "deals with" includes a touching of the person.

   It does not have to be a touching of the person by the defendant's hand – it can be a touching of the person by any part of the defendant's body.

3. **The dealing was indecent. The word "indecent" bears its ordinary everyday meaning, that is what the community regards as indecent[4]. It is what offends**

---

1 See s 1, for the meaning of a person with an impairment of the mind.

2 In this section, "carnal knowledge" does not include sodomy: s 216 (5).

3 Section 216(5) defines "deals with" in this section as doing any act which, if done without consent, would constitute an assault as defined by the *Code*. It is ordinarily unnecessary to inform the jury of this definition, as the issue is usually the truth and reliability of the complainant person. The expression "deals with" is capable of wide application and includes a situation in which a person at his own request has a complainant touch and suck his penis: *R v S* [1996] 1 Qd R 559. However now see s 216(1) (c).

4 The use of terms such as "moral turpitude" and an "offence against morality" as used by members of the Court of Criminal Appeal in *R v Bryant* [1984] 2 Qd R 545, are not essential to the meaning of 'indecency'. See *R v Schneiders* [2007] QCA 210. See also *Attorney-General v Huber* (1971) 2 SASR 142.

against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.[5]

4. The carnal knowledge (or attempted carnal knowledge) was unlawful.

or

The dealing was unlawful.

Unlawful means not justified authorised or excused by law.[6]

It is a defence to prove on the balance of probabilities –

(a) that the defendant believed, on reasonable grounds, that the person was not "a person with an impairment of the mind";[7] or

(b) that the act that was the offence did not, in the circumstances, constitute sexual exploitation of the "person with an impairment of the mind".

It is a circumstance of aggravation if the person with an impairment of the mind is, to the knowledge of the defendant, his lineal descendant.

It is a circumstance of aggravation if the person with an impairment of the mind is not the lineal descendant of the offender but the offender is the guardian of that person or, for the time being, has the person under his care.[8]

---

5 *R v Dunn* [1973] 2 NZLR 481.

6 Refer to any relevant issue raised on the evidence.

7 *R v Libke* [2006] QCA 242.

8 See s 216(3), (3A).

Unlawfully procuring a child under 16 to commit an indecent act (s 210(1)(b))

The prosecution must prove that:

1. **The defendant unlawfully procured a child.**

   "Procured" means to bring about. Procuring can be regarded as bringing about a course of conduct which the complainant would not have embarked upon of his or her own volition.

   "Unlawfully" means not justified authorised or excused by law.

2. **To commit an indecent act.**

   "Indecent" bears its ordinary everyday meaning, that is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.[1]

3. **The complainant was under 16 years.**[2]

4. **Refer to any circumstances of aggravation.**[3]

---

1 *R v Dunn* [1973] 2 NZLR 481.

2 If the offence is alleged to have been committed in respect of a child of or above 12 years, it is a defence to prove that the defendant believed on reasonable grounds, that the child was of or above 16 years (s 210(5)). See also s229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

3 Section 210(3),(4) and (4A). See also Circumstances of Aggravation in Sexual Offences (100.1). The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Permitting Indecent Dealing s 210(1)(c)

The prosecution must prove:

1. **The defendant permitted the complainant to deal with him.**

   "Permitted" means allowed.

   The expression "deals with" includes doing any act which if done without consent, would constitute an assault as defined in the Code.[1] Therefore "deals with" includes a touching of the defendant by the complainant.[2]

2. **That such dealing was indecent.**

   The word "Indecent" bears its ordinary everyday meaning, that is what the community regards as indecent. Indecency is that which offends against currently accepted standards of decency.[3]

   Indecency must always be judged in the light of time, place and circumstances.[4]

3. **That such dealing was unlawful; ie not authorised, justified or excused by law. Eg the defendant must consciously allow the complainant to touch him.**

4. **That the complainant was under the age of 16 years.[5]**

5. **Refer to any circumstances of aggravation.[6]**

---

1 Section 210(6).

2 The expression "deals with" is capable of wide application: *R v S* [1996] 1 Qd R 559.

3 *Attorney-General v Huber* (1971) 2 SASR 142.

4 *R v Dunn* [1973] 2 NZLR 481. See also Circumstances of Aggravation in Sexual Offences.

5 If the offence is alleged to have been committed in respect of a child of or above 12 years, it is a defence to prove that the defendant believed on reasonable grounds, that the child was of or above 16 years (s 210(5)). See also s229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

6 Section 210(3),(4) and (4A). See also Circumstances of Aggravation in Sexual Offences (100.1). The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Wilfully and unlawfully exposing a child under 16 to an indecent act (s 210(1)(d))

The prosecution must prove that:

1. **The defendant wilfully and unlawfully exposed a child.**

   The word "wilfully" means that the defendant deliberately or intentionally exposed the child to the indecent act (or that the defendant deliberately did an act, aware at the time that the result charged was a likely consequence of the act and yet recklessly proceeded regardless of the risks).[1]

   "Unlawfully" means not justified authorised or excused by law.

   "Exposed" will usually mean showed but in some factual circumstances the allegation may be that the exposure was not visual but through some other means (e.g. sound). In those cases "exposed" means that the defendant in some (specified) manner made the child aware of the act or object etc.

2. **To an indecent act by the defendant or another person.**

   "Indecent" bears its ordinary everyday meaning, that is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.[2]

3. **The complainant was under 16 years.[3]**

   Refer to any circumstances of aggravation.[4]

---

1 The word "wilfully" was considered in *R v Lockwood, ex parte Attorney-General* [1981] Qd R 209 in relation to s 496 (wilful damage) and Chapter 46 of the *Criminal Code*. The Court of Criminal Appeal extended the meaning to include reckless conduct. Neither *R v Lockwood* nor any later case (see, for example, *R v T* [1997] 1 Qd R 623 at 630) has considered the meaning to be given to the term under this section. It is debateable whether the extended concept of recklessness should apply to this offence. The Crown case, in any event, will usually be an alleged deliberate act by the defendant. In relation to the word "likely" in the direction concerning recklessness see comments in *R v T* (above) that the concept conveys a substantial – a real and not remote – chance.

2 *R v Dunn* [1973] 2 NZLR 481.

3 If the offence is alleged to have been committed in respect of a child of or above 12 years, it is a defence to prove that the defendant believed, on reasonable grounds, that the child was of or above 16 years(s 210(5)). See also s229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

4 Section 210(3),(4) and (4A). See also Circumstances of Aggravation in Sexual Offences (100.1). The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Exposing a child under 16 to an indecent object etc s 210(1)(e)

The prosecution must prove that:

1. **The defendant wilfully exposed a child.**

   The word "wilfully" means that the defendant deliberately or intentionally exposed the child (or that the defendant deliberately did an act, aware at the time that the result charged was a likely consequence of the act and yet recklessly proceeded regardless of the risk).[1]

   "Exposed" will usually mean showed but in some factual circumstances the allegation may be that the exposure was not visual but through some other means (e.g. sound). In those cases "exposed" means that the defendant in some (specified) manner made the child aware of the act or object etc.

2. **To an indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter.**

   "Indecent" bears its ordinary everyday meaning, that is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.[2]

3. **The complainant was under 16 years at the time.[3]**

4. **The defendant had no legitimate reason to expose the complainant to the object etc.**

---

[1] The word "wilfully" was considered in *R v Lockwood, ex parte Attorney-General* [1981] Qd R 209 in relation to s 496 (wilful damage) and Chapter 46 of the *Criminal Code*. The Court of Criminal Appeal extended the meaning to include reckless conduct. Neither *R v Lockwood* nor any later case (see, for example, *R v T* [1997] 1 Qd R 623 at 630) has considered the meaning to be given to the term under this section. It is debateable whether the extended concept of recklessness should apply to this offence. The Crown case, in any event, will usually be an alleged deliberate act by the defendant. In relation to the word "likely" in the direction concerning recklessness see comments in *R v T* (above) that the concept conveys a substantial – a real and not remote – chance.

[2] *R v Dunn* [1973] 2 NZLR 481.

[3] If the offence is alleged to have been committed in respect of a child of or above 12 years, it is a defence to prove that the defendant believed, on reasonable grounds, that the child was of or above 16 years(s 210(5)). See also s229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

The law leaves it to the good sense of the jury as representatives of the community whether the defendant acted without legitimate reason.[4] A legitimate reason could include for the benefit of the complainant's sexual education.

The onus of proof is on the prosecution. The defendant does not have to satisfy the jury that he or she had a legitimate reason. The prosecution has to satisfy the jury beyond a reasonable doubt that the defendant had no legitimate reason.

5. Refer to any circumstances of aggravation.[5]

---

[4] The phrase "legitimate reason" is derived from the *Protection of Children Act* 1978 (UK). Lord Scarman said during the debate on the Act: "This phrase really embraces a question of fact on which courts and juries are well able to reach a sensible decision in determining the meaning."

[5] Section 210(3) and (4). See also Circumstances of Aggravation in Sexual Offences. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Taking an indecent photograph etc of a child under 16 s 210(1)(f)

The prosecution must prove that:

1. **The defendant took an indecent photograph or recorded, by means of any device, any indecent visual image of a child.**

   "Indecent" bears its ordinary everyday meaning, That is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.[1]

2. **The complainant was under 16 years at the time.[2]**

3. **The defendant had no legitimate reason for taking the photograph or image.**

   The law leaves it to the good sense of the jury as representatives of the community whether the defendant acted without legitimate reason.[3]

   The onus of proof is on the prosecution. The defendant does not have to satisfy the jury that he or she had a legitimate reason. The prosecution has to satisfy the jury beyond a reasonable doubt that the defendant had no legitimate reason.

4. **Refer to any circumstances of aggravation.[4]**

---

1 *R v Dunn* [1973] 2 NZLR 481.

2 If the offence is alleged to have been committed in respect of a child of or above 12 years, it is a defence to prove that the defendant believed, on reasonable grounds, that the child was of or above 16 years(s 210(5)). See also s229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

3 The phrase "legitimate reason" is derived from the *Protection of Children Act* 1978 (UK). Lord Scarman said during the debate on the Act: "This phrase really embraces a question of fact on which courts and juries are well able to reach a sensible decision in determining the meaning."

4 Section 210(3),(4) and (4A). See also Circumstances of Aggravation in Sexual Offences (100.1). The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Kidnapping s 354[1]

The prosecution must prove that:

1. **The defendant took or detained[2] another person.**
2. **The taking or detention was done forcibly.**
3. **The taking or detention was unlawful. That is, not authorized, justified or excused by law.**
4. **The defendant intended to gain anything from any person or to procure[3] anything to be done or omitted to be done by any person.**

[1] The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

[2] The term "detain" should be given its ordinary and natural meaning. It has a variety of meanings including "keep in confinement" and "hold back, delay, stop". See *R v Awang* [2004] 2 Qd R 672 per Williams JA.

[3] The word "procure" in this section means "facilitate", "enable", "bring about" or "cause". The word was not confined to meaning compel or induce. See *R v F, ex parte Attorney General* [2004] 1 Qd R 162.

Kidnapping for ransom s 354A[1]

A. (s 354A(1)(a))

The prosecution must prove that:

1. **The defendant took, enticed away or detained[2] another person.**
2. **The defendant intended to extort[3] or gain anything from or procure[4] anything to be done or omitted to be done by any person.**
3. **By a demand containing threats of detriment of any kind to be caused to the person taken, enticed away or detained, by the defendant or another, if the demand was not complied with**

B. (s 354A(1)(b))

The prosecution must prove that:

1. **The defendant received or harboured.**
2. **The person in respect of whom the threats of detriment of any kind were made.**
3. **Knowing that person to have been so taken or enticed away or detained.**

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 The term "detain" should be given its ordinary and natural meaning. It has a variety of meanings including "keep in confinement" and "hold back, delay, stop". See *R v Awang* [2004] 2 Qd R 672 per Williams JA.

3 "Extort" means obtain by force, threats, persistent demands, etc (the Australian Concise Oxford Dictionary, Third Ed).

4 The word "procure" in this section means "facilitate", "enable", "bring about" or "cause". The word was not confined to meaning compel or induce. See *R v F, ex parte Attorney General* [2004] 1 Qd R 162.

Maintaining A Sexual Relationship With a Child s 229B (Offences between 3 July 1989 and 1 July 1997)

The prosecution must prove that:

1. **The defendant did an act defined as an offence of a sexual nature in relation to the child on three or more occasions. In this case the prosecution relies on the offences of [**as pleaded in the indictment as substantive offences OR, where the prosecution is proceeding only with the offence of maintaining,[1] the offences of (as particularised by the prosecution)**]. These acts are all offences of a sexual nature.[2] [**Here refer to the elements required to be proved for each discrete sexual offence[3] OR if the offences are charged in the indictment as substantive offences, refer the jury to the directions already given in relation to them**].**

   If the prosecution has proved that the defendant did an act on three or more occasions, it does not matter that the dates or exact circumstances of those occasions are not disclosed by the evidence.

   Before you can be satisfied of this element, you must all agree as to the same three or more offences.[4]

---

1 As a result of the High Court's judgment in *KBT v The Queen* (1997) 191 CLR 417 at 423, the circumstances in which the prosecution will proceed with a maintaining charge without specified substantive offences on the same indictment, will be rare.

2 An offence defined in s 210(1)(e) or (f) (exposing a child to an indecent object, film etc or taking an indecent photograph or visual image of a child) cannot constitute an offence of a sexual nature for the purpose of establishing any of the three occasions necessary. In *R v Bradfield* [2012] QCA 337, the conviction was quashed because the directions did not distinguish between the counts on the indictment which related to sexual acts and those which did not, leaving open the possibility that a jury member may have convicted on the basis of an offence of the latter kind.

3 It may be more logical and helpful to the jury to direct as to the elements of any substantive offences before giving directions on the maintaining charge. Such an approach would allow the jury to understand what is meant by "an offence of a sexual nature" and also the direction on the meaning of "unlawful" when considering the directions on this offence.

4 *KBT at* 423. In *R v S* [1999] 2 Qd R 89, a case in which the complainant gave evidence that the appellant had engaged in certain conduct every night for 5 months, the Court of Appeal held (distinguishing *KBT*) that the failure of the trial judge to instruct the jury as to the need to agree on the commission of the same three acts would not have made a difference. Again in *KRM v The Queen* (1999) 105 A Crim R 437, 438, the Victorian Court of Appeal distinguished *KBT* on the basis of the identical nature of the acts alleged by the complainant, notwithstanding that she was unable to specify separate occasions. An appeal to the High Court was unsuccessful; but there was no ground of appeal argued in relation to the failure of the trial judge in the circumstances of that case, to direct the jury that they must all agree on the same three acts: *KRM v The Queen* (2001) 206 CLR 221.

If you cannot be satisfied of the same three or more occasions, the charge of maintaining has not been established.

2. That an unlawful relationship of a sexual nature has been maintained.[5]

[5] It is of concern whether the offence is simply established by the proof of the three separate occasions or whether something more in terms of a continuous relationship also needs to be proved. Would proof of three occasions separated by long periods of time be sufficient?

In *R v Kemp (No. 2)* [1998] 2 Qd R 510, Macrossan CJ, 511 said:

> "In the general aspect of its case, the Crown will have to prove that between the complainant and the accused there existed a relationship which had an unlawful sexual nature. Use of the term 'relationship' implies a continuity of contact in which both parties are involved; the sexual element will be the particular character of the relationship which will appear. Evidence of conduct occurring between the two parties, if it pointed to the existence of a sexual character in their relationship during the specified period, would be direct evidence of an aspect of this offence."

Pincus JA, 512:

> "The subsection (s 229B(1A) now s 229B(2)) does not say, nor imply, that the offence of maintaining an unlawful relationship must necessarily be held proved if the three acts mentioned in subs [(2)] are proved; it is easy to imagine circumstances in which those three acts could be proved without necessitating the conclusion that there was such a relationship as the section contemplates."

Mackenzie J, 518:

> "The offence created by s 229B is unusual in that it combines the requirements of proving at least some degree of habituality (maintaining a sexual relationship) and of proving at least three acts constituting an offence of a sexual nature, committed during the period over which it is alleged that the sexual relationship was maintained. Both these elements must be proved beyond reasonable doubt. The offence is neither an offence completed upon the commission of three discrete acts of a sexual nature, nor an offence defined solely in terms of a course of conduct or state of affairs. It combines elements of both."

In *R v S* [1999] 2 Qd R 89, the Court of Appeal noted, 91:

> "The statement in the joint judgment in *KBT* that 'the actus reus of the offence is as specified in subsection (1A) rather than maintaining an unlawful sexual relationship' may, with respect, be capable of producing a somewhat surprising result in a case where, for example, the three acts in question all occurred in the course of the same day… It would in those circumstances be difficult to regard the accused as 'maintaining a sexual relationship', according to the natural meaning of those words, over so short a period."

Some direction on the meaning of the term relationship needs to be given so that the jury are told of this additional feature of the offence. The trial judge in *KRM v The Queen* (2001) 206 CLR 221 told the jury:

> "Now, relationship is a position where one person holds with respect to another, on account of some social or other connection between them and 'maintain' is to continue, to carry on, or keep up. The Crown must therefore prove an offence of an ongoing nature."

Some of the High Court thought this might have been overly generous to the accused but some direction is necessary that it must be proved that a relationship existed.

The suggested direction should be expanded to include the necessity of proving a "relationship" involving continuity or habituality of conduct.

3. **That the relationship of a sexual nature was unlawful – that is, it was not justified, authorised or excused by law.**[6]

4. **That the defendant maintained such a relationship with the child.**

   Maintained carries its ordinary meaning. That is carried on, kept up or continued. It must be proved that there was an ongoing relationship of a sexual nature between the defendant and the complainant. There must be some continuity or habituality of sexual conduct, not just isolated incidents.

5. **That the defendant was an adult – defined as a person of or over the age of 18 years.**

6. **That the complainant was a child; that is, under 16.**[7]

If the prosecution is relying on evidence of other alleged sexual conduct of the defendant which is not the subject of a specific charge, then the trial judge should have regard to the joint judgment of Fitzgerald P and Shepherdson J in *Kemp* [1997] 1 Qd R 383, and the judgment of the Court of Appeal in *Kemp (No. 2)* [1998] 2 Qd R 510, and consider giving a further direction in terms set out below. See also *HML v R* (2008) 235 CLR 334; [2008] 82 ALJR 723 and the directions concerning Evidence of other Sexual (or violent) Acts or other "Discreditable Conduct" at No. 66.1.

It may also be appropriate to give a *Longman* warning: see discussion under *Longman* Direction.

If the prosecution does lead such evidence in a case in which it also relies on specific offences charged in the indictment to prove the charge of maintaining, it is suggested that a further direction be given to the jury in these terms.

> **In this case, as well as the specific counts in the indictment, the prosecution relies on the evidence of the child of other alleged acts of a sexual nature to establish that the defendant maintained a sexual relationship with the child. The child has not been able to be specific about when or under what circumstances those acts occurred.**
>
> **If you have a doubt about the specific offences then you should only convict the defendant on the basis of the evidence of the other alleged acts if after carefully**

---

[6] In relation to the direction on "unlawful", although it is difficult to imagine a situation where a sexual relationship with a child could be authorised, justified or excused by law (except, perhaps, where the parties were married), it is appropriate, out of an abundance of caution, to give the usual direction as to the meaning of the term.

[7] If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the defendant believed on reasonable grounds that the child was of or above the age of 16 years at the commencement of the period in which the defendant maintained the relationship (s 229B(1D)). See also s 229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

scrutinising the evidence of the child you are satisfied beyond reasonable doubt that the defendant did these acts during the period alleged in the indictment.[8]

A reasonable doubt with respect to the complainant's evidence on any specific count should be taken into account and considered by you in your assessment of the complainant's credibility generally; however, it remains a matter for you as to what evidence you accept and what evidence you reject.[9]

---

8 This form of direction attempts to reconcile the judgments in *Kemp* and *Kemp (No 2)*.

9 See *R v Markuleski* (2001) 52 NSWLR 82, *R v M* [2001] QCA 458, *R v S* (2002) 129 A Crim R 339, [2002] QCA 167 and *R v D* [2002] QCA 445. See directions at No 34.

Maintaining A Sexual Relationship With a Child s 229B (Offences between 1 July 1997 and 3 May 2003)

[Note – This direction differs from that in 125.1 only in footnote 7]

The prosecution must prove that:

1. **The defendant did an act defined as an offence of a sexual nature in relation to the child on three or more occasions. In this case the prosecution relies on the offences of [**as pleaded in the indictment as substantive offences OR, where the prosecution is proceeding only with the offence of maintaining,[1] the offences of (as particularised by the prosecution)**]. These acts are all offences of a sexual nature.[2] [**Here refer to the elements required to be proved for each discrete sexual offence[3] OR if the offences are charged in the indictment as substantive offences, refer the jury to the directions already given in relation to them**].**

   If the prosecution has proved that the defendant did an act on three or more occasions, it does not matter that the dates or exact circumstances of those occasions are not disclosed by the evidence.

   Before you can be satisfied of this element, you must all agree as to the same three or more offences.[4]

---

1 As a result of the High Court's judgment in *KBT v The Queen* (1997) 191 CLR 417 at 423, the circumstances in which the prosecution will proceed with a maintaining charge without specified substantive offences on the same indictment, will be rare.

2 An offence defined in s 210(1)(e) or (f) (exposing a child to an indecent object, film etc or taking an indecent photograph or visual image of a child) cannot constitute an offence of a sexual nature for the purpose of establishing any of the three occasions necessary. In *R v Bradfield* [2012] QCA 337, the conviction was quashed because the directions did not distinguish between the counts on the indictment which related to sexual acts and those which did not, leaving open the possibility that a jury member may have convicted on the basis of an offence of the latter kind.

3 It may be more logical and helpful to the jury to direct as to the elements of any substantive offences before giving directions on the maintaining charge. Such an approach would allow the jury to understand what is meant by "an offence of a sexual nature" and also the direction on the meaning of "unlawful" when considering the directions on this offence.

4 *KBT at* 423. In *R v S* [1999] 2 Qd R 89, a case in which the complainant gave evidence that the appellant had engaged in certain conduct every night for 5 months, the Court of Appeal held (distinguishing *KBT*) that the failure of the trial judge to instruct the jury as to the need to agree on the commission of the same three acts would not have made a difference. Again in *KRM v The Queen* (1999) 105 A Crim R 437, 438, the Victorian Court of Appeal distinguished *KBT* on the basis of the identical nature of the acts alleged by the complainant, notwithstanding that she was unable to specify separate occasions. An appeal to the High Court was unsuccessful; but there was no ground of appeal argued in relation to the failure of the trial judge in the

If you cannot be satisfied of the same three or more occasions, the charge of maintaining has not been established.

2. That an unlawful relationship of a sexual nature has been maintained.[5]

---

circumstances of that case, to direct the jury that they must all agree on the same three acts: *KRM v The Queen* (2001) 206 CLR 221.

[5] It is of concern whether the offence is simply established by the proof of the three separate occasions or whether something more in terms of a continuous relationship also needs to be proved. Would proof of three occasions separated by long periods of time be sufficient?

In *R v Kemp (No. 2)* [1998] 2 Qd R 510, Macrossan CJ, 511 said:

> "In the general aspect of its case, the Crown will have to prove that between the complainant and the accused there existed a relationship which had an unlawful sexual nature. Use of the term 'relationship' implies a continuity of contact in which both parties are involved; the sexual element will be the particular character of the relationship which will appear. Evidence of conduct occurring between the two parties, if it pointed to the existence of a sexual character in their relationship during the specified period, would be direct evidence of an aspect of this offence."

Pincus JA, 512:

> "The subsection (s 229B(1A) now s 229B(2)) does not say, nor imply, that the offence of maintaining an unlawful relationship must necessarily be held proved if the three acts mentioned in subs [(2)] are proved; it is easy to imagine circumstances in which those three acts could be proved without necessitating the conclusion that there was such a relationship as the section contemplates."

Mackenzie J, 518:

> "The offence created by s 229B is unusual in that it combines the requirements of proving at least some degree of habituality (maintaining a sexual relationship) and of proving at least three acts constituting an offence of a sexual nature, committed during the period over which it is alleged that the sexual relationship was maintained. Both these elements must be proved beyond reasonable doubt. The offence is neither an offence completed upon the commission of three discrete acts of a sexual nature, nor an offence defined solely in terms of a course of conduct or state of affairs. It combines elements of both."

In *R v S* [1999] 2 Qd R 89, the Court of Appeal noted, 91:

> "The statement in the joint judgment in *KBT* that 'the actus reus of the offence is as specified in subsection (1A) rather than maintaining an unlawful sexual relationship' may, with respect, be capable of producing a somewhat surprising result in a case where, for example, the three acts in question all occurred in the course of the same day… It would in those circumstances be difficult to regard the accused as 'maintaining a sexual relationship', according to the natural meaning of those words, over so short a period."

Some direction on the meaning of the term relationship needs to be given so that the jury are told of this additional feature of the offence. The trial judge in *KRM v The Queen* (2001) 206 CLR 221 told the jury:

> "Now, relationship is a position where one person holds with respect to another, on account of some social or other connection between them and 'maintain' is to continue, to carry on, or keep up. The Crown must therefore prove an offence of an ongoing nature."

Some of the High Court thought this might have been overly generous to the accused but some direction is necessary that it must be proved that a relationship existed.

The suggested direction should be expanded to include the necessity of proving a "relationship" involving continuity or habituality of conduct.

3. **That the relationship of a sexual nature was unlawful – that is, it was not justified, authorised or excused by law.**[6]

4. **That the defendant maintained such a relationship with the child.**

   Maintained carries its ordinary meaning. That is carried on, kept up or continued. It must be proved that there was an ongoing relationship of a sexual nature between the defendant and the complainant. There must be some continuity or habituality of sexual conduct, not just isolated incidents.

5. **That the defendant was an adult – defined as a person of or over the age of 18 years.**

6. **That the complainant was a child; that is, under 16.**[7]

If the prosecution is relying on evidence of other alleged sexual conduct of the defendant which is not the subject of a specific charge, then the trial judge should have regard to the joint judgment of Fitzgerald P and Shepherdson J in *Kemp* [1997] 1 Qd R 383, and the judgment of the Court of Appeal in *Kemp (No. 2)* [1998] 2 Qd R 510, and consider giving a further direction in terms set out below. See also *HML v R* (2008) 235 CLR 334; [2008] 82 ALJR 723 and the directions concerning Evidence of other Sexual (or violent) Acts or other "Discreditable Conduct" at No. 66.1.

It may also be appropriate to give a *Longman* warning: see discussion under *Longman* Direction.

If the prosecution does lead such evidence in a case in which it also relies on specific offences charged in the indictment to prove the charge of maintaining, it is suggested that a further direction be given to the jury in these terms.

> **In this case, as well as the specific counts in the indictment, the prosecution relies on the evidence of the child of other alleged acts of a sexual nature to establish that the defendant maintained a sexual relationship with the child. The child has**

---

6 In relation to the direction on "unlawful", although it is difficult to imagine a situation where a sexual relationship with a child could be authorised, justified or excused by law (except, perhaps, where the parties were married), it is appropriate, out of an abundance of caution, to give the usual direction as to the meaning of the term.

7 If the unlawful sexual relationship involves an act of sodomy or attempted sodomy – 18 years. If the offence of a sexual nature is alleged to have been committed in respect of a child of or above the age of 12 years and the offence is defined under section 208 or 209 (sodomy or attempted sodomy), it is a defence to prove that the defendant believed throughout the relationship on reasonable grounds that the child was of or above the age of 18 years (s 229B(1D)). If the offence of a sexual nature is alleged to have been committed in respect of a child of or above 12 years and the offence is one other than one defined under section 208 or 209, it is a defence to prove that the defendant believed throughout the relationship on reasonable grounds that the child was of or above 16 years (s 229B(1E)). See also s 229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

not been able to be specific about when or under what circumstances those acts occurred.

If you have a doubt about the specific offences then you should only convict the defendant on the basis of the evidence of the other alleged acts if after carefully scrutinising the evidence of the child you are satisfied beyond reasonable doubt that the defendant did these acts during the period alleged in the indictment.[8]

A reasonable doubt with respect to the complainant's evidence on any specific count should be taken into account and considered by you in your assessment of the complainant's credibility generally; however, it remains a matter for you as to what evidence you accept and what evidence you reject.[9]

---

8 This form of direction attempts to reconcile the judgments in *Kemp* and *Kemp (No 2)*.

9 See *R v Markuleski* (2001) 52 NSWLR 82, *R v M* [2001] QCA 458, *R v S* (2002) 129 A Crim R 339, [2002] QCA 167 and *R v D* [2002] QCA 445. See directions at No 34.

Maintaining a Sexual Relationship with a Child s 229B[1] (after 1 May 2003)

The prosecution must prove that the defendant maintained an unlawful relationship of a sexual nature with a child under the prescribed age.

1. **The prosecution must prove that the defendant was an adult, that is, a person over 18 years of age.**
2. **The prosecution must prove that complainant was at the time a child under the age of 16 years.[2]**
3. **An unlawful sexual relationship is a relationship that involves more than one unlawful sexual act over any period. "Unlawful sexual act" means an act that constitutes an offence of a sexual nature which is not authorised, justified or excused by law.** [Here identify the offence(s) of a sexual nature upon which the Prosecution relies, explaining in respect of each what the jury must find in order to be satisfied that such an offence occurred. 'Offence of a sexual nature' means an offence defined in Sections 210 (other than section 210 (1) (e) or (f)),[3] 215, 222, 349, 350 or 352]**.**
4. **Maintained carries its ordinary meaning. That is, carried on, kept up or continued. It must be proved that there was an ongoing relationship of a sexual nature between the defendant and the complainant. There must be some continuity or habituality of sexual conduct, not just isolated incidents.**
5. **All of you must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving**

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 If the child was at least 12 years when the crime was alleged to have been committed, it is a defence to prove the defendant believed on reasonable grounds the child was at least the age of 16 years (s229B(5) *Criminal Code*). See also s 229 of the *Code* which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

3 An offence defined in s 210(1)(e) or (f) (exposing a child to an indecent object, film etc or taking an indecent photograph or visual image of a child) cannot constitute an offence of a sexual nature for the purpose of establishing any of the three occasions necessary. In *R v Bradfield* [2012] QCA 337, the conviction was quashed because the directions did not distinguish between the counts on the indictment which related to sexual acts and those which did not, leaving open the possibility that a jury member may have convicted on the basis of an offence of the latter kind.

unlawful sex acts existed. It is not necessary that all of you be satisfied about the same unlawful sexual acts.

Where the prosecution joins a maintaining count with specific counts of sexual offences during the specified period, the prosecution may also rely on evidence of other alleged sexual conduct of the defendant which is not the subject of specific counts. The trial judge should have regard to the decision of the High Court in *HML v R* (2008) 235 CLR 334 and the directions concerning Evidence of other Sexual (or violent) Acts or other "Discreditable Conduct" at No. 66.1. It may be necessary to give a further direction in terms set out below.

If you are satisfied beyond reasonable doubt of the guilt of the defendant in relation to any of counts (2, 3 or 4), the relevant sexual act or acts will then be used in your consideration of the count of maintaining.

In this case, as well as relying on the specific sexual acts identified in counts (2, 3 and 4), the prosecution relies upon sexual acts about which the complainant was not specific as to times or circumstances under which the acts occurred. Those sexual acts described by the complainant were…

If you have a doubt about the specific offences in counts (2, 3 and 4), then you should only convict the defendant on the basis of the evidence of the other alleged acts if after carefully scrutinising the evidence of the child you are satisfied beyond reasonable doubt that the defendant did these acts during the period alleged in the indictment (specify period).

A reasonable doubt with respect to the complainant's evidence on any specific count should be taken into account and considered by you in your assessment of the complainant's credibility generally; however it remains a matter for you as to what evidence you accept and what evidence you reject. [4]

It may also be appropriate to give a *Longman* warning; see No 65 *Longman* Direction.

[4] See *R v Markuleski* (2001) 52 NSWLR 82, *R v M* [2001] QCA 458, *R v S* (2002) 129 A Crim R 339, [2002] QCA 167, and *R v D* [2002] QCA 445. See directions at No 34.

Official Corruption[1] s 87(1)(a)[2]

The prosecution must prove:

1. **That the defendant was employed in the public service (or was the holder of a public office[3]).**
2. **The defendant was charged by virtue of such employment (or office) with the performance of any duty did not touch on the administration of justice.**
3. **The defendant asked for, (received, obtained or agreed or attempted to receive or obtain)**
4. **Any property (or benefit) of any kind**
5. **For himself (or any other person)**
6. **The defendant did so corruptly[4]**
7. **On account of anything already done (or omitted to be done, or to be afterwards done or omitted to be done)**
8. **By the defendant in the discharge of the duties of the defendant's office.[5]**

---

1 See also s 87(1)(b) and ss 120 Judicial Corruption, 121 Official Corruption not Judicial but Relating to Offences.

2 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

3 This is a question of fact: *R v McCann* [1998] 2 Qd R 56.

4 Corruption is not to be equated with dishonesty and dishonesty does not necessarily connote corruption: see *Re Lane* (QSC, Ryan J, 9 October 1992, unreported) which is referred to with approval in *DPP (Cth) v Hogarth* (1995) 93 A Crim R 452. In *Re Lane* at [10], Ryan J stated that in the context of the legislation relevant to the case, corrupt conduct means conduct which is done deliberately and contrary to the duties incumbent on the person by virtue of his public office, as a result of which the person sought to gain an advantage for himself or another (see Hogarth at 455).

5 'Holder of Public Office' has a narrower meaning than 'public officer' defined in s 1: *McCann* (ibid).

Official Corruption[1] s 87(1)(b)[2]

The prosecution must prove:

1. **That the defendant gave[3] property or a benefit[4] to a holder of public office.[5]**
2. **The defendant did so corruptly.[6]**
3. **The defendant did so with the intention[7] that the holder of public office should be corrupted.**
4. **The defendant did so on account of the holder of public office doing or omitting to do something in the discharge of his duties.[8]**

---

1 See also s 87(1)(a) and ss 120 Judicial Corruption, 121 Official Corruption not Judicial but Relating to Offences.

2 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

3 (Or conferred or procured or promised, etc).

4 If the charges alleges "promises" or "offers to give", it is not necessary for the prosecution to prove that the holder of public office received any property or benefit.

5 This is a question of fact: *R vMcCann* [1998] 2 Qd R 56.

6 Corruption is not to be equated with dishonesty and dishonesty does not necessarily connote corruption: see *Re Lane* (QSC, Ryan J, 9 October 1992, unreported) which is referred to with approval in *DPP (Cth) v Hogarth* (1995) 93 A Crim R 452. In *Re Lane* at [10], Ryan J stated that in the context of the legislation relevant to the case, corrupt conduct means conduct which is done deliberately and contrary to the duties incumbent on the person by virtue of his public office, as a result of which the person sought to gain an advantage for himself or another (see Hogarth at 455).

7 See notes to Intention.

8 "Holder of public office" has a narrower meaning than "public officer" defined in s 1: *McCann* [ibid].

Perjury

The prosecution must prove that:

1. **The defendant was lawfully sworn as a witness in a judicial proceeding;**[1]
2. **The defendant made a statement wilfully – that is to say he made the statement deliberately and not inadvertently or by mistake or at cross purposes with the person questioning him;**[2]
3. **The statement was false;**
4. **The defendant knew it was false;**
5. **The statement was material, that is, it was of such significance that it was capable of affecting the decision of the court. In this case, the statement was, as a matter of law, material.** [3]

---

[1] See definition in s 119 *Code*; and see *R v Deemal* [2010] 2 Qd R 70 as to its application to investigative agencies.

[2] *R v Lowe* [1917] VLR 155.

[3] The question of whether there is evidence of materiality is a question of law for the judge to decide: *R v Traino* (1987) 45 SASR 473. That judgment from South Australia (King CJ, Jacobs & Millhouse JJ) deals with the common law offence of perjury, however in *Mellifont v Attorney-General* (1991) 173 CLR 289; 57 A Crim R 256 at 267-268 a majority of the High Court (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ) considered the test for materiality under s 123, and referred to *Traino.* The court held that (unlike the necessity at common law to establish the materiality of the false statement itself) under s 123 the question is whether the false testimony relates to a matter which was itself material to a question then pending in the proceeding and not whether the false testimony itself was material to such a question. A "question depending" is one which arises, but is not necessarily to be determined, in the proceedings: *R v Deemal* at [30] and [46].

A person cannot be convicted of committing perjury upon the uncorroborated evidence of one witness: s 125.

And as from 1 July 1997, it is no longer necessary for the jury to be satisfied beyond a reasonable doubt that a statement was false, provided that they are satisfied that one of two contradictory statements made under oath by the defendant was deliberately false: s 123A.

Possession of a Child Abuse Computer Game[1] (Offences prior to 4 April 2005)

The prosecution must prove that:

1. The defendant knowingly had in his possession;

Possession involves custody or control of the thing and/or ability or right to obtain custody or control of the thing.[2]

2. A child abuse computer game.

"Child abuse computer game" means a computer game that is an objectionable computer game because it depicts a person who is, or who looks like a child under 16 years (whether the person is engaged in sexual activity or not) in a way likely to cause offence to a reasonable adult.[3]

---

1 *Classification of Computer Games and Images Act* 1995.

2 See also remarks of Lord Scarman in *Boyesen* [1982] AC 768 at 773-774 as to the meaning of "possession" at common law, quoted with approval by the Court of Appeal in *R v Shew* [1998] QCA 333. Proof of possession in a case, in which joint possession is not alleged, requires proof that others were, or could be, excluded from control of the thing in question. *R v Campbell* (2009) 195 A Crim R 374.

3 Schedule 2 of Dictionary.

Possession of Housebreaking Implements s 425(1)(c)

The prosecution must prove that the defendant:

1. Was found by night.

That means that the defendant was located between the hours of 9pm and 6am.

2. Was in possession of an instrument of housebreaking.

The essence of the concept of possession is that at the relevant time the defendant intentionally had control over the object in question. The defendant may have that control either alone or jointly with some other person or persons.

To be in possession of the object the defendant must know that he is in possession of the object, thus, if the defendant was carrying a case into which somebody had, without his knowledge, slipped an object he would not be in possession of that object.

If is not necessary for the accused to have the object in his hand or on his person for him to be in possession of it. Further, you do not need to own something in order to be in possession of it. You can possess something temporarily or for some limited purpose.

3. Of an instrument of housebreaking.

An instrument of housebreaking includes every instrument which, from its nature, is capable of being used for housebreaking although it may ordinarily be used for a lawful purpose.

4. Without lawful excuse.

Once the prosecution has established beyond reasonable doubt that the defendant was found at night in possession of an instrument of housebreaking the defendant is guilty of the offence unless he establishes on the balance of probabilities that he had a lawful excuse for possession of the instrument at the time and place alleged.

Observations or Recordings in Breach of Private s 227A(1) (Commencement date: 8 Dec 2005)

The prosecution must prove that:

1. **The defendant observed[1] or visually recorded[2] another person in circumstances where a reasonable adult would expect to be afforded privacy;**
2. **The observation or visual recording was done without the other person's consent;[3]**
3. **The other person was in a private place[4] or engaging in a private act[5] and the observation or visual recording was made for the purpose of observing or visually recording a private act.**

Note: s 227C provides for an excuse from criminal responsibility for law enforcement officers acting in the course of their duty and for persons acting in the course of duty with respect to persons in lawful custody or under a supervision order.

---

1 Observe means observe by any means (s 207A).

2 Visually record a person means record by any means, moving or still images of that person or part of the person (s 207A).

3 Consent would appear to have its normal meaning and not that defined in s348 in relation to Chapter 32.

4 Private place means a place where a person might reasonably be expected to be engaging in a private act (s 207A).

5 Private act, for a person, means –

(a) showering or bathing; or

(b) using a toilet; or

(c) another activity when the person is in a state of undress; or

(d) intimate sexual activity that is not ordinarily done in public (s 207A).

"State of undress" for a person means –

(a) the person is naked or the person's genital or anal region is bare or, if the person is female the person's breasts are bare; or

(b) the person is wearing only underwear; or

(c) the person is wearing only some outer garments so that some of the person's underwear is not covered by an outer garment (s 207A).

Observations or Recordings in Breach of Privacy s 227A(2) (Commencement date: 8 Dec 2005)

The prosecution must prove that:

1. **The defendant observed[1] or visually recorded[2] another person's genital or anal region[3] where a reasonable adult would expect to be afforded privacy in relation to that region;**
2. **The observation or visual recording was done without the other person's consent;[4]**
3. **The observation or visual recording was made for the purpose of observing or visually recording the other person's genital or anal region.**

Note: s 227C provides for an excuse from criminal responsibility for law enforcement officers acting in the course of their duty and for persons acting in the course of duty with respect to persons in lawful custody or under a supervision order.

1 Observe means observe by any means (s 207A).

2 Visually record a person means record by any means, moving or still images of the person or part of the person (s 207A).

3 Genital or anal region of a person means the person's genital or anal region when the region is covered by underwear or bare (s 227A(3)).

4 Consent would appear to have normal meaning and not that defined in s 348 in relation to Chapter 32.

Distributing prohibited visual recordings s 227B
(Commencement date: 8 Dec 2005)

The prosecution must prove that:

1. **The defendant distributed[1] a prohibited visual recording of another person;[2]**

2. **The defendant had reason to believe that it was a prohibited visual recording;**

3. **The distribution occurred without the other person's consent.[3]**

Note: s 227C provides for an excuse from criminal responsibility for law enforcement officers acting in the course of their duty and for persons acting in the course of duty with respect to persons in lawful custody or under a supervision order.

---

[1] Distribute includes –

(a) communicate, exhibit, send, supply, transmit to someone, whether a particular person or not; and
(b) make available for access by someone, whether by a particular person or not; and
(c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and
(d) attempt to distribute (s 227B(2)).

[2] Prohibited visual recording of another person, means –

(a) a visual recording of the person in a private place or engaging in a private act made in circumstances where a reasonable adult would expect to be afforded privacy; or
(b) a visual recording of the person's genital or anal region when it is covered by underwear or bare made in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region (s 227B(2)).

For definitions of "visually record", "private place" and "private act", see s 207A.

[3] Consent would appear to have its normal meaning and not that defined in s 348 in relation to Chapter 32.

Procuring Prostitution[1]

The prosecution must prove:

1. That the defendant knowingly procured[2] the complainant;

The prosecution must prove that the defendant knowingly recruited or enticed [the complainant] for the purposes of sexual exploitation.

2. To engage in prostitution.

A person engages in prostitution if the person engages (or offers to engage) in the provision to another person[3], under an arrangement of a commercial character, of any of the following activities:

(a) sexual intercourse;

(b) masturbation;

(c) oral sex;

(d) any activity, other than sexual intercourse, masturbation or oral sex that involves the use of one person by another for his sexual satisfaction, involving physical contact.[4]

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 There are number of specific offences of procuring in the *Code* containing the same definition.

For example s 217 (Procuring a young person or an intellectually impaired person to engage in carnal knowledge), and s 218 (Procuring sexual acts by coercion). In relation to most of the offences of procuring under Chapter 22 (Offences Against Morality), each section provides a definition of "procure" and it is suggested that in these cases the trial judge direct the jury specifically in terms of this definition.

Similarly the offence of procuring prostitution (Under Chapter 22A) contains the same definition: s 229G. However, in relation to the offence of supplying drugs or instruments to procure abortion (s 226) the word "procures" when it relates to an event rather than a person carries its dictionary meaning: "to effect, cause, bring about".

3 This section applies equally to males and females: s 229E(3).

4 A person does not engage in prostitution if:

(a) the activity is one mentioned in 1(d) and

(b) the person is providing adult entertainment under a permit and is an adult and is not a person with an impairment of the mind. See s 1; and

(c) the activity is authorised under the permit: s229E(4).

Rape s 347 (now repealed)
(For offences occurring prior to 27 October 2000)[1]

The prosecution must prove the defendant:

1. **Had carnal knowledge[2] of (the complainant).**

   The prosecution must prove that the defendant penetrated the genitalia of the complainant with his penis. Any degree of penetration is sufficient. It is not necessary for the prosecution to prove that the defendant ejaculated.

2. **Without her consent.[3] Consent is a common word in every day use. When it is used in the context of sexual activity it means consciously permitting the act of sexual intercourse to occur. Consent may be defined as the agreement to, or the acquiescence in, the act of sexual intercourse by the complainant.**

---

[1] For offences occurring on and after 27 October 2000 the above direction will have to be modified. The definition of "rape" has been substantially widened by the *Criminal Law Amendment Act* 2000 operational on and after 27 October 2000. A person rapes another if without that other person's consent he -

(a) has carnal knowledge (including sodomy and penetration to any extent: see definitions s 1 and 6) of or with the person or;

(b) penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis or;

(c) penetrates the mouth of the other person to any extent with the person's penis.

Section 348 sets out a definition of "consent". "Consent" is defined in sub-section (1) as "consent freely and voluntarily given by a person with cognitive capacity to give the consent". "Cognitive" means "to know; perceive (Macquarie Dictionary). Section 348(2) sets out that a person's consent is not freely and voluntarily given if obtained by force, etc.

[2] See definition s 1 and s 6.

[3] Where the prosecution case is that the complainant consented, but by force, or by means of threat or intimidation of any kind, or by fear of bodily harm, it is only in an exceptional case in which it would be necessary for the trial judge to direct the jury as to the distinction between "without consent" and "consent obtained by force etc": *I.A. Shaw* [1996] 1 Qd R 641, 645; cf *P.S. Shaw* [1995] 2 Qd R 97.

In a case in which there is an issue as to consent, or if it is alleged that consent was obtained by force, it may be useful for the trial judge to adapt the words at p 636 of *I.A. Shaw*:

"Under 347 consent refers to a subjective state of mind on the part of the complainant at the time when penetration took place. It is not in law necessary that the complainant should manifest her dissent, or strictly even that she should say in evidence at the trial that she did not consent to sexual intercourse."

In most cases, it will not be necessary for the judge to use these words in directing the jury. It may arise, for example, in a case in which the evidence establishes that the complainant said or did nothing prior to and during intercourse.

In *R v Mrzljak* [2005] 1 Qd R 308 it was held that a complainant's intellectual impairment will be a relevant matter for the jury to consider when determining whether or not the complainant had the necessary cognitive capacity. Intellectual impairment itself does not deprive the complainant of the cognitive capacity to give or withhold consent.

See *R v Winchester* [2014] 1 Qd R 44 for a detailed examination of the subject of consent in the context of s. 348 (applicable to offences from 27 October 2000), including whether consent is freely and voluntarily given where there is a promise of a gift.

The defendant does not have to prove she consented, the prosecution must prove that she did not.[4]

[4] An issue of honest and reasonable mistake of fact may arise – see notes on Mistake of Fact.

Rape s 349[1] (Offences occurring after 27 October 2000[2])

The prosecution must prove the defendant:

1. Had carnal knowledge[3] of or with (the complainant).

2. Without her consent.[4]

OR

1. Penetrated the vulva, vagina or anus of the other person.

2. To any extent.

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 For offences occurring prior to 27 October 2000, see 133 Rape s 347 (now repealed).

3 See definition s 1 and s 6 *Criminal Code*.

4 "Consent" is defined in s 348 of the *Criminal Code*:

s348

(1) In this chapter, "consent" means consent freely and voluntarily given by a person with the cognitive capacity to give consent.

(2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained –

(a) by force; or

(b) by threats or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by an accused person that the accused person was the person's sexual partner.

In *R v Makary* [2019] 2 Qd R 528, Sofronoff P (with whom Bond J agreed) said of the definition of "consent" in s 348, which was inserted by the *Criminal Law Amendment Act* 2000 that it required two elements:

> [49] …First, there must in fact be "consent" as a state of mind … Second, consent must also be "given" in the terms required by the section.
>
> [50] The giving of consent is the making of a representation by some means about one's actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, a representation might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluation against a pattern of past behaviour.

In *R v Mrzljak* [2005] 1 Qd R 308 it was held that a complainant's intellectual impairment will be a relevant matter for the jury to consider when determining whether or not the complainant had the necessary cognitive capacity. Intellectual impairment itself does not deprive the complainant of the cognitive capacity to give or withhold consent.

See *R v Winchester* [2014] 1 Qd R 44 for a detailed examination of the subject of consent including whether consent is freely and voluntarily given where there is a promise of a gift.

An issue of mistake of fact may arise – see notes on mistake of fact.

3. **With a thing or part of the defendant's body that is not a penis.**

4. **Without the consent of the other person.**

OR

1. **Penetrated the mouth of the other person.**

2. **To any extent.**

3. **With the defendant's penis.**

4. **Without the consent of the other person.**

Receiving s 433 (Before 1 December 2008)

The prosecution must prove beyond a reasonable doubt that:

1. **The defendant received the property.**

   The prosecution can prove that the defendant received the property if it establishes that, either alone or jointly with some other person, he had it in his possession (or he aided in concealing it or disposing of it[1]).

   A person possesses something if:

   (a) he has it in his physical custody; or

   (b) he knowingly has it under his control.

2. **The property was obtained by means of any act constituting an indictable offence.**

   Property is stolen if it is taken from the owner, without the owner's consent and with an intent to permanently deprive the owner of it.

3. **At the time the defendant received the property he had reason to believe that the property was stolen.[2] [3]** (This applies to offences committed after 1 July 1997

---

1 Section 433(7).

2 See Gleeson CJ in *Watkins* (unreported, Court of Criminal Appeal NSW, 5 April 1995) in which His Honour said:

"In my belief the common direction that is presently given on the issue of guilty knowledge in cases of receiving is as follows:

The Crown must prove and prove beyond reasonable doubt that at the time when an accused received the goods he knew that they were stolen or obtained in circumstances amounting to felony. The receipt of stolen goods in circumstances where the person receiving them did not know that the goods were stolen or obtained feloniously does not constitute the crime of receiving. It is an essential feature of the offence that the person receiving the goods knew that they were stolen or feloniously obtained. But if a person believes the goods to be stolen or feloniously obtained at the time when he receives them, that is sufficient to constitute the requisite guilty knowledge since belief without actual knowledge is sufficient. The knowledge required to constitute the offence need not be such as would be required if the accused had actually seen the property stolen.

Indeed, it is not necessary that the accused knew when or by whom the property was stolen. In order to prove the required knowledge of the accused it is sufficient if you as judges of the facts think that the circumstances accompanying his receipt of the goods were such that they made the accused believe the goods were stolen goods. Mere negligence or carelessness or even recklessness in not realising that the goods were stolen does not create guilt. The test is not 'Ought he to have realised that they were stolen?' It is 'Did he realise that they were stolen?'

However, if you think that the facts known to him would have put a reasonable man on inquiry, that would be a relevant factor when you are considering whether he did not know it. It must be kept in mind that the issue finally for you to determine and the Crown to prove beyond reasonable doubt is 'What did the accused believe?' not 'What would the ordinary man have believed?'

That in my view is an appropriate direction."

3 See notes on Recent Possession.

– see footnote 3. Otherwise, for offences committed earlier, it would be appropriate to follow the direction given by Gleeson CJ in *Watkins*, reproduced in footnote 1).

The defendant's state of mind as to the property being stolen must be more than suspicion, but it does not require the defendant to have actually seen the property being stolen, nor does it require him to know when and by whom the property was stolen.

It is sufficient for the prosecution to prove that the circumstances surrounding the defendant's receipt of the property were such that he had reason to believe that the property was stolen.

Mere negligence, or carelessness or even recklessness in not realising that the property was stolen is not enough however if you think that the facts known to the defendant would have put a reasonable man on inquiry that would be a relevant factor when you are considering whether he had reason to believe it was stolen.[4]

Where the thing so obtained has been –

1. converted into other property in any manner whatsoever; or
2. mortgaged or pledged or exchanged for any other property;
3. any person who, having reason to believe –
4. that the said property is wholly or in part the property into which the thing so obtained has been converted or for which the same has been mortgaged or pledged or exchanged; and
5. that the thing so obtained was obtained under such circumstances as to constitute a crime under s 433(1);
6. receives the whole or any part of the property into which the thing so obtained has been converted, mortgaged, pledged or exchanged, also commits the offence (see s 433(2)).

[4] The words "had reason to believe" that the property was obtained by means of the commission of an indictable offence, were inserted by Act No. 3 of 1997 and apply in relation to offences occurring on or after 1 July 1997. For offences committed prior to that date, the prosecution have to prove that the defendant knew that the property had been so obtained.

Receiving s 433[1] (From 1 December 2008)

The prosecution must prove that:

1. **The defendant received the property.**

   The prosecution can prove that the defendant received the property if it establishes that, either alone or jointly with some other person, he had it in his possession (or he aided in concealing it or disposing of it[2]).

   A person possesses something if:

   (a) he has it in his physical custody; or

   (b) he knowingly has it under his control.

2. **The property was tainted property; that is, it was obtained by way of stealing (or some other act constituting an indictable offence; or it is the property into which tainted property was converted or is the proceeds of a mortgage, pledge or exchange of tainted property[3]).**

   Property is stolen if it is taken from the owner, without the owner's consent and with an intent to permanently deprive the owner of it.

3. **At the time the defendant received the property he had reason to believe that the property was stolen.**

   The defendant's state of mind as to the property being stolen must be more than suspicion, but it does not require the defendant to have actually seen the property being stolen, nor does it require him to know when and by whom the property was stolen.

   It is sufficient for the prosecution to prove that the circumstances surrounding the defendant's receipt of the property were such that he had reason to believe that the property was stolen.

   Mere negligence, or carelessness or even recklessness in not realising that the property was stolen is not enough. However if you think that the facts

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 Section 433(2).

3 See the definition of tainted property in s 432(1); and note, property stops being tainted property after a person acquires a lawful title to it; s 432(2).

known to the defendant would have put a reasonable man on inquiry that would be a relevant factor when you are considering whether he had reason to believe it was stolen.

Retaliation against judicial officer – s 119B

Commentary

Extracts from *R v Enright* [2020] QCA 6

COURT: District Court at Maryborough – Date of Conviction: 8 June 2018 (Farr SC DCJ)

CORAM: Philippides and McMurdo JJA and Boddice J

ORDERS:

1. The appeal be allowed.
2. The convictions be set aside.
3. There be a new trial in respect of each of counts 2, 3, 5 and 6.

RESULT AT FIRST INSTANCE:

On 8 June 2018, the defendant, Enright, was found:

- guilty of 4 x retaliation against a judicial officer; and
- not guilty of 1 x retaliation against a judicial officer.

He was sentenced to 12 months on each count, to be served concurrently.

Context

Whilst incarcerated in Maryborough Correctional Centre, the appellant had telephone conversations with his mother and grandmother which were recorded (as is the advertised practice in Correctional Centres).

The Crown case was that each of those telephone calls contained a threat to cause injury to the acting Magistrate in retaliation for having imposed imprisonment upon the appellant.

Relevant legislation

[15] s 119B of the Code provides:

> "A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer … for the purpose of retaliation or intimidation because of – (a) anything lawfully done or omitted to be done or that may be lawfully done or omitted to be done by the judicial officer as a judicial officer … is guilty of a crime."

Summing up

[20] The trial judge directed the jury that there were four elements to each offence and that the prosecution must prove each element beyond reasonable doubt. Those elements were:

1. Threaten to cause injury;

2. To a judicial officer;

3. Without reasonable cause;

4. In retaliation because of something lawfully done by a judicial officer as a judicial officer, namely imposing a sentence of imprisonment on the appellant.

[21] The trial Judge directed the jury in respect of these elements as follows:

"Now, injury in this context means a bodily injury. **Threatened is a common word used in everyday language, it means to utter a threat against someone. It is a question for your determination whether you accept, beyond reasonable doubt, that the comments made by the defendant that formed the basis of each of these charges constitutes a threat.** In so far as the term judicial officer is concerned, there is no dispute in this matter that the Acting Magistrate was a judicial officer.

The third element is, of course, without reasonable cause. Now, in so far as that element is concerned, this is an objective test based upon the state of mind of the defendant at the time the comments were made. So you have to determine, beyond reasonable doubt, whether a reasonable person, holding the defendant's beliefs, would have been justified in making the threat or threats in question. If you are satisfied, beyond reasonable doubt, that such a reasonable person would not have been justified in making the threat, then that element would have been proved. If you are not so satisfied, then it has not.

And, of course, if any one or more elements are not proved beyond reasonable doubt then the defendant is entitled to be acquitted of that charge. All elements must be proved beyond reasonable doubt before conviction can take place.

Now, in so far as the element without reasonable cause is concerned, the precise wording of the threat is relevant to, and perhaps determinative of, the issue of reasonable cause. You are entitled to take in to account the wording of the threat itself. You may well take the view that there cannot be a reasonable cause when the threat of injury would involve the commission of a criminal offence but, ultimately, that is a matter for yourselves.

The final element is in retaliation for the imposition of a sentence of imprisonment. Now, I direct you, as a matter of law, that the imposition of a sentence of imprisonment was a lawful act by a judicial officer, as a judicial officer. Retaliation implies a causal connection between the lawful act of the judicial officer and the threat that is made. And, in the context of these charges, retaliation might mean something like an act of revenge, or out of vengeance or reprisal, something of that nature. The element of retaliation requires you, the jury, to conduct a subjective assessment. That is, you would need to look into the mind of the defendant by reference to those surrounding circumstances and facts which you do accept, so that would include all relevant circumstances as you find them to be, including the nature of the threats themselves, the circumstances in which he found himself at the time, and you do that to determine if that element has been proved to the requisite standard."

Discussion

[26] A central issue at trial was the circumstances in which the appellant uttered the words in the conversations with his mother and grandmother. The appellant's evidence raised whether the appellant's utterances were, in fact, threats to cause injury or mere venting in his incarcerated circumstances.

[27] This central issue was not dealt with, however, on the basis that those circumstances were matters for the jury to consider in determining whether, as a matter of fact, the jury was satisfied beyond reasonable doubt that the words uttered by the appellant "threatens to cause injury". Defence counsel focused on those circumstances in the context of the jury's

consideration of the element of "without reasonable cause". This focus was an error. There is no reasonable basis to conclude that it was part of a forensic decision.

[28] Not surprisingly, the trial Judge, consistent with the conduct of the trial, specifically directed the jury to consider the circumstances of the telephone conversations in respect of the elements of without reasonable cause and retaliation. As a consequence, **the jury was not specifically directed to consider those circumstances when determining satisfaction beyond reasonable doubt as to the first element, namely, threatens to cause injury, in respect of each count. That was an error**.

[29] Although correctly directed that it was a factual determination for them whether they accepted that each of the statements made by the appellant constituted a threat, **the trial Judge ought to have specifically directed the jury of the need to consider the tone and circumstances in which the words were said by the appellant in order to determine whether the jury was satisfied beyond reasonable doubt that the particular words uttered by the appellant established the element "threaten to cause injury".**

[30] It was insufficient to merely direct the jury that "threaten" means "to utter a threat against someone". The words, by their very content, may be said to constitute a threat. The issue for the jury was not whether the words constituted a threat but whether the words, as uttered by the appellant in the context of the particular circumstances in which the appellant found himself, amounted to a threat to cause injury intended to be taken seriously, or were words said in temper.

[31] In this respect, the observations of Olsson J in *Carter v R* were apposite:

> "… in the setting of this case, it was incumbent on the trial judge to make it clear to the jury that … if it remained a reasonable possibility that, in speaking as he did, the appellant was doing no more than merely unburden his feelings … the offence was not made out".

[32] In the present case, the jury ought specifically to have been directed that words, which interpreted literally would amount to a threat to cause injury, are frequently made in jest or temper and in a context where they are not to be taken seriously. The issue for the jury to determine was whether those words, in the context in which they were used, satisfied the element "threatens to cause injury".

[33] That obligation arose notwithstanding the manner in which the trial was conducted by defence counsel. It was a factual issue for determination by the jury, on each count.

[34] As satisfaction of the first element of each offence was specifically in contention, and the jury were inadequately directed in relation to that aspect, there has been a material misdirection. That material misdirection related to a specific factual matter for determination by the jury.

[35] In the circumstances of this trial, the material misdirection constitutes a miscarriage of justice, notwithstanding that there was no request by defence counsel for such a direction, or further redirection. The failure to properly direct the jury in respect of that element deprived the appellant of a fair chance of acquittal.

Retaliation Direction - s 119B

Legislation

Section 119B

(1) A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer, juror, witness or member of a community justice group, or a member of the family of a judicial officer, juror, witness or member of a community justice group, for the purpose of retaliation or intimidation because of—

(a) anything lawfully done or omitted to be done or that may be lawfully done or omitted to be done by the judicial officer as a judicial officer; or

(b) anything lawfully done or omitted to be done or that may be lawfully done or omitted to be done by the juror or witness in any judicial proceeding; or

(c) anything lawfully done or omitted to be done or that may be lawfully done or omitted to be done by any member of the community justice group a representative of which makes or may make a submission—

(i) to a court or police officer under the *Bail Act 1980* about a defendant who is an Aboriginal or Torres Strait Islander person; or

(ii) to a court or police officer under the *Youth Justice Act 1992* about a child who is an Aboriginal or Torres Strait Islander person; or

(iii) to a court under the *Penalties and Sentences Act 1992* about an offender who is an Aboriginal or Torres Strait Islander person;

is guilty of a crime.

Sample direction[1]

This offence has several elements or parts and the prosecution must prove each of them, beyond reasonable doubt, for you to convict the defendant.

The elements of the offence may be broken down as follows:

The defendant –

1. **caused or threatened to cause;**
2. **injury or detriment**;
3. **to a [judicial officer, juror, witness or member of a community justice group, or a member of the family of a judicial officer, juror, witness or member of a community justice group];**
4. **without reasonable cause**;

[1] Based in part on the decision in ***R v Enright*** **[2020] QCA 6.**

5. in retaliation because of something lawfully done by a [judicial officer as a judicial officer/ juror or witness/ any member of the community justice group], namely [describe alleged action of defendant, e.g. imposing a sentence of imprisonment on the defendant].

Taking those elements slightly out of turn, you must be satisfied, beyond reasonable doubt that:

(1) An injury or detriment was caused or threatened.

The prosecution relies upon [X] as the injury/detriment;

Note that the section defines an "injury or detriment" as including "intimidation"; and "intimidation" as including "harassment".

Depending on the way on which the case is argued, there may be an issue as to whether what is relied upon by the prosecution is in fact an injury or detriment, or whether it was merely trifling.

(2) The defendant caused or threatened to cause the injury or detriment.

'To cause' means to produce an effect: the question is whether the acts or omissions of the defendant were a substantial cause of the injury or detriment suffered by the complainant;

As to 'threaten to cause' – the question is whether the words spoken by the defendant amounted to a threat to cause injury or detriment.

In addition to taking into account the content of the statements said to amount to a threat, you must consider matters such as –

- **the *tone* used by the defendant; and**
- **the *circumstances* in which he/she used the words.**

You must determine whether, in the context of the particular circumstances in which he/she found themselves, the words uttered amounted to a threat to cause injury or detriment intended to be taken seriously, or whether he/she spoke in temper or in humour or otherwise without an intention that their words be taken seriously as a threat to cause injury or detriment.

Words, which interpreted literally would amount to a threat to cause injury, are frequently made in jest or temper and in a context where they are not to be taken seriously.

(3) The injury or detriment was caused or threatened to [any of the persons listed in section 119B(1)].

(4) The defendant had no reasonable cause to cause, or threaten to cause, injury or detriment.

This is an objective test based upon the state of mind of the defendant at the time the comments were made.

You have to determine whether you are satisfied, beyond reasonable doubt, that a reasonable person, holding the defendant's beliefs, would have been justified in making the threat or threats in question.

You are entitled to take in to account the wording of the threat itself. You may well take the view that there cannot be *reasonable cause* when the threat of injury would involve the commission of a criminal offence but, ultimately, that is a matter for yourselves.

(5) The injury or detriment was threatened or caused <u>in retaliation or intimidation</u> because of [any of the matters listed in 119B(1)(a), (b) or (c)].

The injury or detriment will be caused or threatened *in retaliation* where there is a causal connection between [e.g. the lawful act of the judicial officer] and the causing or threatening of the injury or detriment.

Determining whether the injury or detriment was caused or threatened in retaliation requires you to look into the mind of the defendant – that is, to conduct a subjective assessment – to determine whether you are satisfied that the injury or detriment was caused or threatened as an act or revenge, or out of vengeance or as an act of reprisal or something of that nature.

You are to consider all of the relevant circumstances, as you find them to be, including the nature of the threats themselves and the circumstances in which the defendant found himself/herself at the time.

Recent Possession

The prosecution relies on what it alleges was the recent possession the property by the defendant which the prosecution says is stolen.

Where a defendant is in possession of property which has recently been stolen the jury may – not must – in the absence of any reasonable explanation, draw the inference that he stole the property or received the property.

Before such an inference can be drawn, the prosecution must prove that:

1. **The defendant was in possession of the property.**

   Possession means that he knew it was there and had control over it; and

2. **The property had recently been stolen.**

There is no rule about what length of time qualifies as recent. It depends on the circumstances generally, and particularly on the nature of the property stolen. If the property stolen is commonplace, the time would be very short. If on the other hand, the thing was uncommon or unusual, the time would be longer.

The defendant must have had an opportunity to give an explanation in circumstances where if he is innocent an explanation might reasonably be expected.

[Those circumstances do not include the situation where a defendant, having been duly cautioned, declines to answer questions by the police, and also does not include his decision not to give or call evidence in his own defence.]

[If the defendant has given an explanation which you accept or think might be true, even though not convinced that it is true, the prosecution has not discharged the onus it has of satisfying you beyond reasonable doubt of the guilt of the defendant.]

The explanation having been given, it is for the jury to say on the whole of the evidence whether the defendant is guilty or not guilty.

The burden of proof on this issue, lies on the prosecution.

In *Bruce v The Queen*[1], the High Court (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) said:

> *"Where an accused person is in possession of property which is recently stolen, the jury is entitled to infer as a matter of fact, in the absence of any reasonable explanation, guilty knowledge on the part of the accused. Such an inference will be drawn from the unexplained fact of possession of such property and not from any admission of guilt arising from the failure to proffer an explanation. It is the possession of recently stolen property in the absence of explanation or explanatory circumstances, which enables the inference to be drawn. Thus the absence of any reasonable explanation must not itself be explicable in a manner consistent with innocence."*

1 (1987) 74 ALR 219.

Riot and Unlawful Assembly[1] s 61 and s 62 (Offences prior to 1 December 2008

The prosecution must prove that the defendant:

1. **With at least two others assembled, that is, gathered together.**

2. **With the intention of carrying out some common purpose (*here refer to the evidence led by the prosecution on this issue*) at that time.**

3. **With at least two others assembled in such a manner or being gathered together, conducted themselves in such a way as to cause people in the vicinity to fear on reasonable grounds that he and at least two others so gathered would tumultuously disturb the peace, and so became an unlawful assembly.**

   It is immaterial that the original assembling was lawful if they conduct themselves with a common purpose in the manner described.

   A tumult occurs where people usually, but not always, to the accompaniment of noise, engage in agitated movement or are excited or emotionally aroused.[2]

   A disturbance of the peace occurs where [direction should be adapted in accordance with the definition given by the English Court of Appeal in *Howell* [1982] 1 QB 416 at 427][3].

4. **That that unlawful assembly began to act in so tumultuous a manner as to disturb the peace and so became a riotous assembly.**

---

1 Section 62 *Criminal Code* (definition in s 61) and s 92(1) *Corrective Services Act* 1988. Where the accused is a prisoner, and the charge is under s 92(1) of the *Corrective Services Act* 1988, regard should be had to the definition of "unlawful assembly" in s 92(b)(a).

2 Per Derrington J (with whom Ambrose and Dowsett J.J. agreed) in *R v Thomas* [1993] 1 Qd R 323 at 325 approving *J.W. Dwyer Ltd v Metropolitan Police District Receiver* [1967] 2 QB 970 at 979-980.

3 The Court of Appeal said (by reference to the powers of police office to arrest for a breach of the peace): "… there is a breach of the peace whenever harm is actually done or is likely to be done to a person or, in his presence, to his property, or a person is in fear of being so harmed …."

Riot s 61 (Offences after 1 December 2008)

The prosecution must prove that the defendant:

1. **Was one of 12 or more persons gathered together (the assembled persons).**

2. **Who used, or threatened to use, unlawful violence to a person or property for a common purpose *(here refer to the evidence led by the prosecution on this issue)* at the time.**

3. **The conduct of them taken together would cause a person in the vicinity to reasonably fear for the person's personal safety.**

   Each of the assembled persons commits the crime of taking part in the riot.

   It is immaterial whether there was, or was likely to be, a person in the vicinity who held the fear for personal safety.

4. **Direct on any circumstances of aggravation.**[1]

[1] See penalty provisions contained in s 61(1). See page 114 for directions in relation to grievous bodily harm. See s 1 for the definition of "explosive substance". See page 99.1 for directions on being armed and offensive weapon. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Robbery s 409

The prosecution must prove that:

1. **The defendant stole something.**[1]

2. **At the time of, or immediately before, or immediately after, stealing it, the defendant used or threatened to use actual violence to any person or property.** [2]

Any degree of violence is sufficient.[3]

Use of violence means that some degree of force is used.[4]

The use or threat of violence must be done in order to obtain the thing stolen or to prevent or overcome resistance to it being stolen.

Refer to any circumstances of aggravation. [5]

---

1 See note to Stealing.

2 Stealing is open as an alternative verdict on a charge of robbery; however assault is not. If in doubt about the element of violence, the prosecution usually charge stealing from the person: s 398(4)(a). Attempted robbery is a substantive offence: s 412.

3 *R v Jerome and McMahon* [1964] Qd R 595. The fear of violence without a threat is not sufficient: *R v Parker* [1919] NZLR 365.

4 It means no more than physical force which is real and not merely threatened or contemplated: *R v De Simoni* (1981) 147 CLR 383.

5 Eg being armed/offensive weapon/in company with wounding. See Circumstances of Aggravation (robbery, assault, burglary). In *R v Graham* [2016] QCA 73 the Court of Appeal held that when the elements of the offence are to be proved by s 7(1)(a), any circumstance of aggravation cannot be established by s 7(1)(c) (at [59]-[63]).

Secret commissions
s 442B, s 442M

The common law did not have secret commission offences. The *Criminal Code* provides for such offences in Ch 42A (s 442A – 442M).

Section 442B creates the offence of receipt or solicitation of a secret commission and deals with the offence of corrupt receipt or solicitation of valuable consideration with agents. Section 442M(1) provides that for prosecutions under Ch 42A it is not a defence to show that any secret receipt commission is customary in any trade, business or calling. It also deals with matters of proof. Once certain matters are proved, s 442M(2) creates, in effect, a rebuttable presumption that a payment is a secret commission.

Sections 442B and 442M provide different paths to conviction in respect of an offence under s 442B; s 442M is not merely a truncated version of s 442B. The Crown is entitled to have both alternatives left to the jury. Under s 442B, the Crown need not show the absence of the principal's assent or that the payer had business relations with the principal, although it must establish that the receipt was an inducement or reward or on account of the agent acting in the way described, or alternatively would tend to influence the agent in the way described. Under s 442M, business relations between the payer and the principal and the absence of the latter's assent must be proved by the prosecution, together with the receipt of valuable consideration by the agent from the payer. Once those matters are proved, the burden of proving the absence of corruption or the absence of any tendency to influence falls to the defendant.[1]

Direction under s 442B

The defendant is charged with the offence of receiving [or solicitation] of a secret commission as an agent pursuant to s 442B of the Criminal Code.

A person commits the offence of receiving [or solicitation] of a secret commission where the defendant being an agent corruptly receives [or solicits] from any person for himself or herself or for any other person any valuable consideration –

(a) as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal's affairs or business; or

(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or to forbear to show, favour or disfavour to any person in relation to his or her principal's affairs or business.

[1] *R v Nuttall* [2011] 1 Qd R 270; [2010] QCA 64 at [31].

It is alleged that the defendant was at the relevant time an agent for the purposes of this provision. For present purposes "agent" encompasses a Minister of the Crown, while "principal" includes the Crown.[2]

It is further alleged that the defendant when an agent corruptly received [or solicited] for himself [or herself/ or another person specifying which**] valuable consideration**[3] **[**namely, specify the nature of the consideration**].**

In the present case it is alleged that the defendant corruptly received [or solicited] the valuable consideration:

(a) as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal's affairs or business; or

(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or to forbear to show, favour or disfavour to any person in relation to his or her principal's affairs or business.

[outline prosecution case and defence contentions**].**

A defendant acts corruptly if at the time he received [or solicited] the benefit he believed that the person providing the valuable consideration intended that it should influence the defendant to show or refrain from showing favour or disfavour in relation to the principal's affairs or business.[4]

The onus of proof is on the prosecution to prove the offence. In this regard the prosecution must satisfy you beyond a reasonable doubt of each one of the following matters, that is, at the relevant time:

1. **the defendant, being an agent of the principal [eg a Minister of the Crown];**
2. **received from any person [specify person or his associated companies as appropriate];**
3. **any valuable consideration;**
4. **corruptly;**

---

2 See definition of "agent" and "principle" in s 442A.

3 "Valuable consideration" is defined in broad terms in s 442A.

4 This formulation by Brooking J in *R v Dillon and Riach* [1982] VR 434 was adopted by the trial judge in *Nuttall* and referred to without criticism on appeal at [36].

5. **as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to the principal's [eg the Crown's] affairs or business [in respect of a case concerning s 442B(a)];**

6. **the receipt or expectation of which would tend to influence him to show or forbear to show favour or disfavour to any person, in relation to the principal's affairs and business [in respect of a case concerning s 442B(b)].**

If the prosecution does satisfies you beyond a reasonable doubt of each those matters, then you would find the defendant guilty of the offence. If you are not so satisfied beyond reasonable doubt then you must find the defendant not guilty unless you are satisfied of guilt proceeding under an alternate approach I will now explain.

Direction under s 442M

There is an alternate approach which arises for your consideration provided the prosecution first satisfies you beyond reasonable doubt of certain matters.

This approach requires the prosecution to satisfy you beyond reasonable doubt of each one of the following 4 matters that is, at the relevant time:

1. **the defendant was an agent of his principal [eg that the defendant was a Minister of the Crown];**

2. **any valuable consideration has been received [or solicited] by the defendant;**

3. **from any person having business relations with the principal [specify details eg person or associated companies, having business relations with the Crown and the business relations]; and**

4. **this was done without the assent of the principal [eg without the assent of the Crown (Governor in Council)]**

If the prosecution so satisfies you beyond reasonable doubt, then the burden of proof shifts to the defendant to prove that he is not guilty of the offence charged. Importantly, the standard of proof for the defendant in such a case is one on the balance of probabilities (and not one requiring proof beyond reasonable doubt). To discharge that onus of proof, the defendant would have to satisfy you that more probably than not –

5. **the defendant did not corruptly receive [or solicit] [**specify the valuable consideration**];**

   [eg. when the defendant received that payment, the defendant did not believe that [specify the payer**] intended that the payment or expectation of that payment should influence the him/her to show or refrain from showing favour or disfavour to any person];**

OR THAT

6. **the receipt or expectation of that [payment] was not an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal's affairs or business [**in respect of a case under s 442B(a)**];**

OR THAT

7. **the receipt or expectation of that [payment] would not tend to influence the defendant to show or forbear to show favour or disfavour to any person in relation to the principal's [eg the Crown's] affairs and business [**in a case concerning s 442B(b)**].**

If the defendant satisfies you on the balance of probabilities of either 5 or [6 or 7 as appropriate**] then you must find him not guilty of the offence in s 442B. If the defendant does not satisfy you on the balance of probabilities of either 5 or [**6 or 7 as appropriate**] then you would find him guilty.**

JURY AID – Secret Commissions

Section 442B

If the prosecution satisfies you beyond a reasonable doubt of each and every one of the following matters that is,

At the relevant time the defendant:

1. was an agent of the principal;
2. received from any person;
3. any valuable consideration;
4. corruptly;
5. as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to the principal's affairs or business;
6. the receipt or expectation of which would tend to influence him to show or forbear to show favour or disfavor to any person, in relation to the principal's affairs and business.

THEN you would have to find the defendant GUILTY.

IF you are not satisfied beyond reasonable doubt of each and every element then you would find the defendant NOT GUILTY.

Section 442M

The prosecution must satisfy you beyond reasonable doubt of each and every one of the following 4 matters:

At the relevant time –

1. any valuable consideration [i.e. $...insert value]
2. has been given to an agent [i.e. insert name] as Minister for the Crown;
3. from any person having business relations with the principal [i.e. from a person having business relations with the Crown]; and
4. without the assent of the principal i.e. without the assent of the Crown (the Governor in Council)

If you are not satisfied beyond reasonable doubt of all 4 matters, you do not consider this option further.

If, however, you are so satisfied, the burden shifts to the defendant to prove, on the balance of probabilities, that he is not guilty. He would have to satisfy you that more probably than not of any one of the following:

At the relevant time the defendant:

5. Did not corruptly give [$...insert detail] to [insert name]

OR

6. The receipt of [$...insert detail] would not tend to influence the agent, [insert name] to show a forebear to show favour or disfavour to his principal's (the Crown – State of Queensland) affairs or business.

OR

7. The receipt or expectation of that [$...insert detail] would not tend to influence the defendant to show or forbear to show favour or disfavour to any person in relation to the principal's (the Crown – State of Queensland) affairs and business.

If the defendant satisfies you on the balance of probabilities of any one of these matters THEN you must find him NOT GUILTY.

If the defendant does not satisfy you on the balance of probabilities of any one of these matters THEN you would find him GUILTY.

Serious Animal Cruelty s 242

1. The prosecution must prove that:

(a) the defendant killed or caused serious injury[1] or prolonged suffering to an animal; and

(b) the defendant did so with the intention[2] of inflicting severe pain or suffering; and

(c) that the act or omission by the defendant which caused the death of, or serious injury or prolonged suffering to, an animal was unlawful.

In this section – "serious injury" means:

(a) the loss of a distinct part or an organ of the body; or

(b) a bodily injury of such a nature that, if left untreated would:

(i) endanger, or be likely to endanger life; or

(ii) cause, or be likely to cause, permanent injury to health.[3]

An act or omission that causes the death or, or serious injury or prolonged suffering to, an animal is unlawful unless it is authorised, justified, or excused by –

(a) the Animal Care and Protection Act 2011 (Qld),[4] or

(b) another law, other than s 458 of this Code.[5]

---

1 See s 242(3) for a definition of serious injury.

2 See Benchbook 56 on intention.

3 Section 242(3).

4 Eg: Part 4 of the *Animal Care and Protection Act* 2001 (Qld) allows for certain surgical procedures to be performed by a veterinary surgeon.

5 Section 458 Criminal Code.

Stalking s 359A
(Offences between 23 November 1993 and 30 April 1999)

The prosecution must prove:

1. **The defendant engaged in a course of conduct, by doing at least two "concerning acts" on separate occasions.**[1]

   "Concerning Act" means:

   (a) following, loitering near, watching or approaching another person*; or

   (b) telephoning or otherwise contacting another person*; or

   (c) loitering near, watching, approaching or entering a place where another person* lives works or visits; or

   (d) interfering with property in the possession of another person*; or

   (e) leaving offensive material where it will be found by, given to or brought to the attention of, another person*; or

   (f) giving offensive material to another person* directly or indirectly; or

   (g) an act of harassment, intimidation or threat against another person*; or

   (h) an unlawful act committed against the person or property of another person*.

   *** Another person may (but need not be) the complainant.**

2. **The defendant intended the complainant be aware the course of conduct was directed at her even if some or all of the concerning acts were done to someone else.**

   (an act qualifies as a concerning act only if done with that intention)

3. **The complainant was aware that the course of conduct was directed at her.**

4. **The course of conduct would cause a reasonable person in the complainant's circumstances to believe that a concerning offensive act is likely to happen.**

---

[1] There can be no conviction unless the jury is satisfied as to the commission of at least the same two concerning acts: *R v Hubbuck* [1999] 1 Qd R 314.

The complainant's circumstances are those known or reasonably foreseeable by the defendant.

A "concerning offensive act" means an unlawful act (that is, an offence) of violence by the defendant:

(a) against the complainant's person or property; or

(b) against another person about whose health or custody the complainant would reasonably be expected to be seriously concerned; or

(c) against the property of another person about whose property the complainant would reasonably be expected to be seriously concerned

"Violence" against the person includes an act depriving a person of liberty.

"Violence" against property includes an unlawful act of damaging, destroying, removing, using or interfering with property.

A reasonable person is an ordinary citizen of the complainant's age and sex.

The issue is whether a reasonable person in the complainant's circumstances would believe from the defendant's conduct that he was likely to use violence against the complainant or against her property.

"Likely" is a word that is in everyday use. Its meaning may depend on its context. In this context it means a substantial chance that violence would occur. It must be a real and not remote chance: it must be more than a mere possibility of violence occurring.

Circumstances of Aggravation:

It is a circumstance of aggravation if, for any of the concerning acts the defendant–

1. **unlawfully uses or threatens to use unlawful violence against another person or another person's property[2]; or**
2. **has possession of a weapon within the meaning of the *Weapons Act* 1990; or**

[2] The threat must be expressed, not implied: *R vAllie* [1999] 1 Qd R 618.

3. contravenes an injunction or order imposed or made by a court under a law of Queensland, another State or Territory or the Commonwealth or threatens that.

Stalking[1]

The prosecution must prove:

1. **that the defendant has engaged in conduct that was intentionally directed at the complainant.[2]**

   (It is immaterial whether the defendant intends that the complainant be aware that that conduct is directed at the complainant or if the defendant has a mistaken belief about the identity of the person at whom the conduct is initially directed.[3] It is immaterial whether the conduct directed at the complainant consists of conduct carried out in relation to another person or the property of another person).[4]

2. **the conduct is engaged in on any one occasion if the conduct is protracted or on more than one occasion.[5]**

   (It is immaterial whether the conduct throughout the occasion on which the conduct is protracted, or the conduct on each of a number of occasions, consists of the same or different acts).[6]

3. **the conduct consists of one or more acts of the following, or similar, type:**

   (a) following, loitering near, watching or approaching a person;

   (b) contacting a person in any way, including for example, by telephone, mail, fax, e-mail or through the use of any technology;

   (c) loitering near, watching, approaching or entering a place where a person lives, works or visits;

   (d) leaving offensive material where it will be found by, given to or brought to the attention of, a person;

   (e) giving offensive material to a person, directly or indirectly;

---

1 Offences alleged to have occurred after 30 April 1999.

2 The *Code* uses the term "stalked person": s 359B(a). However, such turgid terminology is unnecessary in directing a jury.

3 See 359(C)(i).

4 See 359(C)(ii).

5 The jury must be unanimous as to the identity of the single act if the conduct is protracted, or two or more of the acts particularised as constituting the conduct relied on: *R v Conde* [2016] 1 Qd R 562, *R v Hubbuck* [1999] 1 Qd R 314.

6 See 359(C)(iii).

(f) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;

(g) An act of violence, or a threat of violence, against, or against property of, anyone, including the defendant.7

(It is immaterial whether the conduct directed at the complainant consists of conduct carried out in relation to another person or property or another person).

4. that the conduct:

(a) would cause the complainant apprehension or fear, reasonably arising in all the circumstances, of violence[8] to, or against property of, the complainant or another person;[9] or

(b) causes detriment, reasonably arising in all the circumstances, to the complainant or another person.

(It is immaterial whether the defendant intended to cause the apprehension or fear, or the detriment, mentioned in the section. It is immaterial whether the apprehension or fear, or the violence is actually caused).[10]

5. Circumstances of aggravation.[11]

---

7 See 359(C)(ii).

8 For definitions of the terms "violence", "property", "detriment", "circumstances": s 359A.

9 In *R v Conde* [2016] 1 Qd R 562, the Court of Appeal held that the relevant apprehension, fear or detriment may arise from a course of conduct, even though each act in isolation would not have that effect.

10 See 359(C)(iv) and (v).

11 For circumstances of aggravation: s 359E. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Stealing s 391

The prosecution must prove that:

1. **The [property described in the indictment] is a thing capable of being stolen.**

   "Anything that is the property of any person is capable of being stolen if it is

   (a) moveable; or

   (b) capable of being made moveable even if it is made moveable in order to steal it."[1]

2. **The thing is owned by the person named as owner in the indictment.**

3. **There was a taking without the consent of the owner.**

   That is the defendant must have actually moved it or actually dealt with it by some physical act without the owner's consent.

4. **The taking was with a fraudulent intent.**

   That is with an intent to permanently deprive the owner of the thing.

   [Where there is more than one item of property:

   It is sufficient for the prosecution to prove the stealing of any one item – not necessary for the prosecution to prove defendant stole all the items referred to in the indictment.][2]

---

[1] The definition of "things capable of being stolen" was simplified by Act No. 3 of 1997. As the learned editor of Carter observes, there maybe some difficulty in applying the simplified definition in s 390, to some of the things now included in the definition of property in s 1 e.g., "things in action or other intangible property". It is suggested that in such a case the Crown would elect to proceed under s 408C and not s 398(1).

[2] If the indictment alleges circumstances of aggravation see s.398. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

Threatening Violence s 75

Section 75(1)(a)

The prosecution must prove that:

1. **The defendant by words or conduct threatened to enter or damage a dwelling or other premises.**

   "Threatened" is an ordinary English word. It must be of such a nature and extent that an ordinary person might be influenced or made apprehensive. It is an objective test.[1]

   The words "dwelling" and "premises" are defined in s 1.

2. **The defendant did so with intent[2] to intimidate or annoy any person.**

3. **Circumstance of aggravation.**

   It is a circumstance of aggravation if the offence is committed in the night[3] (s 75(2)).

Section 75(1)(b)

The prosecution must prove that:

1. **The defendant discharged a loaded firearm (or did any other act likely to cause any person in the vicinity to fear bodily harm to any person or damage to property).**

   "Likely" in this context conveys a substantial – a real and not remote – chance.[4]

   "Bodily harm" means any bodily injury which interferes with health or comfort (s 1).

2. **The defendant did so with intent to alarm any person.**

3. **Circumstance of aggravation.**

---

1 *R v Zaphir* [1978] Qd R 151 at 163-4.

2 See Notes on Intention.

3 See definition in s 1.

4 See comments of Pincus JA in *R v T* [1997] 1 Qd R 623.

It is a circumstance of aggravation if the offence is committed in the night[5] (s 75(2)).

[5] See definition in s 1.

Threats s 359[1]

The prosecution must prove that:

1. **The defendant threatened to cause a detriment[2] to another.**

2. **With intent to:**

   (a) prevent or hinder any person from doing any act which the other person is lawfully entitled to do; or

   (b) Compel any person to do any act which the other person is lawfully entitled to abstain from doing; or

   (c) Cause public alarm or anxiety.

"Threatened" is an ordinary English word. It must be of such a nature and extent that an ordinary person might be influenced or made apprehensive. It is an objective test[3].

3. **Circumstance of aggravation.[4]**

   It is a circumstance of aggravation if:

   (a) The threat is made to a law enforcement officer,[5] or a person helping a law enforcement officer;

   (b) when or because the officer is investigating the activities of a criminal organization.[6]

---

1 Section 359 was amended by s 63 *Criminal Code and Other Acts Amendment Act* 2008 which commenced on 1.12.08. The effect of the amendment was to broaden the scope of operation of the offence by deleting "Any person who threatens to do any injury, or cause any detriment, of any kind to another with intent to prevent or hinder that other person" and inserting "A person (the ***first person***) who threatens to cause a detriment to a second person with intent to prevent or hinder any person (the ***other person*****)** other than the first person." For offences committed prior to 1.12.08, the narrower scope of operation is applicable.

2 Detriment need not necessarily in itself involve a criminal or unlawful connotation: *R v Zaphir* [1978] Qd R 151. It is sufficient for the prosecution to prove that the threat was to cause a detriment to another by inducing a violation of that other person's legal right, contractual or otherwise. See definition in s 1.

3 See *R v Zaphir* [1978] 1 Qd R 151 at 163-4.

4 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

5 The term "law enforcement officer" is defined in s 1.

6 The term "criminal organisation" is defined in s 1.

Torture: s 320A[1]

A person who tortures another person commits a crime.[2] Torture means[3] the intentional infliction of severe pain or suffering on a person by an act or a series of acts done on 1 or more than 1 occasion. The prosecution must prove beyond reasonable doubt that:

1. **The defendant inflicted severe pain or suffering on the complainant.**

   To inflict pain or suffering is to cause it to be felt. The pain or suffering may be physical, mental, psychological or emotional and it may be temporary or permanent.[4] Pain or suffering are subjective. One person may experience greater pain or suffering from the same pain-provoking factor than another person. The question of whether any pain or suffering was severe is a matter of fact for you to determine. The evidence of the person who endured the pain or suffering is not necessarily conclusive of the question.

2. **The defendant inflicted the severe pain or suffering intentionally.[5]**

   That is, that the defendant intended his/her act(s) to inflict severe pain or suffering on the complainant. It is not enough that such suffering is the consequence of the defendant's act(s) and that the acts were deliberate. The prosecution must prove an actual, subjective, intention on the part of the defendant to cause severe pain or suffering by his/her conduct. The acts in question must have the infliction of such pain and suffering as their design or object; that must be their intended consequence or purpose. The prosecution must prove that the defendant consciously decided [eg. to beat] the complainant in order to cause him/her severe pain or suffering.

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 The offence of torture was created by Act No 3 of 1977, operational 1 July 1997. See *R v Burns* [2000] QCA 201.

3 See definitions of "Torture" in s 320A(2).

4 See definitions of "Pain or Suffering" in s 320A(2).

5 'Intention' has no specific legal definition. It is to be given its ordinary, everyday, meaning. 'Intention' is the act of 'determining mentally upon some result'. It is a 'purpose or design'. See *R v Ping* [2006] 2 Qd R 69; also notes on Intention.

The prosecution seeks to prove that intention by what the defendant said and did.[6] It asks you to do have regard to that evidence as facts from which the requisite intention can be inferred. [Refer to the evidence]

3. **The defendant did so by an act or series of acts done on one or more than one occasion.**

To establish the offence of torture the prosecution must prove that the defendant intentionally inflicted severe pain or suffering on the victim by at least one act. A series of acts which by their cumulative effect result in the infliction of severe pain or suffering is sufficient, but to convict of torture you must be unanimously satisfied that the defendant did particular acts described in the evidence, that those were done for the purpose of causing severe pain and suffering, and that they did result in that intentionally inflicted condition.[7] You do not have to be satisfied that every incident or act alleged by the prosecution actually occurred, but you must be unanimous as to acts that did and by which severe pain and suffering was intentionally inflicted on the victim.

---

6 See notes on Intention at No 56.

7 This direction accords with the judgment of the Court of Appeal in *R v HAC* [2006] QCA 291.

Unlawful killing: Murder s 302(1)(aa) Murder by reckless indifference

Commentary

A charge of murder pursuant to s 302(1) requires proof of unlawful killing in any of the circumstances specified therein. If an unlawful killing occurs where none of those circumstances is proved the offender will be guilty of manslaughter, per s 303(1).

One circumstance, specified at s 302(1)(aa), is that "death is caused by an act done, or omission made, with reckless indifference to human life". An unlawful killing in that circumstance is known as murder by reckless indifference.

Section 302(1)(aa) came into effect on 7 May 2019. It was introduced by the *Criminal Code and Other Legislation Amendment Act* 2019, following a review into the adequacy of sentences imposed in respect of the death of children. The Explanatory Notes asserted at p 2:

> "Many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder for a range of reasons, including difficulty in establishing intent even where the death is due to physical abuse. …
>
> "Including recklessness as an element of murder in section 302 of the Criminal Code will capture a wider range of offending as murder in Queensland. Reckless murder exists in a number of other Australian jurisdictions reflecting that intention and foresight of probable consequences are morally equivalent – that is a person who foresees the probability of death is just as blameworthy as the person who intends to kill. This change, depending on the circumstances of the particular case, will apply across the board to not just include recklessness in relation to the deaths of children but will be applicable to any person, including other categories of vulnerable persons such as the disabled and the elderly."[1]

While murder founded on a mental element of indifference is new in Queensland it is a category of murder of longstanding at common law and in the New South Wales *Crimes Act 1900*.

[1] Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2019, 2.

As to the common law, *Stephen's Digest of Criminal Law*, 1st ed. (1877) in Art. 223 relevantly stated:

> "Murder is unlawful homicide with malice aforethought. Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated.
>
> (a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not;
>
> (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (c) An intent to commit any felony whatever…" (emphasis added)

Subsections (a) and (b) of this passage were referred to in *R v Crabbe* (1985) 156 CLR 464, 467. The High Court there concluded in respect of this category of murder at common law that the mental state necessary was "knowledge by the accused that his acts will probably cause death or grievous bodily harm" (at 468).

The common law test therefore imposes a mental element, requiring knowledge by the defendant of a probability, not merely a possibility. Under that test it is not enough that the defendant knew that death "might occur" but rather the defendant must have known that death "would probably occur" – see *R v Crabbe* (1985) 156 CLR 464; *R v Campbell* [1997] 2 VR 585.

In NSW s 18(1)(a) *Crimes Act* 1900 relevantly provides:

> "Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years." (emphasis added)

As with s 302(1)(aa) in Queensland, s 18(1)(a) in NSW uses the term "reckless indifference to human life", without accompanying statutory definition.

NSW appellate cases have interpreted that term as attracting the common law test – see for example *Reg v Annakin* (1988) 37 A Crim R 131. In *Royall v The Queen* (1990)172 CLR 378, 416, Deane and Dawson JJ endorsed NSW's importation of the common law test into s 18(1)(a), explaining:

> "If at common law, in the context of murder, knowledge of the probability, rather than the possibility, of the consequences is required to constitute reckless indifference to them, then it seems to us that the same requirement should be imported into a statutory provision which purports to define the crime of murder by reference to reckless indifference without any elaboration of what is meant by that term."

The common law test refers to the probability of causing death or grievous bodily harm. The lesser probability, of causing grievous bodily harm (or "really serious injury", a term favoured in Victoria – see *R v Barrett* (2007) 171 A Crim R 315), does not apply to NSW's statutory form of this offence. NSW's appellate court's exclusion of the common law test's reference to foresight of grievous bodily harm occurred because, as was explained in *Reg v Solomon* (1980) 1 NSWLR 321, 340 [61]:

> "[Section 18] requires that the accused be proved to be guilty of reckless indifference to human life, not reckless indifference to some other form of physical harm falling short of death."

That reasoning was endorsed in *Royall v The Queen*, at 395 per Mason CJ, and at 415 per Deane and Dawson JJ[2]. It is reasoning apt to Qld's s 302(1)(aa) which is not materially different from the NSW provision.

In the afore-mentioned explanatory notes, at p 3, it was noted that the new definition was consistent with the NSW provision. Further, at p 4 the explanatory notes used the language of the NSW test:

> "This new limb under section 302 will require the prosecution to prove the accused person knew that it was probable that death would result from their act or omission. The proposed amendment reflects that a person who acts knowing that death is a probable consequence is just as culpable as the person who intends to kill or do grievous bodily harm and that reckless indifference to human life should be sufficient to establish the offence of murder." (emphasis added)

The interpretation by intermediate appellate and High Court authorities of the NSW equivalent of s 302(1)(aa) likely makes its unnecessary to refer to extrinsic material like the explanatory

[2] (1990)172 CLR 378,

notes for guidance. Nonetheless, the explanatory notes support the adoption of that interpretation in Qld.

It will be important to emphasise to the jury that reckless indifference involves a subjective analysis. Reckless indifference to human life requires that the defendant must actually have known the death would probably result from the defendant's acts or omissions and it is not enough that that danger may have been obvious to a reasonable person or to members of the jury – see *Pemble v The Queen* (1971) 124 CLR 107; *R v TY* (2006) 12 VR 557; *R v Barrett* (2007) 171 A Crim R 315.

The jury ought be directed that a defendant's circumstances are relevant to the determination of the defendant's state of mind, which circumstances may include age, educational and social background, emotional state and state of sobriety – see *Pemble v The Queen* (1971) 124 CLR 107 (*"Pemble"*); *R v Barrett* (2007) 171 A Crim R 315.

In comparison to murder with intent to kill or do grievous bodily harm, murder by reckless indifference involves a conceptually different state of mind (intent to cause an outcome -v- knowledge of the probability of an outcome) and prospective outcome (death or grievous bodily harm -v- death only). This heightens the risk of confusion and special need for clarity if both forms of murder are left to the jury. In *Pemble* at 118, Barwick CJ emphasised the need for care in ensuring the evidence can support reckless indifference being left to the jury and observed the occasions for leaving murder by reckless indifference, "where there is material from which an intent to kill can be inferred, must be unusual". To similar effect see *La Fontaine v The Queen* (1976) 136 CLR 62, at 69; *R v Barrett* (2007) 171 A Crim R 315, at 326-327.

In *Koani v The Queen* (2017) 263 CLR 427 at 436 [21] the High Court observed that "it is axiomatic in an offence of specific intent that the act or omission and the intent must coincide."

The same reasoning logically applies to an offence of specific knowledge. Proof of murder by reckless indifference requires proof the defendant knew death would be a probable consequence of the defendant's acts or omissions but committed those acts or omissions regardless of that probability and death was caused by those acts or omissions. In a case where multiple acts or omissions of the defendant are relied on collectively as causing death the requisite state of knowledge must be proved to have been present at the time of commission of each and every one of the acts and or omissions. A precursor to ensuring the necessary coincidence of the requisite knowledge with each of the acts or omissions causing death is that the jury must be unanimous as to which acts or omissions caused death.

The need for coalescence of the requisite knowledge with all acts or omissions of the defendant causing death will make proof of this charge challenging in the context of a death occurring after multiple acts or omissions of the defendant towards the alleged victim, possibly on separate occasions, as could occur where the alleged victim is in the care of the defendant. In such a context the prosecution case might be:

(a) it is uncertain precisely which of the multiple acts or omissions caused death but the inference should be drawn that one or more of them must have done so; or
(b) it was the combined consequences of multiple acts or omissions which caused death.

In such a case it will be important to clearly identify the collective acts or omissions relied upon as causing death. This will reduce the risk of confusion as between that fatal collection and other acts or omissions of the defendant towards the victim which were relevantly adduced in evidence. It will also assist jury understanding of the direction that if they are to be persuaded death was caused by the collective acts or omissions of the defendant, they must be unanimous as to which acts or omissions constitute the fatal collection. At an earlier stage it will also assist in determining submissions of no case to answer alleging a lack of evidence to support the presence of the requisite knowledge at the time of every act or omission in the fatal collection.

If an alleged case of murder by reckless indifference by a parent or carer in respect of a child or person in care is founded upon a failure to provide the necessaries of life the potential application of s 285 (Duty to provide necessaries) may be considered. Relevant considerations might include the following:

(a) Section 285 does not alter or substitute the need to prove the knowledge of probable consequence required to prove the murderous element of reckless indifference to life. It may however aid in inferring whether the defendant knew of the probable consequences of the omission, in that it was an omission to perform a duty owed to a person unable to provide himself or herself with the necessaries of life.
(b) In *Koani v The Queen* (2017) 263 CLR 427 the High Court concluded a conviction for murder with intent to kill was incompatible with the unlawful killing being by way of criminal negligence per s 289, because the requisite intent and acts or omissions did not coincide. Such incompatibility will not arise in the present context as long as the trial judge ensures, as earlier explained, that the jury is unanimous as to which acts or omissions caused death and instructs the jury of the need to be satisfied the defendant had the requisite knowledge of probability of death in respect of every one of those acts

and omissions. Also see *R v Macdonald and Macdonald* [1904] St R Qd 151 in which reliance upon breach of a s 285 duty was not incompatible with proof of murder with intent.

Suggested Direction:

I now turn to the law relating to the charge of murder.

Our law provides that any person who unlawfully kills another is guilty of a crime which is called murder or manslaughter according to the circumstances of the case. A person who unlawfully kills another and does so in particular circumstances stipulated by law is guilty of murder. Where a person unlawfully kills another but those stipulated circumstances are not present, that person will be guilty of manslaughter.

The circumstances stipulated by law which are relied upon here in support of the charge of murder are:

- **that [X]'s death was caused by an act done, or omission made, with reckless indifference to human life.**
- [If other types of murder pursuant to s 302(1) are also to be left to the jury, list the other types relied upon in the alternative and adjust the draft direction as necessary.]

I will for convenience refer to those particular circumstances as reckless indifference to life. Proof of reckless indifference to human life requires proof the defendant knew it was probable that death would result from the defendant's acts or omissions. I will enlarge upon that requirement later.

Proof of any offence requires proof of the elements of the offence. The elements of an offence are the essential ingredients of it, all of which must be proved beyond a reasonable doubt to prove the offence. (It will assist to accompany the direction with a jury handout listing the elements)

In order for the prosecution to prove murder by reckless indifference it must prove all of the following elements beyond a reasonable doubt:

1. **That [X] is dead;**
2. **That the defendant caused [X]'s death;**

3. **That the defendant did so unlawfully; and**
4. **That in committing the acts or omissions which caused [X]'s death the defendant knew those acts or omissions would probably cause [X]'s death.**

I will discuss each element in more detail shortly.

(Where multiple limbs of s 302(1) are to be put in the alternative consider expanding element 4 by listing the relevant alternative elements within it.)

The first three of those elements are the elements of an unlawful killing. Proof of them without proof of the fourth element would prove the offence of manslaughter. Manslaughter is an inherent alternative charge to murder but it only becomes available as an alternative in the event you find the defendant not guilty of murder.

So, after your deliberations have concluded, in taking your verdicts my associate will ask you, *"How do you find the defendant: guilty or not guilty of murder?"* If you find the defendant *"guilty"* of murder, that would be the end of the process (on that charge). However, if you were to say, *"not guilty"* then my associate would go on with a second question, *"How do you find the defendant: guilty or not guilty of manslaughter?"* and you would return your verdict of *"guilty"* or *"not guilty"* as the case may be in respect of manslaughter.

You will appreciate from what I have said that the first three elements are elements common to both murder and manslaughter. If any one of the first three elements have not been proved there will not have been an unlawful killing and must you find the defendant not guilty of murder <u>and</u> not guilty of manslaughter.

I will now discuss each element.

<u>Element 1</u> requires that [X] is dead. In this case it has been admitted [and/or you might think there is persuasive evidence] that [X] is dead. [If there is an issue as to whether X is dead, explain the relevant issue(s) of fact which the jury must determine in deciding whether X is dead].

<u>Element 2</u>, the element of causation, requires that the defendant caused [X]'s death. To decide whether the defendant caused [X]'s death you will need to

decide whether [X]'s death was caused by the acts or omissions alleged against the defendant.

Our law provides a person who causes the death of another, directly or indirectly and by any means whatever, is deemed to have killed that other person.

[If death was delayed **- It does not matter that death was not immediate. If the acts or omissions of the defendant led to the injury/condition of the deceased which in the ordinary course resulted in the death, then in law the defendant is responsible for that death however long after the defendant's acts or omissions the death occurred.]**

The means by which a person causes the death of another may be direct or indirect, as long as those means are, or are caused by, the defendant's acts or omissions. To prove the defendant's acts or omissions caused death it is not necessary to prove they were the sole or only contributing cause of death. However, it must be proved the defendant's acts or omissions were a substantial or significant cause of death or contributed substantially to the death.

[Where the events causing death are uncertain or there are competing innocent causes**:** - **Whether it has been proved that the defendant's acts or omissions were a substantial or significant cause of death or contributed substantially to the death is not a question for scientists or philosophers. It is a question for you to answer, applying your common sense to the facts as you find them, appreciating you are considering legal responsibility in a criminal matter and the high standard of satisfaction required is proof beyond a reasonable doubt.**]

In considering whether the defendant caused [X]'s death you should take into account what (if anything) is known as to the medical cause of [X]'s death. The medical cause of death in the present case is alleged to be … [Here identify the evidence based medical cause of death or, if it is unknown, the evidence relied upon to establish the mechanism(s) of death by inference. If the mechanism relied upon by the prosecution is in issue identify the material facts and or inferences to be determined].

Your consideration of the defendant's conduct as potentially causing death must be confined to such of the defendant's acts or omissions, if any, as have been

proved beyond a reasonable doubt. This element of causation will only have been proved if you are satisfied beyond a reasonable doubt that acts or omissions of the defendant which you find to have been proved beyond a reasonable doubt were a substantial or significant cause of death or contributed substantially to the death.

[Where more than one act or omission is alleged to have caused death **- In the event you find that [X]'s death was caused by the combined effect of a number of the acts or omissions of the defendant it is essential, before you can find this element has been proved, that you reach unanimous agreement on which of the defendant's acts or omissions had that combined consequence. That is necessary because an offence can only be committed by acts and or omissions. For a jury to reach unanimous agreement that an offence has been committed each juror must be satisfied the offence is constituted by the same acts and or omissions. So, if you are satisfied element 2 is proved, when you refer to the acts or omissions of the defendant in considering elements 3 or 4 they must be the same acts or omissions which you have unanimously agreed caused death for the purposes of element 2.**)

The act(s) or omission(s) of the defendant alleged by the prosecution to have caused death is/are … [Here list the act(s) and or omission(s) relied upon. Where the occurrence of any acts or omissions is in dispute, identify the factual dispute(s) which the jury must resolve. This may require a direction about circumstantial evidence where an act or omission is alleged as an inference arising from proved facts. If the prosecution rely upon omissions in the form of a s 285 failure to provide the necessaries of life as causing death, a direction should be given about the effect of s 285].

<u>Element 3</u>, the element of unlawfulness, requires that in causing [X]'s death the defendant did so unlawfully. All killing is unlawful, unless authorised, justified or excused by law. Our law creates some defences which can operate to excuse an unlawful killing, for example acting in self-defence. In the present case….[Here indicate whether any defences, such as self-defence, emergency or accident arise for the jury's consideration and, if any do, proceed to explain the operation of the defence including the onus. Where referring to the defendant's acts or omissions make plain they are confined to those about which the jury must be in unanimous agreement before being satisfied of element 2.]

Before turning to element 4 I remind you that if any one of elements 1, 2 or 3 is not proved beyond a reasonable doubt then element 4 is irrelevant because the defendant could not be found guilty of murder or manslaughter.

Element 4, reckless indifference to life, requires that in committing the acts or omissions which caused [X]'s death the defendant knew those acts or omissions would probably cause [X]'s death. If at the time the defendant committed the acts or omissions that caused the death of the deceased, the defendant knew the acts or omissions would probably cause the death of the deceased but the defendant continued to commit those acts or omissions regardless of that consequence, then the defendant would be guilty of murder.

In considering this element you are solely concerned with the defendant's knowledge of the probable consequences of the same acts or omissions of the defendant which you must be unanimously agreed caused [X]'s death as required in element 2. (Where more than one act or omission is relied upon it will be necessary to emphasise that the requisite knowledge must have accompanied all such acts or omissions.)

A person cannot be recklessly indifferent to life unless the person is conscious of the danger to life the person's conduct represents, if proceeded with. It is the defendant's consciousness of the danger, coupled with the decision to proceed regardless, which is the focus of this element. Here the danger you are concerned with is the probable death of another person. By probable I mean likely. By consciousness of the danger I mean the defendant knew of the danger, in the sense that the defendant was aware of, realised or foresaw that death was a probable consequence of his acts or omissions.

In ascertaining whether the defendant knew, in the sense that the defendant was aware of, realised or foresaw, that death was a probable consequence of the defendant's acts or omissions you are drawing inferences from facts which you find established by the evidence concerning his state of mind.

Knowledge may be concluded or inferred from the circumstances in which death occurred and from the proven conduct of the defendant before, at the time of, or after the acts or omissions which caused death. You should also consider

anything the defendant has said of relevance to whether or not he had the requisite knowledge.

Importantly, in drawing inferences as to the state of the defendant's knowledge you are not concerned with what you or some other reasonable or ordinary person might have foreseen the consequences of the defendant's acts or omissions would be. Your concern is with the knowledge, if any, which the defendant had. In considering what his knowledge was you should have regard to circumstances personal to him which may have influenced whether or not he was aware of, realised or foresaw that death was a probable consequence of his acts or omissions. Examples of such circumstances include age, educational and social background, emotional state and state of sobriety.

In cases of this kind the situation may sometimes arise where the evidence sustains the possibility of more than one inference – an inference consistent with guilt as well as an inference consistent with innocence. For example, what if you considered the evidence supports the guilty inference that the defendant knew that death would probably result from the defendant's conduct but that it also supports the innocent inference he did not think of the probability of death and merely thought injury might result? In such a situation you could not draw the guilty inference unless you were satisfied the innocent inference had been excluded beyond reasonable doubt.

This simply reflects the prosecution's obligation to prove beyond reasonable doubt an offence which is concerned with reckless indifference to life itself, not merely the quality of life. It is not enough if you infer the defendant believed that serious harm might result from the defendant's conduct or that the defendant merely thought that there was a possibility of death. Nothing less than a realisation on the part of the defendant that death was a probable consequence of the defendant's acts or omissions is sufficient to establish murder in this way. [Here canvass the competing inferences and the issues of fact informing the drawing of inferences about the state of the defendant's knowledge at the time he proceeded to commit each relevant act and omission.]

If you are satisfied beyond reasonable doubt the defendant did know that [X]'s death would be a probable consequence of the defendant's acts or omissions but committed those acts or omissions regardless of that probability, and if

death resulted from those acts or omissions, then element 4 will have been proved. If so, and you are also satisfied beyond reasonable doubt of elements 1, 2 and 3, then your verdict on the charge of murder would be guilty. (The preceding sentence will need adjustment if provocation is under consideration.)

If Element 4 has not been proved beyond a reasonable doubt your verdict on the charge of murder would be not guilty. In that event it would remain for you to deliver a verdict on the inherent alternative charge of manslaughter; a verdict which will depend upon whether or not the prosecution has proved all of elements 1, 2 and 3 beyond a reasonable doubt.

Murder: Code s 302(1)(a)[1]

Legislation

302 Definition of *murder*

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

(aa) if death is caused by an act done, or omission made, with reckless indifference to human life;

(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of ***murder***.

(2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.

(4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

(5) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992* , section 161Q may not be presented without the consent of a Crown Law Officer.

[1] This section was formerly s 302(1).

Murder: Code s 302(1)(a)

The defendant is charged with the murder of [the deceased] on [date].

Our law provides that any person who unlawfully kills another is guilty of a crime which is called murder or manslaughter according to the circumstances of the case.

A person who unlawfully kills another is guilty of murder if he intends to cause the death of the person killed [or some other person] or intends to do the person killed [or some other person] grievous bodily harm.

"Grievous bodily harm" means bodily injury of such a nature that, if left untreated, would be likely to endanger life or likely to cause permanent injury to health. It does not matter whether or not treatment is or could have been available.

A person "intends" to cause death or grievous bodily harm if that is what he meant to do.

Where a person unlawfully kills another but does not have an intention to kill or to do grievous bodily harm, the person will be guilty of manslaughter.

Before the defendant can be found guilty of murder, you need to be satisfied beyond reasonable doubt of four things – the four "elements" of the offence of murder:

1. **the deceased is dead;**
2. **the defendant caused his death;**
3. **the defendant did so unlawfully; and**
4. **at the time of the act which caused death, the defendant intended to kill or do grievous bodily harm.**

Meaning of "causing" death

Any person who causes the death of another, directly or indirectly, by any means whatsoever, is deemed to have killed that person.

For the defendant to have killed the deceased it is enough that he did an act that was a "substantial or significant cause" of death or which substantially contributed to it.[2]

If at the time the deceased was killed, the deceased was already suffering from a disorder or disease for which the defendant was not himself responsible, it is enough that the defendant did an act which hastened the death of the deceased.[3]

Meaning of "unlawful' killing

An unlawful killing is a killing that is not authorised justified or excused by law. In other words, and unlawful killing is a killing for which there is no defence or excuse. To be satisfied beyond reasonable doubt that the killing was unlawful, you must be satisfied that any potential defences have been excluded by the prosecution beyond reasonable doubt.

Inherent alternative verdict of manslaughter

Whenever a charge of murder is brought, there exists an inherent alternative to that charge, namely the offence of manslaughter.

The offence of manslaughter will be proven if the prosecution satisfy you, beyond reasonable doubt, of the first three of the elements of murder. If a person unlawfully kills another, but without an intention to kill or do grievous bodily harm, they will be guilty of manslaughter. It is the fourth element of intention which "lifts" an unlawful killing, a manslaughter, to murder.

Murder s 302(1)(a) – example direction

The essential facts in this trial are not contested. The deceased shopkeeper Fred Jones was killed by shot fired from a sawn-off double-barrelled shotgun. He was in his corner store at about 9.15 at night on 3 August 1998 when the defendant came into the shop. He was carrying the shotgun which he knew was loaded. His face was covered with a balaclava. He pointed the gun at Mr Jones and demanded money from the cash till. The gun suddenly went off and the shopkeeper was killed by shots discharged from both barrels of the gun.

Afterwards the defendant told police he did not know why the gun went off. He said that at the time he did not have his finger on the triggers or either of them.

---

2 Section 293; *Royall v The Queen* (1991) 172 CLR 378 at 411, 423, applied in *R v Jeffrey* [2003] 2 Qd R 306.

3 Section 296. Cf ss 297, 298. Ordinarily a direction as in (a) or (b) above would not be called for.

Sgt. Smith of the Queensland Police forensic section, who later tested the gun, said it was a very old firearm that was prone to discharge even with delicate handling. The prosecution has urged that, since both barrels were discharged, the killing must have been deliberate, and that you should find the defendant guilty of murder.

There are two possible ways in which the defendant may be found guilty of murder. I will call them murder (a) and murder (b), because that is how they are designated in s 302(1) of the Criminal Code.

First, as to murder (a).

(a) Read s 23(1)(a) to the jury. Direct them as follows.

The law holds that the relevant act is the death causing act (eg the discharge of a loaded gun[4]).

You should ask yourselves have the prosecution[5] excluded beyond reasonable doubt the possibility of (discharge of the gun without pressure being applied to the trigger, or the possibility of that discharge by) an unwilled reflex or automatic motor-action of the defendant.[6] Remember the prosecution must exclude beyond reasonable doubt the possibility that the death causing act occurred independently of the will of the defendant. This is a matter for you to decide; it may help to ask if the prosecution have proved the defendant made a conscious choice[7] (to discharge the gun).

Where proof of intent is an element of the offence charged, direct the jury.

---

4 The "act" is the discharge of the loaded gun and not the mere contraction of the trigger finger, or the wounding of the victim: *R v Falconer* (1990) 171 CLR 30 at 39, 81.

5 The onus of proof of voluntariness of the act rests on the prosecution: "*Falconer;* 41; *Griffiths* (1994) 125 ALR 545; 69 ALJR 77 at 78n1. See also *Breene v Boyd, exp Boyd* [1970] Qd R 292 at 297. As to the circumstances in which a direction is called for under s 23(1)(a), see *Griffiths* (1994) 125 ALR 545; 69 ALJR 77 at 80; and cf *R v Falconer* (1990) 171 CLR 30 at 40, 67-68; *Guise v The Queen* (1998) 101 A Crim R 143.

6 Under s 23(1)(a) a person is excused from criminal responsibility for an act that, so far as he or she is concerned, is involuntary: *Falconer* 38, 72. Hence a person is not criminally responsible for an act done by an employee without authority and contrary to instructions, nor for an act done, for example, while asleep; or in a state of automatism due to concussion: *Kaporonovski v The Queen* (1973) 133 CLR 209 at 227; or in a state of dissociation: (*Falconer*); or for a reflex action following a painful stimulus or a spastic movement: *Falconer*, 43. But he may be criminally responsible under s 7 for an act done by another: *Kaporonovski* at 227; and cases of insanity and intoxication are governed by ss 27 and 28 and not by s 23(1)(a): *Kaporonovski* at 227.

7 *Falconer*, 40 "a choice, consciously made, to do an act of the kind done. In this case, a choice to discharge the gun"...

If you are satisfied beyond reasonable doubt that (the discharge of the gun) occurred by a willed act of the defendant, you must ask yourselves if the prosecution have also proven beyond reasonable doubt that the defendant intended[8] (when discharging the gun, to kill the shop keeper or do him grievous bodily harm.) If you have a reasonable doubt about the answer to this question, then you are required by law to find him not guilty (of murder).[9]

Then you should consider murder (b). Here the question you must consider is this: Was discharging the gun an act of a kind likely to endanger human life, and was it the result of a conscious choice on the part of the accused in carrying out a robbery? Robbery is stealing or attempting to steal with violence, or threats of violence, to a person (or property). There is little doubt - although it is a matter for you to decide - that the defendant was carrying out a robbery when Mr Jones was shot. He demanded money from Mr Jones, and he menaced him with a shotgun.

If you find the defendant not guilty of murder (a) or murder (b), then it remains for you to decide whether or not he is guilty of manslaughter.[10] Manslaughter is the unlawful killing of a human being in circumstances not amounting to murder. The question you should consider in deciding whether or not the defendant is guilty of manslaughter comes down to this: Was the defendant reckless in his control of the shotgun? Was his conduct in handling and in pointing the shotgun in the circumstances such a grave departure from the reasonable standard of care expected of a person in control of a loaded gun as to show a reckless disregard for obvious risks to the life and safety of Mr Jones?[11] If you are satisfied beyond

---

8 Intention to kill does not necessarily import or require actual foresight of death or of grievous bodily harm*:* *Charlie v The Queen* (1999) 199 CLR 387.

9 In *Murray v The Queen* (2002) 211 CLR 193 the appellant succeeded because the trial judge had not separated the concept of a willed act in "discharging the gun" from the concept of doing so with the intention to intent to kill a person to do that person grievous bodily harm. Hence the necessity for separation of the concepts in the direction. Further, Kirby J (at [94] – [102]), Callinan J (at [103] – [155]), and Gaudron J (at [1] – [24]) concluded that a direction on s 23 was required in a trial on a charge of murder even where intention was the major issues on the trial where the evidence raised its application. The onus of proof is of voluntariness of the act rests on the prosecution: Falconer at 41; *Griffiths v The Queen* (1994) 125 ALR 545; 69 ALJR 77 at 78 n1. See also *Breene v Boyd*, ex p Boyd [1970] Qd R 292 197. As to the circumstances in which a direction is called for under s 23 (1) (a), see *Griffiths v The Queen* (1994) 125 ALR 545; 69 ALJR 77 at 80; and cf *R v Falconer* (1990) 171 CLR 30 at 40, 67-68.; *Guise v The Queen* (1998) 101 A Crim R 143.

10 A direction under s 23(1)(a) on the voluntariness of the act may be required in respect of criminal responsibility for murder under s 302(1)(b): see *Stuart* (1974) 134 CLR 426 at 438.

11 Section 23(1) is subject to the express provisions of the *Code* relating to negligent acts and omissions, which has been held to include the case of death caused by failing to fulfil the duty to take care under s 289 of a thing that is dangerous: *Callaghan v The Queen* (1952) 87 CLR 115, 124; *Evgeniou v The Queen* (1964) 37 ALJR 508. A person may be responsible under s 289 even though there is no act on his or her part: *R v Morgan* [1999] QCA 348.

reasonable doubt that the defendant was reckless[12] in that sense, then you must find him not guilty of murder but guilty of manslaughter.

If you are left with a reasonable doubt about the answer to that question, then you are required by law to find the defendant not guilty of murder and not guilty of manslaughter.

[12] Cf *Andrews v DPP* [1937] AC 576 at 538. *Evgeniou v The Queen* (1964) 37 ALJR 508 at 515 ("An element of reckless disregard for life and safety of others").

Murder: Code s 302(1)(b)[1]

[Following a direction as to murder under *Code* s.302(1)(a), proceed as follows:]

If you are not satisfied beyond reasonable doubt that the defendant intended to kill (Z) or cause him grievous bodily harm, then you will need to consider another basis on which the prosecution says that the defendant is guilty of murdering (Z).

For this purpose, you need not concern yourselves with the question whether the defendant intended to hurt (Z). It is enough if you are satisfied that:

1. **the defendant did an act by means of which the death of (Z) was caused;**
2. **that the defendant's act was of such a nature as to be likely to endanger (Z's) life; and**
3. **that he did that act in carrying out the purpose [of robbing the bank].[2][3]**

Let me explain what I have just said in relation to the evidence given at this trial.[4] It is that the defendant pointed a revolver at the bank teller and told him to give him money. There is evidence that the defendant threatened to shoot the teller if he did not hand over the money at once. The gun suddenly went off and killed the teller. If you are satisfied that those things happened, then it is open to you to find that (Z's) death was caused by means of an act done by the defendant in carrying out a bank robbery.

Do you think that the act of pointing the gun at the teller was something that was likely to endanger human life? If you are satisfied beyond reasonable doubt that it was, then you may find that the defendant murdered (Z).

That is so even though the defendant did not mean to kill (Z) or to hurt him at all.[5]

---

1 This section was formerly *Code* s 302(2).

2 See *Stuart v The Queen* (1974) 134 CLR 426 at 438.

3 If the unlawful purpose is particularised as an offence an element of which is an intention to cause a specific result (e.g. burglary), and intoxication is raised, it will be necessary to direct the jury (see No 79B) that it must have regard to that intoxication in determining the existence of the intent and hence whether the unlawful purpose has been proved: *R v George* [2014] 2 Qd R 150.

4 The facts adopted here are based by analogy on *Fitzgerald v The Queen* (1999) 106 A Crim R 215. Differences between murder under s 302(1)(b) and manslaughter are: (i) that s 302(1)(b) requires an act done in prosecution of an unlawful purpose; and (ii) manslaughter may require a direction under s 289, which attracts the common law test under *Callaghan v The Queen* (1952) 87 CLR 115.

5 See *Code* s 302(3).

But what I have just said is all subject to this.[6] The defendant told the police that the gun went off and killed (Z) by accident. Was the death of (Z) a real risk which an ordinary person in the position of the defendant would have foreseen as a possible outcome when he pointed the gun at the teller; or was it something which an ordinary person might think of as so remote a possibility that there was no need to take it into account or guard against its happening?[7]

If you are left with a doubt about the answer to that question, then you must find the defendant not guilty of murder.[8] On the other hand, if you are satisfied beyond reasonable doubt that an ordinary person would have realised there was a real risk that (Z) would be killed if the gun was pointed at him, then it is open to you to find the defendant guilty of murdering (Z).

---

6 Section 23(1)(b): *Stuart v The Queen* (1974) 134 CLR 426 at 438. Query whether a direction under s 23(1)(a) is called for here: cf. *Griffiths v The Queen* (1994) 69 ALJR 77 at 79 col 1 (manslaughter) and compare the standard direction given in this Bench Book in relation to s 23(1)(a).

7 *R v Taiters* [1997] 1 Qd R 333 at 338. This leaves little scope for a verdict of manslaughter; but that seems to be the effect of the authorities under s 302(1)(b).

8 Note, however, that s 302(2) does not apply if the "unlawful purpose" and the dangerous act in s 302(2) are one and the same: *Hughes v The King* (1951) 84 CLR 170 at 174-175 (death resulting from violent assault).

Manslaughter: Code s 303

In order for the prosecution to prove the charge of manslaughter, it must establish that the defendant killed the deceased and that he did so unlawfully. Unlawful simply means not authorised, justified or excused by law.[1]

Significantly, it is not an element of the offence that the defendant intended to kill the deceased or to do the deceased any particular harm. So it is sufficient if the prosecution proves that the accused unlawfully killed the deceased.

Any person who causes the death of another, directly or indirectly and by any means whatever, is deemed to have killed that other person: s 293. [2]

In that regard it does not matter that the death did not immediately result. If the actions of the defendant led to injury to the deceased which in the ordinary course resulted in his death, then in law the defendant is responsible for that death, even though it occurred some days after these actions.

The actions of the defendant need not have been the only contributing cause of death. However, the defendant's acts must be a substantial or significant cause of death or have contributed substantially to the death.[3]

In law, a killing is excused if an ordinary person in the position of the defendant would not have foreseen the death of the deceased as a possible outcome of his act[4] (e.g. in pushing the deceased).

Murder/Manslaughter: Elements of the Offence and Standard Defences

The jury might benefit if asked the following questions: (as largely suggested by Dutney J).

1. **Did A kill B?**
   - (a) **If "no" to question 1, A is <u>not guilty</u> of any offence;**
   - (b) **If "yes" to question 1, go to question 2.**
2. **Has the prosecution proved that A was not acting in self-defence?**

---

1 See directions on accident, self defence and other possible defences such as the defence of a dwelling house.

2 See also directions on criminal negligence.

3 See *Royall v The Queen* (1991) 172 CLR 378 at 411, *R v Sherrington* [2001] QCA 105 at [4].

4 See directions on accident.

(a) If "no" to question 2, A is <u>not guilty</u> of any offence;

(b) If "yes" to question 2, go to question 3.

3. When he killed B, did A intend to kill him or cause him grievous bodily harm?

(a) If "no" to question 3, A is <u>not guilty</u> of <u>murder</u> but <u>guilty</u> of <u>manslaughter</u>;

(b) If "yes" to question 3, go to question 4.

4. Has the prosecution proved that A was not provoked by B?

(a) If "no" to question 4, A is <u>not guilty</u> of <u>murder</u> but <u>guilty</u> of <u>manslaughter</u>.

(b) If "yes" to question 4, go to question 5.

5. Has A provided (on the balance of probabilities) a defence of diminished responsibility?

(a) If "no" to question 5, A is guilty of murder;

(b) If "yes" to question 5, A is guilty of <u>manslaughter</u>.

Attempted Murder: Code s 306(2)[1]

The defendant is charged with the attempted murder of (insert name). Any person who attempts unlawfully to kill another is guilty of a crime.[2] Unlawful simply means not authorised, justified or excused by law. In this case there are no issues to suggest authorisation, justification or excuse.

The Code defines an "attempt" in the following way:[3]

"When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence."

In order to establish the charge, the prosecution must prove beyond reasonable doubt that :[4]

1. **the defendant had an intention to kill at the requisite time,**
2. **the defendant put the intention to kill into execution by means adapted to its fulfilment,**
3. **the defendant manifested the intention to kill by some overt act.**

As to the first issue, it is an essential element of the offence that the defendant had an intent to kill (insert name of victim) at the time of or during the relevant act

---

1 The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

2 Section 306(a) *Code*. As to attempted murder where the defendant did or omitted to do an act which it was his or her duty to do, which act or omission was of such a nature as to be likely to endanger human life: see s 306(b) *Code*. Note that s 538 *Code* provides for a reduction in punishment where a person convicted of attempted murder, voluntarily desists from prosecuting the attempt. As to the application of s 538 in the case of an attempted murder conviction see *R v Witchard* [2005] 1 Qd R 428.

3 See s 4 *Code*. There is conflict in the authorities as to the applicability of the s 4 definition to those offences in the *Code* of which an attempt is an element of the offence. In *R v Leavitt* [1985] 1 Qd R 343, the Court of Criminal Appeal held that s 4 does not apply to offences in the *Code* in which an attempt is an element of the offence. In *R v O'Neill* [1996] 2 Qd R 326 at 431-432, Dowsett J observed that the s 4 definition does apply to the offence of attempted murder in s 306. Although the remarks are obiter, the editors of Carter's *Criminal Law of Queensland* cite *O'Neill* as authority for the proposition that the s 4 definition applies to s 306. The question remains unsettled, possibly because reference to the s 4 definition as opposed to the term in ordinary usage is unlikely to produce a different outcome. In *Leavitt* the phrase used by Andrews CJ (345) in eschewing the s 4 definition was "meaning by action to achieve a particular result" (Williams J to similar effect at 347).

4 See *Barbeler v The Queen* [1977] Qd R 80 as to the components to an attempt charge.

or acts inflicted on the victim.[5] Anything less than an intent to cause death is insufficient. It is not sufficient, for example, that the defendant was recklessly indifferent as to whether (insert name of victim) lived or not, nor is it sufficient on a charge of attempted murder that the defendant intended to do grievous bodily harm.[6]

Intention is a state of mind.[7] It is necessarily a matter of inference whether a person had an intent to kill. As I have mentioned, you may draw inferences only from the proven facts. There must be a logical and rational connection between the facts as you find them and any inference you draw. Importantly, if more than one inference is reasonably open, that is, an inference adverse to the defendant (i.e. one pointing to his guilt), and an inference in his favour (i.e. one consistent with innocence) you must give the defendant the benefit of the inference in his favour. Therefore, you must be satisfied beyond reasonable doubt that the inference of an intention to kill (insert name of victim) is the only reasonable inference open on the evidence which you accept.

If you are not satisfied beyond reasonable doubt that there was an intent to kill, the offence of attempted murder cannot be established and you must find the defendant not guilty of the charge. On the other hand, if you come to the conclusion beyond reasonable doubt that the defendant had an intent to kill at the relevant time, the element of intent will have been proved.

The second element of the offence is that the defendant must put his intention to kill into execution by means adapted to its fulfilment. This simply means that the defendant began to carry out his intention to kill in a way suitable to bring about what he intended to achieve. Where a person is physically attacked, the phrase "by means adapted to its fulfilment", basically requires you to ask whether the means was such as to be capable of killing someone. For example, stabbing

---

5 See *Alister v The Queen* (1984) 154 CLR 404; *Knight v The Queen* (1992) 175 CLR 495; *Cutter v The Queen* (1997) 143 ALR 498.

6 Where there is a live issue as to whether the defendant's intent was to cause grievous bodily harm rather than to kill, the trial judge should explain to the jury what grievous bodily harm is, rather than risk leaving it with the impression that it is no more than an intention to hurt: *R v Rogers* [2013] QCA 52.

7 An elaboration as to the meaning of the word "intention" should be avoided: see *R v Willmot (No 2)* [1985] 2 Qd R 413; *Cutter v The Queen* (1997) 143 ALR 498. See also the direction on "Intention" and the discussion in *R v Glebow* [2002] QCA 442.

someone with a knife (adapt according to facts of the case) may be a means adapted to the fulfilment of an intention to kill. [8]

The third element is that there must be a manifestation of the intention to kill by some overt act. That simply means that there was some act that, if an observer had been standing by, the observer could have seen.

The concept of attempted murder is really, in a nutshell, that someone unlawfully attacks or does something else to another person, intending to kill them and using means capable of doing so, but fails.

The case against the defendant is that intending to kill (insert name), he (insert details).

[8] But see s 4(3) of the Code (it is immaterial that by reason of circumstances not known to the offender it is impossible to commit the offence)

Unlawful Striking Causing Death s 314A

It is an offence for a person to unlawfully strike another person to the head or neck and cause the death of that other person.

In order to establish such an offence, the prosecution must prove each of the following four elements beyond reasonable doubt:

1. **That the defendant struck the deceased to the head or neck;**

2. **That the striking was unlawful;**

3. **That the striking caused the death of the deceased; and**

4. **That the striking was not done as part of a socially acceptable function or activity that was reasonable in the circumstances.**

As to the *first* of those elements, to strike another person to the head or neck means to directly apply force to the head or neck of that person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument.

As to the *second* element, the striking will be unlawful if it was not authorised, justified or excused by law.[1]

As to the *third* element, to cause means to cause directly or indirectly. It does not matter that death did not immediately result. If the striking led to an injury to the deceased which in the ordinary course resulted in his or her death, then in law the defendant is responsible for that death, even though it occurred some days after the striking. The striking need not have been the only cause of death. However, the striking must have been a substantial or significant cause of death or have contributed substantially to the death.[2]

As to the *fourth* element, the defendant is not criminally responsible for causing the death of another person by striking that person in the head or neck if the striking was done as part of a socially acceptable function or activity and the

---

[1] The defences under s 23(1)(b) and 270 do not apply to this offence because they are expressly excluded: s 314A(2). Also, because s 314A(3) provides that an assault is not an element of the offence, the defences under ss 268 and 269 do not apply. Nor would diminished responsibility under s 304A be available because the offence charged is not murder.

[2] See *Royall v The Queen* (1991) 172 CLR 378 at 411.

striking was reasonable in the circumstances. In this regard, function or activity includes a sporting event. The prosecution must prove beyond reasonable doubt that either the striking was not part of a socially acceptable function or activity or, if it was, that the striking was not reasonable in the circumstances before this element will be established.

Unlawful Sodomy: Of a Person Under 18 s 208(1)(a)

The prosecution must prove that:

1. The defendant penetrated the anus[1] of the complainant with his penis (or attempted to do so) [2];

and

2. That the complainant was under 18 years of age at the time.

There is no need for ejaculation to occur, or for the penetration to be of any particular depth or to last any particular time.

Consent is irrelevant.

In respect of a child who is 12 years or more it is a defence to prove that the defendant believed, on reasonable grounds, that the person in respect of whom the offence was committed was 18 years or more.

It is a circumstance of aggravation if the complainant was:

(a) a child under 12 years; or

(b) a child who is, to the knowledge of the defendant, -

(i) his lineal descendant; or

(ii) under his guardianship or care.

Except in relation to an attempt, it is a circumstance of aggravation if the offence is committed in respect of a child who is a person with in impairment of the mind (s 208 (2A)).[3] It is a defence to the circumstance of aggravation to prove that the defendant believed on reasonable grounds that the child was not a person with an impairment of the mind (s 208 (5)).

---

1 The term "sodomy" is not defined in the Criminal Code. However, in s 6 "carnal knowledge" is defined to include sodomy, but the section is limited to circumstances in which "carnal knowledge" is used in defining an offence. The ordinary meaning of the term "sodomy" is sexual intercourse per the anal orifice. *Russell on Crime* 12th Ed at 735.

2 Since 1 December 2008, this offence includes an attempt: see s 208.

3 The circumstance of aggravation was introduced by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act* 2013, assent 29 April 2013. "A person with an impairment of the mind" is defined in s 1 *Criminal Code*.

Permitting Sodomy by a Male Person Under 18 s 208(1)(b)

The prosecution must prove that:

1. **that the complainant at the relevant time was a male person under 18 years of age;**
2. **that the complainant penetrated the anal orifice[1] of the defendant with his penis (or attempted to do so)[2]; and**
3. **that the defendant knowingly and willingly allowed this to happen.**

Ejaculation is not necessary to complete the offence. (In cases alleging actual penetration), penetration of the anus to any extent is sufficient.

If the offence is alleged to have been committed in respect of a child who is 12 years or more it is a defence to prove that the defendant believed, on reasonable grounds, that the complainant was 18 years or more.

It is a circumstance of aggravation –

- **(a) if the complainant was a child under 12 years; or**
- **(b) was, to the knowledge of the defendant,**
  - **(i) his lineal descendant; or**
  - **(ii) under his guardianship or care.**

Except in relation to an attempt, it is a circumstance of aggravation if the offence is committed in respect of a child who is a person with an impairment of the mind (s 208(2A))[3]. It is a defence to the circumstance of aggravation to prove that the defendant believed on reasonable groups that the child was not a person with an impairment of the mind (s 208 (5)).

---

1 The term "sodomy" is not defined in the Criminal Code. However, in s 1 "carnal knowledge" is defined to include sodomy. Section 6 defined one aspect of "carnal knowledge" but the section is limited to circumstances in which "carnal knowledge" is used in defining an offence. The ordinary meaning of the term "sodomy" is sexual intercourse per the anal orifice. *Russell on Crime* 12th Ed at 735.

2 Since 1 December 2008, this offence includes an attempt see s 208.

3 The circumstance of aggravation was introduced by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act* 2013, assent 29 April 2013. "A person with an impairment of the mind" is defined in Section 1 *Criminal Code*.

Unlawful Sodomy: A Person with an Impairment of the Mind s 208(1)(c)

The prosecution must prove that:

1. The complainant was a person with an impairment of the mind at the relevant time.

A person with an impairment of the mind means a person with a disability that -

(a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and

(b) results in –

(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and

(ii) the person needing support.[1]

2. The defendant with his penis actually penetrated the anal orifice[2] of the complainant.

There is no need for ejaculation to occur or for the penetration to be of any particular depth or to last any particular time.

Consent is irrelevant.

It is a defence to prove –

(a) that the defendant believed, on reasonable grounds, that the person was not "a person with an impairment of the mind"; or

(b) that the act that was the offence did not, in the circumstances, constitute sexual exploitation of the "person with an impairment of the mind" .

It is a circumstance of aggravation if the person with an impairment of the mind is, to the knowledge of the defendant:

---

1 See s 1 for the meaning of a person with an impairment of the mind.

2 The term "sodomy" is not defined in the Criminal Code. However, in s 1 "carnal knowledge" is defined to include sodomy. Section 6 defined one aspect of "carnal knowledge" but the section is limited to circumstances in which "carnal knowledge" is used in defining an offence. The ordinary meaning of the term "sodomy" is sexual intercourse per the anal orifice. *Russell on Crime* 12th Ed at 735.

(i) his lineal descendant; or

(ii) under his guardianship or care.

Unlawful Use of a Motor Vehicle etc. s 408A(1)(a)

The prosecution must prove that:

1. The defendant unlawfully used the vehicle referred to in the indictment.

"Used" in this context means used as a conveyance – that is that the defendant travelled in it whether as the driver or a passenger.

"Unlawfully" means not justified authorised or excused by law.

2. The person in lawful possession did not consent to its use.[1]

A person in lawful possession of a vehicle can give consent upon conditions as to limitations of the use to which it can be put. If the defendant exceeds those conditions it may constitute an offence.[2]

3. [Direct on any circumstance of aggravation.[3]]

It is a defence to prove that the defendant had the lawful consent of the owner of the vehicle to its use by the defendant (s 408A(1C)). The onus is on the defendant to prove the defence on the balance of probabilities.

---

1 Knowledge of the absence of consent of the person in lawful possession of the vehicle etc. is not an element of the offence: *R v C* [2001] QCA 387 at [25]. However, an issue may arise in relation to honest claim of right pursuant to *Criminal Code* s 22(2).

2 See *R v Judkins* [1979] Qd R 527; *Hollingsworth v Bean* [1970] VR 819; *R v Wibberley* [1966] 2 QB 214.

3 Section 408A (1A) and (1B).

Unlawful Possession of a Motor Vehicle s 408A(1)(b)

The prosecution must prove that:

1. **The defendant had the vehicle in his or her possession.**

   "Possession" means that the defendant had control of the vehicle or was capable of exercising control over it. Where the vehicle is found on the defendant's premises, it must be proved that the vehicle was there with the defendant's knowledge and approval and that the defendant was exercising control over it.[1]

2. **The person in lawful possession did not consent to the defendant's possession of it.**

3. **At the time that the defendant had possession of the vehicle he or she knew that the person in lawful possession had not given consent to the defendant having possession.**

4. **The defendant had the vehicle in his or her possession with the intent to deprive the person in lawful possession thereof of the use of the vehicle either temporarily or permanently.**

5. **Direct on any circumstances of aggravation.[2]**

It is a defence to prove that the defendant had the lawful consent of the owner of the vehicle to its possession by the defendant (s 408A(1C)). The onus is on the defendant to prove the defence on the balance of probabilities.

---

1 See definition of "possession" in s 1; *R v Solway* [1984] 2 Qd R 75.

2 Section 408A(1A) and (1B).

Unlawful Wounding s 323

The prosecution must prove:

1. That the defendant wounded the complainant.

In order to constitute a wound the true skin must be broken and penetrated, not merely the cuticle or outer skin. (*Refer to evidence including medical evidence*).[1]

2. That the wounding was unlawful.

A wounding is unlawful unless it is authorised or justified or excused by law.[2]

3. Circumstance of aggravation.

It is a circumstance of aggravation if the offence is committed in a public place while the person was adversely affected by an intoxicating substance.[3]

---

1 Per McPherson ACJ in *R v Jervis* [1993] 1 Qd R 643 at 645.

2 An assault is not an element of the offence of wounding, provocation is not available: *Kaporonovski v The Queen* (1973) 133 CLR 209.

3 s 108B Penalties and Sentences Act 1992. See s 365C Criminal Code for circumstances in which a person is taken to be adversely affected by an intoxicating substance.

Using the Internet to Procure Children under 16 s 218A

(Offence introduced by the *Sexual Offences (Protection of Children) Act* 2003. Commencement date 1 May 2003.

1. **The defendant is charged with committing the crime of using electronic communication contrary to the provisions of s 218A of the Criminal Code.**

2. **That section makes it an offence for an adult to use electronic communication with intent to procure a person who is in fact under the age of 16 years** (or 12 years, as the case may be) **or who the adult believes is under the age of 16 years** (or 12 years, as the case may be) **to engage in a sexual act, either in Queensland or elsewhere.**[1]

3. **To prove that charge the prosecutor must prove**

   (a) The defendant was an adult at the time of the offence;

   (b) The defendant used electronic communication;

   (c) In doing so, the defendant had the intent to procure a person to engage in a sexual act, either in Queensland or elsewhere.

   (d) The person was aged under 16 years (or 12 years, as the case may be) or the defendant then believed that the person was aged under 16 years (or 12 years, as the case may be).

4. **In a little more detail, that the defendant was an adult at the time of the offence. An adult is a person of or above the age of 18 years.**[2]

5. **The defendant used electronic communication. Electronic communication means email, internet chat rooms, SMS messages, real time audio/video or other similar communication. The prosecution must prove it was the defendant who used that communication.**

6. **In using that electronic communication, the defendant had the intent to procure a person to engage in a sexual act. To procure means knowingly to**

[1] *R v Shetty* [2005] 2 Qd R 540 at [18].

[2] See s 1 of the Criminal Code.

entice or persuade a person to engage in a sexual act. To procure a sexual act may mean that the person allows a sexual act to be done to the person's body, or that person does a sexual act to the person's own body or the body of another person or engages in an act of an indecent nature.

The sexual act sought to be procured may be in Queensland or elsewhere. The prosecution does not have to prove that the sexual act the defendant intended to procure was sexual intercourse or acts involving physical contact or any particular sexual act. It is not necessary for the prosecution to prove that the defendant intended to procure the person to engage in any particular sexual act.

The word "*indecent*" bears its ordinary everyday meaning, that is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstance.

It does not matter that, by reason of circumstances not known to the defendant it was impossible in fact for the person to engage in the sexual act intended to be procured.

7. The person intended to be procured was aged under 16 years (or 12 years, as the case may be) or the defendant then believed that the person was aged under 16 years (or 12 years, as the case may be).

It does not matter that the child is a fictitious person represented to the defendant to be a real person, provided the prosecution prove beyond reasonable doubt that the defendant believed that the person being communicated with was a real person under the age of 16(or 12 years, as the case may be).

Evidence that the person was represented to the defendant as being under the age of 16 (or 12 years, as the case may be) **is, in the absence of evidence to the contrary, proof that the defendant believed the person was under that age.**

[Where the child is a fictitious person, or a real person over 16] **evidence to the contrary includes evidence that the defendant did not believe the representation that the person was under 16. This could include evidence such as, that despite the representation, the defendant had no belief either way whether the person was under or over 16. It is for you the jury to assess the credibility of any explanation raised by the defendant as to his lack of belief as to the representation and for you to decide whether the prosecution has disproved that explanation beyond reasonable doubt.**

Belief is concerned with the state of mind of the defendant at the time of the communication and involves drawing an inference as to his state of mind, in the same way as drawing an inference as to his intention.

(See the general direction on intention on page 56.1).

No offence against this provision is committed unless the defendant is proved to have intended to procure a person the defendant believed to be under 16 (or 12 years, as the case may be) **to engage in a sexual act.**

8. **Evidence that the person was represented to the defendant as being under the age of 16** (or 12, as the case may be) **is, in the absence of evidence to the contrary, proof that the defendant believed the person was under that age.** [Where the child is a fictitious person, or a real person over 16] **evidence to the contrary includes evidence that the defendant did not believe the representation that the person was under 16; this could include evidence such as, that despite the representation, the defendant had no belief either way whether the person was under or over 16. It is for you the jury to assess the credibility of any explanation the defendant has given as to his lack of belief as to the representation, and for you to decide whether the prosecution have disproved that explanation beyond reasonable doubt. No offence against s 218A is committed unless the defendant is proved to have intended to procure a person the defendant believed to be under 16** (or 12, as the case may be) **to engage in a sexual act.**

9. [When a child is under 16 years (or 12, as the case may be)] **it is a defence for the defendant to prove on the balance of probabilities that the defendant believed on reasonable grounds the person was at least 16** (or 12, as a defence to the circumstance of aggravation in subsection (2)(a)(i))**.**[3]

10. Direct on any circumstances of aggravation.[4] [5]

[3] These directions in 7 and 8 derive from the decision in *R v Shetty* [2005] 2 Qd R 540; the Benchbook Committee considers the words in plain type within the square brackets are supported by that decision.

[4] Section 218A(2). It is a circumstance of aggravation if the person was under 12 years or the defendant believed the person was under 12 years or the offence involved the adult intentionally meeting the person or going to a place with the intention of meeting the person. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

[5] See s 228G for the power to order the forfeiture of child exploitation material.

Uttering s 488[1]

The prosecution must prove that:

1. The defendant uttered a forged document.

"Utter" means and includes using or dealing with, and attempting to use or deal with, and attempting to induce any person to use, deal with, or act upon, the thing in question (s 1).

As to the phrase "forged document" the words "forge" and "document" are defined in s 1.[2]

It does not matter whether the document is complete or if the document is not or does not purport to be, binding in law (s 488(2))

2. The uttering must have been done with intent to defraud.

"Intent to defraud" means an intent to practise a fraud on another person, it being sufficient if anyone may be prejudiced by the fraud. If, therefore, there is an intention to deprive another person of a right or to cause him or her to act in any way to his or her detriment or prejudice or contrary to what would otherwise be his or her duty, an intent to defraud is established notwithstanding that there is no intention to cause pecuniary or economic loss.[3]

It is not necessary to prove an intent to defraud any particular person (s 643).

---

1 The offence of uttering was redefined in the 1997 amendments; as was the definition of "forgery" in s 488. For offences occurring prior to 1 July 1997, refer to repealed s 489.

2 See Forgery s 488.

3 *Welham v DPP* [1961] AC 103; [1960] 1 All ER 805. An intent to defraud and an intent to deceive are distinguishable: *Tan v The Queen* [1979] WAR 149. See *R v Birt* (1899) 63 JP 328 and cf *Re London and Globe Finance Corp* [1903] 1 Ch 728 where the difference is explained by Buckley J: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

Wilful Damage s 469

The prosecution must prove:

1. **The defendant damaged (or destroyed) the property described in the indictment.[1]**

   "Damage" means to render imperfect or inoperative.[2]

2. **The defendant did so wilfully.**

   "Wilfully" requires proof that the defendant either:

   a) **had an actual intention to do the particular kind of harm that was in fact done; or**

   b) **deliberately did an act aware at the time he or she did it that the result charged in the indictment was a likely consequence of his or her act and that he or she recklessly did the act regardless of the risk.[3]**

   The word "likely" in the direction concerning recklessness conveys a substantial – a real and not remote chance.[4]

3. **The defendant did so unlawfully.**

   "Unlawfully" means not justified authorised or excused by law.

   An act which causes injury to the property of another and which is done without the owner's consent is unlawful unless authorised or justified or excused by law: s 458(1).

   It is immaterial that the person who does the injury is in possession of the property injured, or has a partial interest, or an interest in it as joint or part owner or owner in common: s 458(2).

---

1 The prosecution does not have to prove the property was the property of the person named in the indictment unless the prosecution is relying on such ownership as proof that the damage was unlawful under s 459: *R v McClymont; ex parte Attorney-General* [1987] 2 Qd R 442 at 443.

2 *R v Zischke* [1983] 1 Qd R 240; *Grajewski v DPP (NSW)* [2019] HCA 8; (2019) 93 ALJR 405. See s 1 *Criminal Code* as to what constitutes damage to a document.

3 *R v Lockwood; ex parte Attorney-General* [1981] Qd R 209; *R v T* [1997] 1 Qd R 623; [1996] QCA 258.

4 *R v T* (above) per Pincus JA.

When an act which causes injury to property, and which would be otherwise lawful, is done with an intent to defraud[5] any person, it is unlawful: s 459(1).

When an act which causes injury to property is done with intent to defraud any person, it is immaterial that the property in question is the property of the defendant: s 459(2).

4. Direct on any circumstances of aggravation.[6]

5 As to the meaning of intent to defraud see the Notes to Forgery.

6 Section 469, 1-10.

Commonwealth Code – Proof of Physical and Mental Elements of an Offence

Prior to the operation of Ch 2 of the *Criminal Code Act* 1995:

You cannot convict the defendant of the offence unless you are satisfied firstly, that he did the act which the prosecution alleges [identify act or acts said to constitute offence] and secondly, that he intended to do it. That is, you must be satisfied that the act was a willed act, something of which he was aware and meant to do.[1] **It is impossible, of course, to look into someone's mind and see what they intended, but you can sometimes draw inferences from what they do and say. The prosecution invites you to infer from [identify relevant acts or statements] that the defendant intended [identify]. You should draw the inference that he did have that intention only if you are satisfied that there is no other reasonable inference available on the evidence.**

Wilful Blindness

Before you could convict the defendant, the prosecution must satisfy you beyond reasonable doubt that the defendant intended to [commit the wrong act**]. If you concluded that the circumstances in which he [**engaged in the conduct involving the act**] were so suspicious, and his failure to make inquiry so clearly deliberate, that the only reasonable inference open was that he knew his conduct involved that act, or the likelihood of it, but he persisted in it nonetheless, you would be entitled to conclude he had the necessary intention.**[2]

Mistake (where raised on the evidence)[3]

If you think that the prosecution has not ruled out an honest and reasonable belief on the part of the defendant that [identify circumstances which would make the act

---

1 Any direction that recognition of the probable consequences of an act amounts to intention is a misdirection: *Parker v The Queen* (1963) 111 CLR 610; *R v Schonewille* [1998] 2 VR 625; *McKnoulty v The Queen* (1995) 77 A Crim R 333.

2 A combination of suspicious circumstances and failure to make inquiry (or "wilful blindness") may support an inference of knowledge of the actual or likely existence of the relevant matter: *Pereira v DPP* (1988) 82 ALR 217; *Giorgianni v The Queen* (1985) 156 CLR 473; *He Kaw The v The Queen* (1985) 157 CLR 523; *Kural v The Queen* (1987) 162 CLR 502.

3 Some controversy exists as to whether mistake has any relevance as a defence to offences requiring mens rea, since it can be said that in such cases the prosecution will necessarily fail to prove a guilty mind. (For discussion see *He Kaw The* at 532-533.) Honest and reasonable mistake provides, in any event, a defence to offences not requiring proof of intent: *Proudman v Dayman* (1941) 67 CLR 536; *R v Sheehan* [2001] 1 Qd R 198. The defence must be raised on the evidence, but it falls to the prosecution to rebut it.

said to constitute the offence innocent**] that is to say, has not satisfied you beyond reasonable doubt that the defendant was operating under that belief, you should acquit him. If the prosecution has satisfied you that the defendant did not hold that belief honestly and on reasonable grounds, you need not concern yourself with this aspect further.**

Where voluntariness is an issue

You must be satisfied beyond reasonable doubt that the act of [identify act constituting offence] was the voluntary or willed act of the defendant. It is the act which must be willed, although its consequences may not be intended.

There is a presumption, which may be displaced by contrary statutory indication, that mens rea is an element of any Commonwealth offence.[4] Mens rea may, depending on the nature of the offence, require "intention, foresight, knowledge or awareness with respect to some act, circumstance or consequence"[5]. Ignorance of the law is irrelevant to the question of mens rea unless knowledge of the law is specifically an element of the offence.[6]

Proof of mental and physical elements after the operation of Ch 2 of the *Criminal Code Act*

Codified principles of criminal responsibility

Chapter 2 of the *Criminal Code* enacted by the *Criminal Code Act* 1995 (Cth), codifies the general principles of criminal responsibility with respect to offences against the laws of the Commonwealth: s 2.1. Provision is made for the progressive application of the provisions of Ch 2 to Commonwealth offences. These provisions have applied to all Commonwealth offences since 15 December 2001: s 2.2.

The general principles of criminal responsibility in the *Criminal Code* do not adopt the common law concepts of *actus reus* and *mens rea*. Instead the *Criminal Code* defines criminal responsibility in terms of proof of the physical elements and fault elements of an offence: s 3.1. Liability for the commission of an offence is dependent upon proof of each physical element of the offence together with proof of the fault element that is applicable to each physical element: s 3.2.

Physical elements

The physical elements of an offence may be conduct, a result of conduct and a circumstance in which conduct, or a result of conduct, occurs: s 4.1.

---

4 *Cameron v Holt* (1980) 142 CLR 342.

5 *Kural* at 504.

6 See *Taib, ex parte DPP (Cth)* [1999] 2 Qd R 649 at 651-2, 659-6; where *Question of Law Reserved (No. 2 of 1998)* (1998) 70 SASR 502 was considered.

An offence may comprise more than one physical element and different fault elements may apply to each physical element: s 3.1 (However, the law that creates an offence may provide that there is no fault element for one or more of the physical elements of the offence: s 3.1(2)).

A physical element of an offence may be conduct; or a result of conduct; or a circumstance in which conduct, or a result of conduct occurs: s 4.1. "Conduct" means an act, an omission to perform an act or a state of affairs. "Engage in conduct" means to do an act or omit to perform an act.

Fault elements

Under the *Criminal Code* the fault elements of an offence may be "intention"[7], "knowledge", "recklessness" and "negligence": s 5.1 (additional fault elements may be specified for the physical elements of a given offence). These concepts are defined in Division 5 of Ch 2.

Where the law creating an offence does not specify a fault element for a physical element, the *Criminal Code* makes provision for a fault element by default: s 5.6. Thus where no fault element is specified for a physical element that consists only of conduct, intention applies as the fault element for that physical element: s 5.6(1). Where no fault element is specified for a physical element that consists of a circumstance or a result, recklessness applies as the fault element: s 5.6(2). See *Crowther v Sala* [2008] 1 Qd R 127.

Suggested directions

Intention

> **Intention is an element of the offence.**
>
> **[**Where conduct the physical element**] A person has intention with respect to the conduct of [**insert details**] if the person means to engage in that conduct.**
>
> **Or**
>
> **[**Where circumstance is the physical element**] A person has intention with respect to the circumstance of [**insert details**] if the person believes that it exists or will exist.**
>
> **Or**
>
> **[**Where the result is physical element**] A person has intention with respect to the result that [**insert details**] if the person means to bring it about or is aware that it will occur in the ordinary course of events.**

---

[7] So far as proof of intention is concerned, the pre Code law in respect possession and importation remains pertinent: *R v Saengsai-Or* (2004) 61 NSWLR 135, [2004] NSWCCA 108 at [74]; *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89; see *R v Kaldor* (2004) 150 A Crim R 271; [2004] NSWCCA 425 at [45]; *R v Lam (Ruling No10)* (2005) 191 FLR 261.

Intention is a state of mind. In ascertaining a defendant's intention, you are drawing an inference from facts which you find established by the evidence concerning the defendant's state of mind. The prosecution invites you to draw an inference as to the defendant's state of mind from certain facts. You are entitled to infer such intent as is put to you by the prosecution if, after considering all the evidence, you are satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence.[8]

Knowledge or belief is often relevant to intention.[9] **The prosecution may establish intention by inference based on a belief.**[10]

Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events

Recklessness[11]

A person is reckless with respect to a circumstance if the person is aware of a substantial risk that the circumstance exists or will exist; and having regard to the circumstances known to the person, it is unjustifiable to take the risk.

A person is reckless with respect to a result if the person is aware of a substantial risk that the result will occur; and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

The question whether taking a risk is unjustifiable is one of fact.

Recklessness can be established by proving intention, knowledge or recklessness.

---

[8] It is appropriate for a judge in directing a jury on proof of intention under the Criminal Code to provide assistance as to how (in the absence of admission) the prosecution may establish intention by inferential reasoning in the same way as intention may be proved at common law: *R v Saengsai-Or* (2004) 61 NSWLR 135, [2004] NSWCCA 108 at [74]; *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89; see *R v Kaldor* (2004) 150 A Crim R 271; [2004] NSWCCA 425 at [45]; *R v Lam (Ruling No10)* (2005) 191 FLR 261.

[9] *R v Tang* (2008) 237 CLR 1; 82 ALJR 1334 at 1348.

[10] The jury may be directed in case where the prosecution are required to prove intention to import or take possession of narcotic goods that such an intention may be inferred from a finding that the defendant acted with a knowledge or belief that the thing being imported or to be possessed was likely to be narcotic goods: *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89 at [52], [53], [60]; see *R v Kaldor* (2004) 150 A Crim R 271; [2004] NSWCCA 425 at [45]

[11] See *Hann v DPP (Cth)* (2004) 144 A Crim R 534, [2004] SASC 86 as to the term "substantial risk".

Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

1. **such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and**
2. **such a high risk that the physical element exists or will exist;**

that the conduct merits criminal punishment for the offence.

Conspiracy – Commonwealth Criminal Code s 11.5

The Criminal Code 1995 (Cth) Ch 2 codifies the general principles of criminal responsibility with respect to the offences against the laws of the Commonwealth. It applies to all Commonwealth offences since 15 December 2001: s 2.2.

In general terms, a person who conspires with another person to commit a [Commonwealth] offence is guilty of the offence of conspiracy to commit that offence.

It is an offence under Australian law for a person to [specify the offence the subject of the conspiracy eg import narcotic goods into Australia]. For a defendant to be guilty of conspiracy to commit [specify the offence], the prosecution must prove beyond reasonable doubt that:

1. **the defendant entered into an agreement with one or more other persons; and**
2. **the defendant and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and**
3. **the defendant or at least one party to the agreement must have committed an overt act pursuant to the agreement.[1]**

The prosecution must prove each of these matters beyond reasonable doubt. They are cumulative requirements for the offence of conspiracy.

It is not an element of the offence of conspiracy that the offence intended to be committed is in fact committed.[2] And it is irrelevant that performance of the offence the subject of the conspiracy is impossible.[3]

The offence of conspiracy is more than just the agreement to commit the offence with the requisite intention of the parties. The offence of conspiracy is incomplete unless either the defendant or one other party to the agreement has committed an overt act pursuant to the agreement. An overt act is simply an act done pursuant

---

1 Section 11.5(2) Criminal Code.

2 Section 11.5(3)(d) Criminal Code provides that a person may be found guilty of conspiracy to commit an offence even if "all other parties to the agreement have been acquitted of the conspiracy". However, that provision is subject to s 11.5(4)(a) Criminal Code which provides, "A person cannot be found guilty of conspiracy to commit an offence if all other parties to the agreement have been acquitted of the conspiracy and a finding of guilty would be inconsistent with their acquittal".

3 Section 11.5(3)(a) Criminal Code.

to the agreement. Another way of expressing an overt act done pursuant to the agreement is a step that is taken towards carrying out the agreement.

A person cannot be found guilty of conspiracy to commit an offence if, before the commission of the overt act pursuant to the agreement, the person withdrew from the agreement and took all reasonable steps to prevent the commission of the offence.[4]

The defendant entered into an agreement with one or more other persons

Looking at the elements of the offence of conspiracy, the prosecution must prove beyond reasonable doubt that the agreement that the defendant entered into was with at least one of those persons identified in the charge. The prosecution does not need to prove that the agreement by the defendant was with all the named persons.

An agreement does not have to be formal. It can be informal or understood. The agreement may have already been in existence when the defendant entered into it. For example, a person may enter into an agreement by indicating his or her agreement to the purpose of the agreement already entered into by other parties to the agreement. A person can enter into an agreement with one or more persons without knowing how many people have previously entered into the agreement or the identity of the other persons.

Parties can join or leave a conspiracy at different times according to their role and level of involvement. It is not necessary that each participant know all of the details of how the scheme was to be carried out. It is not necessary that all parties be in direct communication with each other. They may not even know each other.

You must be in unanimous agreement as to which person the prosecution has proved that the defendant entered into the agreement with. This element of the offence is not satisfied unless the prosecution proves beyond reasonable doubt that the defendant intended to enter into the agreement with one or more of those alleged co-conspirators. A person has intention with respect to specified conduct, if the person means to engage in that conduct.

---

[4] Section 11.5(5) of the Criminal Code.

The defendant and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement

A further element of the offence of conspiracy that the prosecution must prove beyond reasonable doubt is that both the defendant and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement. You must be in unanimous agreement as to which other party to the agreement the prosecution has proved also had the intention with the defendant that an offence would be committed pursuant to the agreement.

The defendant or at least one party to the agreement must have committed an overt act pursuant to the agreement

The offence of conspiracy is not complete until either the defendant or at least one other party to the agreement has committed an overt act pursuant to the agreement. Against each defendant in respect of each charge there are many overt acts that are relied on by the prosecution. When it comes to considering the case on a particular count against a particular defendant, the prosecution has to prove at least one overt act beyond reasonable doubt and you must be in unanimous agreement as to which overt act has been so proved and by whom the overt act was committed.[5] The prosecution must also prove that the one overt act was committed with the intention to commit the overt act. This can be satisfied if the one overt act is committed by any party to the agreement. It does not have to be committed by the defendant. [6]

The circumstantial evidence relied upon by the prosecution to prove the elements of the offence of conspiracy must be such that any reasonable hypothesis consistent with innocence must be excluded. It is for the prosecution to exclude beyond reasonable doubt all hypotheses raised by the whole of the evidence consistent with innocence. The overt acts alleged against a defendant when taken with any relevant surrounding circumstances must be incapable of rational explanation, except as indicating the conspiracy alleged by the prosecution.

---

5 See *R v Lake* (2007) 174 A Crim R 491, [2007] QCA 209 at [67] per Holmes JA with whom the other members of the Court agreed that "the status of the commission of an overt act as an ingredient of the offence convinces me that, as an essential element requiring proof, it also required unanimity".; cited with approval in *R v Viet Dung Ong* (2007) 176 A Crim R 366 at [25].

6 Section 11.5(c) of the *Criminal Code* does not require "that an overt act be established against each defendant, merely that a party to the agreement have committed an overt act". It follows that it is not necessary to direct the jury as to overt acts available against each particular defendant: see *R v Lake* (2007) 174 A Crim R 491 at [62].

Defrauding the Commonwealth s 29A – *Crimes Act* 1914 (Cth)

The prosecution must prove that:

1. **The defendant defrauded the Commonwealth, that is that he dishonestly deprived the Commonwealth of [money] which was the Commonwealth's or to which it would or might be entitled but for the dishonesty of the accused.**

2. **That what the defendant did was dishonest by the standards of ordinary honest people.**

3. **That the defendant knew that what he did was dishonest by those standards.**[1]

[1] The above form of direction is based on the judgment of the House of Lords in *Scott v Metropolitan Police Commissioner* [1975] AC 819 at 838 per Viscount Dilhorne as to 'defrauding', and the judgment of the Court of Criminal Appeal in Queensland in *Maher* [1987] 1 Qd R 171 approving the directions of the trial Judge based on *Ghosh* [1982] QB 1053. *Maher* was a case involving conspiracy to defraud, and the Court's judgment must now be seen in the light of the High Court's judgment in *Peters* (1998) 151 ALR 517, 96 A Crim R 250. The Court split 3/2 about the appropriate directions a trial judge should be given in the relation to any offence in which the jury have to decide if a particular act was dishonest. Toohey and Gaudron JJ (with whom Kirby J agreed but not on the basis of their reasoning but for the purpose of providing "clear instruction to those who have the responsibility of conducting criminal trials"), 255 of 96 A Crim R 250:

> "In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent, and, if so, to determine whether, on that account, the act was dishonest ….. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury is instructed that that is to be decided by the standards of ordinary, decent people".

(Their Honours then went on to vary the direction to be given in cases in which 'dishonest' has some special sense in the legislation creating the offence.)

Although centred on the notion of dishonesty as an element of the offence of conspiracy to defraud (which they decided it was not) McHugh J (and Gummow J who agreed with McHugh J) delivered a persuasive minority judgment which might suggest that the subjective element of the concept of dishonesty may be removed in the future by the High Court.

Drugs: Commonwealth Offences under s 233B of the *Customs Act* 1901 (before the application of the *Criminal Code Act* 1995)

Possession[1]

Possession involves two elements, one physical, the other mental-

1. **Actual physical custody or control by the defendant;**
2. **An intention to possess or control.**

The physical element is not difficult. (If the defendant is found with the substance in his actual possession. If not, the following is necessary**).**

The concept of possession does not require that the article be in the hand or pocket of the possessor, but it does require, if not in his physical possession, that the possessor knowingly has the article under his control either individually or jointly with others. It is not necessary to prove that the defendant has exclusive possession of the item in question. Several persons can have joint possession.

The prosecution must prove beyond reasonable doubt, not only that the defendant knew that the thing, which is the subject of the charge, was in his custody or control, but also that he knew it was a drug to which the Act applies. It is not necessary that the defendant should know precisely what is the particular substance, but it must be shown that he was aware that he had possession of the substance the possession of which is prohibited under the laws relating to illegal drugs.

Clearly, if somebody put something in your pocket or handbag and you didn't know, nor have reason to suspect it was there, you would not have it knowingly. But whether or not a person had such knowledge is not always able to be proved by direct evidence. Whilst the prosecution must prove beyond reasonable doubt the existence of knowledge in the defendant, this is a fact which might be inferred from all the circumstances. It is a question of looking at the surrounding facts and deciding whether the prosecution has proved beyond reasonable doubt that the defendant knowingly had possession of the substance. If you find there is a combination of suspicious circumstances surrounding the substance and the defendant's association with it, it may be open to you to infer the defendant has

[1] Section 233B(1)(a),(c) *Customs Act* 1901. See *He Kaw The v The Queen* (1985) 157 CLR 523; *R v Pierpoint* (1993) 71 A Crim R 187; *R v Frangos* (1979) 21 SASR 331; *R v Zampaglione* (1981) 6 A Crim R 287; *Bahri Kural v The Queen* (1987) 162 CLR 502; *Pereira v DPP* (1989) 63 ALJR 1; *R v Su* [1997] 1 VR 1.

the requisite knowledge; provided there was no other inference reasonable open in the circumstances.

If appropriate, the "wilful blindness" direction could be included here -

If you find there is such a combination of suspicious circumstances and if you are satisfied there is evidence from which you might reasonably conclude that a particular defendant's suspicions were aroused but that he deliberately refrained from making further inquiries, you might properly conclude in all the circumstances that he knew that the (suitcase) was likely to contain narcotic goods. A person is not entitled deliberately to shut his eyes to the truth, ignoring suspicious circumstances which, if investigated, would show his suspicions to be well founded. These are matters that you are entitled to consider in determining whether the only reasonable inference open to you on the evidence is that the defendant had the requisite knowledge.

"Reasonably suspected of having been imported in contravention of the Act"[2]

This phrase is no more than part of the description of the goods, the possession of which constitutes the offence. The substance of the offence is the possession of prohibited imports,[3] that is, narcotic substances.

For this offence it is not necessary for the prosecution to prove how, when, or by whom the actual importation was effected. It is sufficient for the prosecution to prove beyond reasonable doubt that there was a reasonable suspicion that the drugs were imported and that they were illegally imported. This does not mean that the prosecution must negative each possible way in which the drugs could have been lawfully imported. It is sufficient if evidence as to the character of the drug, the likely source of the drug and the circumstances in which it is found to be in possession raises a reasonable suspicion. The suspicion must be based on facts which would create a reasonable suspicion in the mind of a reasonable person. This simply requires a common sense evaluation of the evidence.

Since the expression "reasonably suspected of having been imported into Australia in contravention of the Act" refers to the character of the prohibited

---

2 Section 233(1)(b) *Customs Act* 1901. See *Pearce & Carter v DPP (No 2)* (1992) 59 A Crim R 182; *R v Abbrederis* [1981] 1 NSWLR 530 on appeal - unreported (1981) High Court 8/10/81; *Manley v Tucs* (1985) 19 A Crim R 310; *R v Brown* (1985) 59 ALR 763.

3 Section 51 defines "**prohibited imports**": "goods, the importation of which is prohibited under s 50, are prohibited imports". The goods do not, in fact, have to be imported. They simply have to fall within the classification of prohibited goods: *Milicevic v Campbell* (1975) 132 CLR 307 at 314.

imports, it is not necessary that the reasonable suspicion should have existed at the time when the defendant had the prohibited imports in his possession. In other words, once it is established that the drugs are of that character it does not matter at what time such character could be established.

Importing/Exporting[4]

The law does not provide any special definition of the words "import" and "export" for the purpose of this offence. So the words retain the meaning they have in ordinary language.[5] They mean the physical transfer of goods from one country to another. Thus, it does not matter whether the drugs were intended for another destination and were at the relevant time only "in transit". It suffices that the goods have been brought into Australia from anywhere outside Australia, whether a foreign port, a foreign land mass, or international waters.[6]

The importation begins when the drugs are physically brought within the limits of the port with the intention of being discharged or when the drugs were in fact landed. But it does not necessarily end there. So long as an act is sufficiently connected to the physical landing it can amount to importation. For example, where a person has arranged for drugs to be secreted in a container which is delivered to a depot, but delays taking delivery for some period of time, he may still be regarded as engaged in the process of "importation" as contemplated by the law. Whether that person's action is sufficiently proximate is a question of degree and is one for you to decide.

The act of exporting involves similar concepts. A direction could be couched in the following terms:-

The ordinary meaning of "export" is to send a commodity from one country to another. This involves acts which occasion or bring about the carriage of the commodity from one country to another, the exportation would be complete when the goods have physically left the limits of the port of departure. So long as an

---

4 Section 233B(1) of the *Customs Act* 1901 sets out nine offences relating to the importation and exportation of prohibited imports (narcotics). The section relates only to narcotics [s 233B(2)]. Narcotic goods (substance) are defined in s 4 - "named in Con. I of Schedule VI etc." Sections 50-51 of the Act permit the Governor General by regulation to prohibit the importation/exportation of prohibited goods - *Customs (Prohibited Goods) Regulations*. Judicial notice of regulations see s 4A(b) *Evidence Act (*Cth*).*

5 See *R v Bull* (1974) 131 CLR 203; *Phil Kim Phieu Lam v The Queen* (1990) 46 A Crim R 402; *R v Courtney-Smith (No.2)* (1990) 48 A Crim R 49; *Australian Trade Commission v Goodman Fielder Industries Ltd* (1992) 36 FCR 517; *R v Su* [1997] 1 VR 1; *R v Pimentel* (1999) 110 A Crim R 30; *R v Mohammadi* (2006) 175 A Crim R 384.

6 *R v Mohammadi* (2006) 175 A Crim R 384 at [28], [82].

act is sufficiently connected to, and effectual for, the physical departure of the drugs from this country it may amount to exporting. Whether the act is sufficiently connected and effectual is a question of degree for you to decide.

(For importation).

To import involves a physical element and a mental element. Both elements must be proved to your satisfaction beyond reasonable doubt to establish criminal responsibility of the defendant. The physical element is not difficult. It is simply the fact of bringing the commodity into the country [as explained above].

The mental element required is that the defendant knew or was aware that he was bringing narcotic goods into the country and intended to do so. The prosecution does not have to show that he knew or was aware that it was actually [heroin] that he was bringing into Australia, but it must satisfy you beyond reasonable doubt that he knew or was aware that he was bringing into the country something that was a narcotic substance.

The prosecution invites you to draw an inference from the following facts (… … …). You are entitled to infer such knowledge as is put to you by the prosecution if, after considering all the evidence, you are satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence. If there is any other inference reasonably open, then you cannot draw the inference of knowledge.

Having said that, I should tell you that actual knowledge or awareness is not an essential element in the guilty mind required for the commission of this offence. A belief falling short of actual knowledge that the (suitcase) contains narcotic drugs could sustain an inference of intention.

If you were satisfied that the narcotic drug was imported in circumstances where it appears, beyond reasonable doubt, that the defendant was aware of the likelihood in the sense that there was a significant or real chance that his conduct involved bringing narcotic goods into Australia and nevertheless persisted in that conduct, you would be entitled to infer that he had the necessary guilty mind or intent. The basic question for your consideration is whether the prosecution has satisfied you beyond reasonable doubt that the defendant intended to import a prohibited import which requires, at least, knowledge of the likelihood that what was being imported is a prohibited import.

[If appropriate the "wilful blindness" direction could be given here. See under "Possession".]

Suggested direction: "knowingly concerned in …"[7]

The word "concerned" to which this section relates does not refer to a state of mind in the sense of being interested in, or worried about, the importation of drugs. For example, a father learning that his son had made arrangements to import drugs into this country, might well be anxious about, interested in, or concerned about, that fact. But he would not be guilty of the offence of being knowingly concerned merely from his knowledge of the importation.

Rather, the term "knowingly concerned in" refers to some activity or role by which it is intended to facilitate the importation of drugs. That role can take one, or more, of any number of forms - organising travel, making finance available, physically moving the drugs or providing a delivery point. The words "concerned in" cover a wide range of activities. They do not necessarily require active participation in this scheme. An omission to do something or wilful neglect may involve a person in the offence. A person may be knowingly concerned in an importation if he remained inactive, but ready and willing to receive drugs according to a pre-arranged plan, even if he did not ultimately receive or physically deal with the drugs. It is enough for the offence that the defendant was knowingly concerned in a venture which centred upon an importation.

What the prosecution has to prove beyond reasonable doubt is a practical connection between the role played by the defendant and that importation or intended importation. It is immaterial whether anyone has been charged with (or even acquitted of) the charge of importing the same drugs.[8]

Alternative direction for "knowingly concerned in…" s 223B(1) (d):

The charge against the defendant is one of being knowingly concerned in the bringing into Australia of prohibited imports, namely [specify the drug][9]

There are three elements to the offence. They are:

1. that [specify the drug] was brought into Australia;[10]

---

7 Section 233B(1)(d). See *Giorgianni v The Queen* (1985) 156 CLR 473; *Yorke v Lucas* (1985) 158 CLR 661; *Natesan & Subramanian v The Queen* (1996) 134 FLR 199.

8 *R v Shin Nan Yong* (1975) 7 ALR 271.

9 See *Goldie; Ex parte Picklum* (1937) 59 CLR 254; *R v Tannous* (1987) 10 NSWLR 303; *R v Nudd* [2004] QCA 154 at [47].

10 As to the first element see *R v Meliton Pimental* (1999) 110 A Crim R 30.

2. that the defendant was "concerned in" bringing the drugs into Australia;

3. that the defendant knew that he was concerned in bringing the drugs into Australia.

As to the second element of the offence, that a person is "concerned in" the activity of bringing goods into Australia simply means that the person is "involved in" that activity, or "taking part in" it, or participating in it.[11] To be concerned in the importation the person must be, in some way, a participant in some aspect of the importation. It is not necessary that the person be involved in all aspects of it, it is enough if he is involved in or takes part in some aspect of the progress of the drugs from their point of origin to Australia. To have been "concerned in" bringing drugs into Australia, the person charged with the offence must have done something that can be seen to have a practical connection with bringing the drugs into Australia.[12] The question is not whether the importation would have taken place without the accused, but whether the accused was concerned in the importation.

The words "concerned in" are meant to apply to a wide variety of circumstances and activities in which people may act individually or in combination with others to bring prohibited goods into the country.[13] It is not limited to direct involvement in the means by which the drugs were brought into Australia. Someone who makes arrangements or assists with making arrangements for the importation can also be said to be concerned in the importation. It applies to acts and events which precede and which follow the actual bringing of the prohibited goods into the country.[14] It is sufficient if the concern, that is, the part played by the defendant, occurs in some part of the venture, which has as its object bringing drugs into the country. That is to say, if the involvement or participation is a practical part of the venture the person is concerned in, even though the participation occurs before the particular activity which actually brings the goods into Australia. Mere knowledge of an importation is insufficient, there must be some act or conduct on

---

[11] *R v Tannous* (1987) 10 NSWLR 303 at 307, 309; *Phil Kim Phieu Lam* (1990) 46 A Crim R 402 at 405.

[12] *Ashbury v Reid* [1961] WAR 49 at 51; *R v Tannous* (1987) 10 NSWLR 303 at 307; *Natesan v The Queen* (1996) 134 FLR 199 at 205.

[13] *Phil Kim Phieu Lam v The Queen* (1990) 46 A Crim R 402 at 405.

[14] *R v Tannous* (1987) 10 NSWLR 303 at 307.

the part of the defendant to connect himself with or involve him in the importation, although it need not in reality do anything to further the importation.[15]

The last element of the offence is that the person charged must be "knowingly" concerned in the importation. The offence is not proved unless it is established, beyond reasonable doubt that the accused knew that the drugs were being brought into Australia and that he was doing something to bring that about. This means that he must know that what he is doing is, or is a part of, bringing drugs into the country. It is not enough that the accused merely suspected, or had reason to believe, that what he was doing was taking part in the importation of the drugs. It must be proved that the defendant himself knew that he was concerned in the importation. It is not necessary that the defendant knew all of the details of the criminal enterprise or the names of all the other participants, for example the supplier of the drugs, or knew the means by which the drugs would be distributed and sold. It is enough if the defendant knew that the drugs were being imported and that he was playing a part in the importation. [16]

[It is immaterial whether anyone else, ie the importer, has been charged with (or even acquitted of) the charge of importing the same drugs.[17]]

To summarise, before the defendant can be convicted he must have been concerned or, involved, or have taken part in some aspect of the importation, and he must have knowledge that what he was doing constituted importing the drugs, or constituted some aspect of importing the drugs into the country.

---

15 *R v Tannous* (1987) 10 NSWLR 303 at 308; *R v Nudd* [2004] QCA 154 at [47].

16 *Natesan v The Queen* (1996) 134 FLR 199.

17 *R v Shin Nan Yong* (1975) 7 ALR 271 at 274.

Drugs: Commonwealth Drug Offences under s 233 B of the *Customs Act* 1901 (after the operation of Chapter 2 of the *Criminal Code Act* 1995 (Cth))[1]

The application of common law principles of criminal responsibility to the offence under s 233B(1)(b) of the *Customs Act* 1901(Cth) as it stood prior to the application of the *Criminal Code* required proof of *mens rea* with respect to the nature of the thing imported: *He Kaw Teh v R* (1985) 157 CLR 523.[2]

Chapter 2 of the *Criminal Code* enacted by the *Criminal Code Act* 1995 (Cth), codifies the general principles of criminal responsibility with respect to offences against the laws of the Commonwealth: s 2.1. These provisions have applied to all Commonwealth offences since 15 December 2001: s 2.2.

The general principles of criminal responsibility in the *Criminal Code* do not adopt the common law concepts of *actus reus* and *mens rea*. Instead the *Criminal Code* defines criminal responsibility in terms of proof of the physical elements and fault elements of an offence. The physical elements of an offence may be conduct, a result of conduct and a circumstance in which conduct, or a result of conduct, occurs: s 4.1. The fault elements of an offence may be "intention", "knowledge", "recklessness" and "negligence": s 5.1.[3] (Additional fault elements may be specified for the physical elements of a given offence).

The *Criminal Code* provides that a person has *intention* with respect to conduct if he or she means to engage in that conduct: s 5.2(1). The fault element of *knowledge* requires proof of actual knowledge; a person has knowledge of a circumstance or a result if he or she is aware that it exists or that it will exist in the ordinary course of events: s 5.3. *Recklessness* with respect to a circumstance requires proof that the person is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances that are known to him or her, it is unjustifiable to take the risk: s 5.4(1).

Liability for the commission of an offence is dependent upon proof of each physical element of the offence together with proof of the fault element that is applicable to each physical element. An offence may comprise more than one physical element and different fault elements may apply to each physical element: s 3.1 (The law creating an offence may provide that there is no fault element for one or more of the physical elements of the offence). In the absence of specification of the fault element for a physical element, the *Criminal Code* makes provision for default fault elements: s 5.6. Intention is the default fault element for a physical element that consists only of conduct: s 5.6(1). Recklessness is the default fault element for a physical element that consists of a circumstance or a result: s 5.6(2). "Conduct" is defined in s 4.1(2) of the *Criminal Code* to mean "an act, an omission to perform an act or a state of affairs".

The offence created by s 233B(1)(b) does not specify the fault element (or elements) for the physical element (or elements) that constitute it.

---

1 This refers to the period after the application of Ch 2 of the *Criminal Code* (Cth) on 15 December 2001 and before the repeal of the importation and exportation offences in s 233B of the *Customs Act* by the *Law and Justice Legislation Amendment (Serious Drug Offences and other Measures) Act* 2005 No 129, 2005 Schedule 1.

2 See Direction No 105.

3 See Direction No 89.3 ff.

In *R v Saengsai-Or* (2004) 61 NSWLR 135, [2004] NSWCCA 108, the Court of Criminal Appeal considered the mental element of the offence under s 233B (1)(b) of the *Customs Act* (importation of prohibited imports) in the light of the provisions of Ch 2 of the *Criminal Code*. The appellant contended that the trial Judge had erred in directing the jury in the terms of "recklessness" as defined in s 5.4(1). The appellant submitted that the offence created by s 233B(1)(b) contains only one physical element being that of "conduct" within the meaning of s 4.1(1)(a), namely the act of importing into Australia prohibited imports to which s 233B(1)(b) applied, so that the fault element by operation of s 5.6(1) was proof of intention. The Crown submitted s 233B(1)(b) was to be read as having a physical element of "conduct" (the act of importing a thing into Australia) and also a further physical element of "circumstance in which the conduct occurs" (that the thing imported is a prohibited import to which s 233B(1) applies). It was submitted that the fault element that applies by operation of s 5.6 is "intention" for the physical element of "conduct" constituted by the act of importing and "recklessness" for the separate physical element of "circumstance in which the conduct occurs" being that the substance was a prohibited import. The Court rejected the Crown submissions, finding that the physical element of the offence created by s 233B(1)(b) is one of "conduct" alone: the act of importing into Australia any prohibited import to which the section applies. In respect of that physical element, consisting only of conduct, the Court held that the provisions of s 5.6(1) apply, so that intention is the fault element apposite to the offence created by s 233B(1)(b).

The reasoning in *R v Saengsai-Or* has been applied to the possession offence under s 233B(1)(c) of the Customs Act: see *R v Kaldor* (2004) 150 A Crim R 271; [2004] NSWCCA 425, [45].

As to drug offences under the *Criminal Code* 1995 (Cth) after the repeal of s 233B of the *Customs Act* 1901, see Direction No 105 B.

Drugs: Commonwealth Drug Offences under the Criminal Code (Cth)[1]

Background

Item 61 of Sch 1 to the *Law and Justice Legislation Amendment (Serious Drug offences and Other Measures) Act* 2005 (Cth) No 129 of 2005 repealed the drug importation and exportation offences in s 233B of the *Customs Act* 1901 (Cth). By item 1 of Sch 1 offences previously the subject of s 233B are dealt with in Division 307 of Part 9.1 of the *Criminal Code.*[2] Sch 1 of the Act commenced operation on 6 December 2005.[3]

Offences that are ancillary to the import-export offences in Subdivision A are covered through the application of Part 2.4 of Chapter 2 of the *Criminal Code*, which extends criminal responsibility to those who attempt, are complicit in, incite, or conspire to commit criminal offences.

Division 307 of Part 9.1 which is concerned with import-export offences is comprised of four subdivisions:

Subdivision A - Importing and exporting border controlled drugs or plants

Subdivision B - Possessing unlawfully imported border controlled drugs or plants

Subdivision C - Possessing border controlled drugs or plants reasonably suspected of having been unlawfully imported

Subdivision D - Importing and exporting border controlled precursors

Subdivision A - Importing and exporting border controlled drugs or plants

Subdivision A of 307 of the *Criminal Code* makes it an offence to import or export border controlled drugs or plants.

The expression a "border controlled drug" refers to a substance, other than a growing plant, that is covered by the offences relating to drug importation and exportation. Border controlled drugs are listed in s 314.4. Growing plants are excluded from the definition of border controlled drugs. A "border controlled plant" refers to a growing plant that is covered by the offences relating to drug importation and exportation. These are listed in s 314.5.

The offences in Subdivision A are approached on a tiered basis and have tiered penalties depending on the quantity of border controlled drug or plant involved. An offence involving a *commercial* quantity carries a maximum penalty of life imprisonment, an offence involving a *marketable* quantity carries a maximum penalty of 25 years imprisonment, and an offence with *no minimum quantity* carries a maximum penalty of 10 years. There is also a two-year offence with no minimum quantity and no defence of absence of commercial intention.

---

1 As to drug offences under s 233B(1)(b) of the *Customs Act* 1901 prior to its repeal, see Direction No 105A.

2 Minister for Justice and Customs, Explanatory Statement – *Select Legislative Instrument 2005 No. 293*, p.1

3 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* 2005, s 2.

Section 307.1: Importing and exporting commercial quantities of border controlled drugs or border controlled plants

By s 307.1(1) it is an offence for a person to import or export a commercial quantity of a border controlled drug or border controlled plant. The offence is committed where:

(a) a person imports or exports a substance; and

(b) the substance is a border controlled drug or border controlled plant; and

(c) the quantity imported or exported is a commercial quantity.

Imports/exports a substance: s 307.1(1)(a)

Section 307.1(1) (a) contains the conduct element of the offence. By operation of s 5.6 of the *Criminal Code*, the prosecution will need to prove that the person intended to import or export the substance. (see Benchbook No 89.3)

The substance is a border controlled drug/ plant: s 307.1(1)(b)

"Border controlled drug" and "border controlled plant" are defined in s 300.2 as substances that are listed or described as a border controlled drug or a border controlled plant in s 314.4 or s 314.5 or prescribed by interim regulations under s 301.3(1) or specified in an emergency determination under s 301.8(1).

The fault element for paragraph (1)(b) is recklessness (see s 307.1(2)). The prosecution must prove that the person was reckless as to whether the substance involved was a border controlled drug or plant. Recklessness is defined in s 5.4 of the *Criminal Code* (but reckless may be shown by proof of intention, knowledge or recklessness s 5.4(4)). (see Benchbook No 89.3)[4]

The quantity imported or exported is a commercial quantity: s 307.1(1)(c)

A "commercial quantity" is defined in s 300.2 as a quantity not less than the prescribed quantity specified in Division 314, prescribed by interim regulations under s 301.5 or specified in an emergency determination under s 301.10.

Section 307.1(3) applies absolute liability to the circumstance that the quantity is a commercial quantity. (See the overview provided in the Explanatory Memorandum*, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill* 2005 (Cth), p 46 in respect of the reasons for applying absolute liability).

If it is provided that absolute liability applies to a particular physical element of the offence, then there are no fault elements for that physical element and the defence of mistake of fact under s 9.2 is unavailable in relation to that physical element. However, the existence of absolute liability does not make any other defence unavailable. (see s 6.2)

[4] Where it is necessary to prove that a person knew or was reckless as to whether a substance was a border controlled drug, it is not necessary for the prosecution to prove that the person knew or was reckless as to the particular identity of the border controlled drug (see s 300.5, *R v Douglas* [2014] QCA 104 at [53], [110], [111]).

Section 307.2: Importing and exporting marketable quantities of border controlled drugs or border controlled plants

Section 307.2(1) makes it an offence for a person to import or export a marketable quantity of a border controlled drug or plant. The offence is committed where:

(a) a person imports or exports a substance; and

(b) the substance is a border controlled drug or border controlled plant; and

(c) the quantity imported or exported is a marketable quantity.

Imports/exports a substance: s 307.2(1)(a)

Section 307.2(1) (a) contains the conduct element of the offence. By operation of s 5.6 of the *Criminal Code*, the prosecution will need to prove that the person intended to import or export the substance. (see Benchbook No 89.3)

The substance is a border controlled drug/ plant: s 307.2(1)(b)

"Border controlled drug" and "border controlled plant" are defined in s 300.2. The fault element for paragraph (1)(b) is recklessness (see s 307.1(2)). The prosecution must prove that the person was reckless as to whether the substance involved was a border controlled drug or a border controlled plant. Recklessness is defined in s 5.4 of the *Criminal Code* (but reckless may be shown by proof of intention, knowledge or recklessness s 5.4(4)). (see Benchbook No 89.3)[5]

The quantity imported or exported is a marketable quantity: s 307.2(1)(c)

A "marketable quantity" is defined in s 300.2 as a quantity not less than the quantity prescribed as a marketable quantity of the drug, plant or precursor specified in Division 314, prescribed by interim regulations under s 301.5 or specified in an emergency determination under s 301.10. Marketable quantities will vary depending on the type of drug or plant involved. Section 307.1(3) applies absolute liability to the circumstance that the quantity is a marketable quantity. (See the overview provided in the Explanatory Memorandum*,* Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth), p 46 for the reasons for applying absolute liability).

Defence – lack of commercial intent: s 307.2(4)

Section 307.2(4) provides a complete defence where the defendant can prove, on the balance of probabilities, that he or she did not intend to sell any of the border controlled drug or plant and did not believe that another person intended to do so. As the Explanatory Memorandum*, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill* 2005 (Cth), p 48 states, this reflects the purpose of this offence in targeting commercially motivated importation or exportation. Commercial intention does not form an element of this offence. Rather lack of commercial intent is framed as a defence, imposing a legal burden on the defendant in relation to it.

Section 307.3: Importing and exporting border controlled drugs or plants

Section 307.3(1) makes it an offence for a person to import or export a border controlled drug or border controlled plant. This offence differs from the more serious offences in s 307.1 and s 307.2 because there is no need for the prosecution to prove that a particular quantity of the

[5] See fn 4.

border controlled drug or border controlled plant was involved. The offence is committed where:

(a) a person imports or exports a substance; and

(b) the substance is a border controlled drug or border controlled plant.

Imports/exports a substance: s 307.3(1)(a)

Section 307.3(1)(a) contains the conduct element of the offence. By operation of s 5.6 of the *Criminal Code*, the prosecution will need to prove that the person intended to import or export the substance. (see Benchbook No 89.3)

The substance is a border controlled drug/ plant: s 307.3(1)(b)

"Border controlled drug" and "border controlled plant" are defined in s 300.2. The fault element for paragraph (1)(b) is recklessness (see s 307.3(2)). The prosecution must prove that the person was reckless as to whether the substance involved was a border controlled drug or a border controlled plant. Recklessness is defined in s 5.4 of the *Criminal Code* (but reckless may be shown by proof of intention, knowledge or recklessness s 5.4(4)). (see Benchbook No 89.3)[6]

Defence – no commercial purpose: s 307.3(3)

Section 307.3(3) provides a complete defence where the defendant can prove, on the balance of probabilities, that he or she did not intend to sell any of the border controlled drug or plant and did not believe that another person intended to do so. This reflects the purpose of this offence in targeting commercially motivated importation or exportation. The lesser offence in s 307.4 targets those who import or export border controlled drugs or border controlled plants without a commercial purpose.

Section 307.4: Importing and exporting border controlled drugs or border controlled plants—no defence relating to lack of commercial intent

Section 307.4(1) makes it an offence for a person to import or export a border controlled drug or border controlled plant. This offence differs from the more serious offence in s 307.3 because it does not contain a defence of lack of commercial intent. It is intended to target those who illegally import border controlled drugs or border controlled plants for their own personal use, or for other non-commercial purposes.

Suggested Direction - Importing commercial quantities of border controlled drugs:

It is an offence for a person to import a commercial quantity of a border controlled drug. The offence is committed where:

(a) a person imports a substance; and

(b) the substance is a border controlled drug; and

(c) the quantity imported is a commercial quantity.

The prosecution must prove each of these elements beyond reasonable doubt.

---

6 See fn 4.

As to the first element, the prosecution must prove that the defendant imported the substance and that he/she intended to import the substance.

[Meaning of "imports" for offences committed until 20 February 2010]:

The word "imports" requires conduct that brings something into Australia. Items are not imported until they are brought into Australia. The act of importing is not something that occurs or ceases at a single moment. The act of importing does not finish the moment that the items containing the substance are brought into the port or are landed. Delays in the port, or the intervention of the authorities, do not prevent the process of importing from continuing. The process may continue after the items containing the substance have been landed.[7]

[Meaning of "imports" for offences committed after 20 February 2010]:[8]

The word "imports" requires conduct that brings something into Australia or that involves dealing with the substance in connection with its importation. Items are not imported until they are brought into Australia. The act of importing is not something that occurs or ceases at a single moment. The act of importing does not finish the moment that the items containing the substance are brought into the port or are landed. Delays in the port, or the intervention of the authorities, do not prevent the process of importing from continuing. The process may continue after the items containing the substance have been landed.[9]

The latter definition requires both a "dealing" with something and that the dealing is "in connection with" the thing's importation. Dealing with something in connection with its importation may include:[10]

(a) packaging the thing for importation into Australia;

(b) transporting the thing into Australia;

(c) recovering the imported thing after landing in Australia;

(d) making the imported thing available to another person;

---

7 See *Campbell v R* (2008) 73 NSWLR 272.

8 See extended definition of "import" inserted into *Criminal Code* (Cth) s 300.2 by the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2)* 2010 sch 9 item 1.

9 See *Campbell v R* (2008) 73 NSWLR 272.

10 *R v Tranter* (2013) 116 SASR 452 at [12], citing the Explanatory Memorandum for the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2)* 2009 (Cth).

(e) clearing the imported thing;

(f) transferring the imported thing into storage;

(g) unpacking the imported thing; or

(h) arranging for payment of those involved in the importation process.

Intention is a state of mind. In ascertaining a defendant's intention, you are drawing an inference from facts which you find established by the evidence concerning the defendant's state of mind. The prosecution invites you to draw an inference as to the defendant's state of mind from certain facts. You are entitled to infer such intent as is put to you by the prosecution if, after considering all the evidence, you are satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence.[11]

> *Knowledge or belief is often relevant to intention.*[12] *Actual knowledge or awareness is not an essential element in the intent to import that is required to be proved. The prosecution may establish intention by inference based on a belief. A belief falling short of actual knowledge that the thing being imported being contained the substance could sustain an inference of intention. In the absence of an admission, proof of a belief that the item being imported contained the substance will often be the way the prosecution proves that a defendant meant to import the substance.*

If you are satisfied beyond reasonable doubt that the defendant believed that there were or were likely to be drugs in the container that was being imported, then you can infer the intention to import the substance. If you are satisfied beyond reasonable doubt that the substance was imported in circumstances where the defendant knew or believed the item being imported contained the substance and nevertheless persisted in that conduct, you would be entitled to infer that he intended to import the substance.

As to the second element, the prosecution must prove that the substance was a border controlled drug. The issue of whether the substance in question was a border controlled drug is [not] in dispute. The prosecution must also prove that the defendant was reckless as to whether the substance involved was a border

---

[11] It is appropriate for a judge in directing a jury on proof of intention under the Criminal Code to provide assistance as to how (in the absence of admission) the prosecution may establish intention by inferential reasoning in the same way as intention may be proved at common law: *R v Saengsai-Or* (2004) 61 NSWLR 135; [2004] NSWCCA 108 at [74]; *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89.

[12] *R v Tang* (2008) 82 ALJR 1334 at 1348. The jury may be directed in case where the prosecution are required to prove intention to import or take possession of narcotic goods that such an intention may be inferred from a finding that the defendant acted with a knowledge or belief that the thing being imported or to be possessed was likely to be narcotic goods: *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89 at [52], [53], [60]; see *R v Kaldor* (2004) 150 A Crim R 271; [2004] NSWCCA 425 at [45].

controlled drug. In order to prove recklessness, it must be proved that the defendant was aware of a substantial risk that the substance was a border controlled drug; and having regard to the circumstances known to him / her, it was unjustifiable to take the risk. The question whether taking a risk is unjustifiable is one of fact.

The third element of the offence is the quantity. There is no issue that a commercial quantity of the drug was imported

Subdivision B – Possessing unlawfully imported border controlled drugs or border controlled plants

The offences in Subdivision B target possession of border controlled drugs and plants that have been illegally imported into Australia. As with the importation offences the possession offences are structured on a tiered basis and have tiered penalties depending on the quantity of border controlled drug or plant involved; ie whether a *commercial* quantity (s 307.5), a *marketable* quantity (s 307.6) or *lesser* quantity (s 307.7).

Section 307.5: Possession of commercial quantities

Section 307.5(1) makes it an offence for a person to possess a commercial quantity of an unlawfully imported border controlled drug or border controlled plant. It provides that the offence is committed where:

(a) a person possesses a substance;

(b) the substance was unlawfully imported;

(c) the substance is a border controlled drug or border controlled plant;

(d) the quantity possessed was a commercial quantity.

Section 307.5(1) (a) contains the conduct element of the offence. By operation of s 5.6 of the *Criminal Code*, the prosecution will need to prove that the person intended to possess the substance (see Bench book No 89.3).

As to (b) "border controlled drug" and "border controlled plant" are defined in s 300.2. Subsection 307.5(2) applies absolute liability to the elements in paragraph 307.5(1)(b). This means that the prosecution does not need to prove that the defendant knew, or was reckless as to whether, the substance was unlawfully imported.

As to (c), the prosecution must prove that the person was reckless as to whether the substance involved was a border controlled drug or border controlled plant: see s 307.5(3). "Recklessness" is defined in s 5.4 of the *Criminal Code* (see Benchbook No 89.3).

As to (d), a "commercial quantity" is defined in s 300.2. Subsection 307.5(2) applies absolute liability to the circumstance that the quantity is a commercial quantity.

Section 307.5(4) provides a complete defence to this offence where the defendant can prove, on the balance of probabilities, that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Section 307.6: Possession of marketable quantities

Note that s 307.6(4) provides a complete defence to this offence where the defendant can prove, on the balance of probabilities, that he/ she did not intend to sell any of the border controlled drug or border controlled plant and did not believe that another person intended to do so. This provision reflects the purpose of this offence being the targeting of commercially motivated importation or exportation. Commercial intention does not form an element of this offence, rather a lack of commercial intent is a defence, with the legal burden being cast on the defendant in relation to that matter.

Section 307.7: Possession of unlawfully imported border controlled drugs or border controlled plants

The lesser offence in s 307.7 targets possession without a commercial purpose.

Suggested Direction - Possessing commercial quantities of border controlled drugs:

It is an offence for a person to possess a commercial quantity of a border controlled drug. The offence is committed where:

(a) a person possesses a substance;

(b) the substance was unlawfully imported;

(c) the substance is a border controlled drug or border controlled plant;

(d) the quantity possessed was a commercial quantity.

The prosecution must prove each of these elements beyond reasonable doubt.

As to the first element, the prosecution must prove that the defendant possessed the substance and that he/she intended[13] to possess the substance.

A person can possess a thing if it is in his physical custody. Possession, however, does not require that the thing be in the actual physical custody of the person. A person can possess something when he has control over it, either alone or jointly with other persons.

As to the second element, the substance must have been brought into Australia. [There is no dispute about that.]

As to the third element, the prosecution must prove that the substance was a border controlled drug. [See definition s 300.2.]

The prosecution must also prove that the defendant was reckless as to whether the substance involved was a border controlled drug. In order to prove

[13] As to intention see suggested direction at No 105B. 5/6; see also No 89.3 ff.

recklessness, it must be proved that the defendant was aware of a substantial risk that the substance was a border controlled drug; and having regard to the circumstances known to him / her, it was unjustifiable to take the risk. The question whether taking a risk is unjustifiable is one of fact.

The fourth element of the offence is the quantity. [There is no issue that a commercial quantity of the drug was imported.]

If you are satisfied of these matters, the defendant will nevertheless not be liable where the defendant can prove, on the balance of probabilities, that he or she did not know that the border controlled drug was unlawfully imported.

Subdivision C – Aiding the importation of a commercial quantity of border controlled drugs

Section 11.2(1) provides that a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

For a person to be guilty their conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person (s 11.2(a)) and the offence must have been committed by the other person (s 11.2(2)(b)).

The person must have intended that his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed or that his or her conduct would aid, abet, counsel or procure the commission of an offence and has been reckless about the commission of the offence (including its fault elements) that the other person in fact committed (s 11.2(3)).

However, s 11.2(3) has effect subject to s 11.2(6): see 11.2(3A). Subsection (6) provides that any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

If the trier of fact is satisfied beyond reasonable doubt that that a person is either guilty of a particular offence otherwise than because of the operation of s 11.2(1) or is guilty of that offence because of the operation of s 11.2(1), but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

Suggested direction

The charge against the defendant is that [between … and …] the defendant imported a commercial quantity of the border controlled drugs, [namely …]. It is an offence for a person to import a commercial quantity of a border controlled drug.

But it is not alleged that the defendant actually arranged the importation of the drugs to Australia. Rather the defendant is alleged to be criminally responsible because he [aided, abetted, counselled or procured] an importation which did

occur. If the defendant [aided abetted, counselled or procured] that importation, then he is by law taken to have himself imported the drugs. He is then guilty of importation.

Elements of aiding importation

For the defendant to be found guilty of the offence charged, the prosecution must prove beyond reasonable doubt the following elements:

(a) The offence of importing a commercial quantity of border controlled drugs as committed [by the other person];

(b) The defendant, by his conduct, in fact [aided, abetted, counselled or procured] the commission of the import offence [by the other person];

(c) The defendant intended that his conduct would [aid, abet, counsel or procure] the commission of that offence.

1. ***Importation by another person***

Firstly, you must be satisfied that an importation was committed [by the other person]. That element is proved beyond reasonable doubt if you are satisfied that:

(a) [that person] imported a substance; and

(b) [that person] intended to do so; and

(c) the substance was a border controlled drug and intended to be such;

(d) the quantity imported was a commercial quantity.[14]

2. The defendant, by his conduct, in fact aided the commission of the import offence etc

The prosecution must prove that the defendant did an act or acts and that he thereby in fact [aided, abetted, counselled or procured] the commission of the importation offence. Aiding here concerns conduct that in fact brings about or makes more likely the commission of an offence. Abet means encouraging. Procure means to bring about or cause to be done, prevail on or try to induce. Acts done by way of abetting or procuring or counselling include acts of encouragement, urging, advising, soliciting.

[14] See direction at No 105B.4

The Crown case is that the defendant [aided, abetted, counselled or procured] the importation by the following acts: [outline the Crown case].

3. *The defendant intended that his conduct would [aid, abet, counsel or procure] the commission of the importation offence*

The prosecution must establish beyond reasonable doubt that the defendant acted intentionally by way of assisting or helping to accomplish the importation of drugs to Australia. As part of that, the prosecution must prove that the defendant was aware of at least the essential matters involved in the contemplated importation into Australia.

Here the essential matters that would need to be proved beyond reasonable doubt are that, when he did an act by way of assistance, the defendant did so:

(a) knowing that border controlled drugs were involved in the importation and

(b) knowing that the drugs were to be imported from […] to Australia.

A mere suspicion as to those matters is not enough.

Intention is a state of mind. In ascertaining a defendant's intention, you are drawing an inference from facts which you find established by the evidence concerning the defendant's state of mind. The prosecution invites you to draw an inference as to the defendant's state of mind from certain facts. [You are entitled to infer such intent as is put to you by the prosecution if, after considering all the evidence, you are satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence.]

Thus, in the present case, before making a finding of guilt you would need to be satisfied beyond reasonable doubt that the only inference available on the evidence you accept is that, at the time the defendant did an act that in fact aided the importation of drugs to Australia, he knew:

(a) that border controlled drugs were involved and also

(b) that the drugs were to be imported into Australia.

People Smuggling

Section 232A of the *Migration Act* 1958 (organising bringing groups of non-citizens into Australia) has application to offences committed before 1 June 2010 as does s 233 (persons bringing non-citizens into Australia or harbouring illegal entrants). These offences have territorial effect beyond Australia's boundaries.[1] Section 232A provides for one offence which may be committed by organising or facilitating either the bringing or the coming to Australia or the entry or proposed entry into Australia of a group of non-citizens. There is no requirement that the group of non-citizens entered Australia.[2]

Organising bringing groups of non-citizens into Australia (prior to 1 June 2010) – s 232A Migration Act 1958

Directions –

The following directions may be given in respect of s 232A3 of the Migration Act:

The defendant is charged that […].

The offence is comprised of physical and fault (mental) elements[4].

The elements of the offence which the prosecution must satisfy you beyond reasonable doubt are:

1. **The defendant organised or facilitated the bringing [or coming or entry or proposed entry] to Australia of a group of five or more people.**
2. **The defendant *intended* (or meant) to facilitate the bringing [or coming or entry or proposed entry] of the group of five or more people to Australia.[5]**

---

1 See s 228A of the *Migration Act*, *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1.

2 *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1.

3 Section 232A of the *Migration Act* provides:

> "232A Organising bringing groups of non-citizens into Australia
>
> (1) A person who:
>
> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
>
> (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia; is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both.
>
> Note: Sections 233B and 233C limit conviction and sentencing options for offences under this section.
>
> (2) For the purposes of subsection (1), the defendant bears an evidential burden in relation to establishing that subsection 42(1) does not apply to a person because of subsection 42(2) or (2A) or regulations made under subsection 42(3).
>
> Note: For evidential burden, see section 13.3 of the Criminal Code."

4 The people smuggling offences are governed by Ch 2 of the *Criminal Code* 1995 (Cth). As to the physical and fault elements see No 89.3.

5 *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1 at [47]. The second element is the fault element relating to physical element one.

3. **At least five of the group were people to whom s 42(1) of the *Migration Act* applied;[6] that is they were not Australian citizens and that at the relevant time they did not have valid visas permitting them to enter Australia.**

4. **The defendant was reckless as to whether those people had a lawful right to come to Australia.**

Non-citizens

That at least five of the people on the vessel were not Australian citizens and that at the relevant time they did not have valid visas permitting them to enter Australia is not in dispute.[7]

Organising or facilitating the bringing/coming/entry/proposed entry to Australia

To organise or facilitate the bringing or coming to Australia of people it is not necessary that the people actually entered Australia.[8]

Once the organisation or facilitation has occurred, the physical element of the crime is complete, regardless of whether the travel to Australia is undertaken or, if undertaken, is unsuccessful.[9]

"Organise" has its ordinary meaning of coordinate the activities, make arrangements or preparations or take responsibility for providing or arranging.[10]

"Facilitate" has its ordinary meaning of make easy or easier.[11]

Intention to organise/facilitate

The prosecution must prove that the conduct of the defendant in organising/facilitating the bringing to Australia of the passengers was carried out with the intention[12] that they be brought to Australia. That is that the defendant

---

6 Prior to the repeal of s 232A of the *Migration Act*, s 42(1) provided that, subject to s 42(2), (2)(A) and (3), a non-citizen must not travel to Australia without a visa that is in effect.

7 To the extent that s 232A by referring to "a group of 5 or more persons to whom s 42(1) applies" means that class of non-citizens travelling to Australia without a visa, proof of entry into Australia is not required: *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1. The defendant bears the evidential burden in relation to establishing that s 42(1) does not apply to a person because of s 42(2) or (2A) or regulations made under s 42(3): see s232A(2). As to the evidential burden, see s 13.3 of the *Criminal Code*.

8 *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1.

9 *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1 at [46].

10 Oxford English Dictionary (online version, February 2013).

11 Oxford English Dictionary (online version, February 2013).

12 Section 5.6 of the *Criminal Code* 1995 (Cth) provides that if the law creating an offence does not specify a fault element for a physical element that consists only of conduct, "intention" is the fault element for that physical element. Because no fault element is specified for the conduct described in s 232A(1)(a) the relevant

intended **(or meant)[13] to organise/facilitate the coming/bringing to Australia of the passengers.**

The prosecution is not required to show that the passengers entered Australia but it must be proved that the defendant knew that Australia was the ultimate destination.[14]

The prosecution seeks to prove the requisite intention by asking that you draw inferences from the following […].[15]

Reckless as to lawful right

The prosecution must prove beyond reasonable doubt that the defendant was reckless as to whether those passengers had a lawful right to come to Australia.

In this context, a defendant is reckless,[16] if:

1. **he is aware of a substantial risk as to whether the passengers had a lawful right to come to Australia[17] and,**
2. **having regard to the circumstances known to the defendant, it is unjustifiable to take that risk.**

Sections 233D – 233E, 234A, 236A, 236B of the *Migration Act* (post 1 June 2010)

The *Anti-People Smuggling and Other Measures Act* 2010 (Cth) which commenced on 1 June 2010 repealed s 232A, s 233, s 233A, s 233B, s 233C and s 234 of the *Migration Act*. It introduced new s 233A, s 233B, s 233C and also s 233D – s 233E, s 234A, s 236A and s 236B. These concern *inter alia* the offence of people smuggling simpliciter (s 233A), the

---

fault element that applies is "intention": see also *R v Razak* [2012] QCA 244, *R v Jufri; R v Nasir* [2012] QCA 248

[13] A person has "intention" with respect to conduct if he or she means to engage in that conduct: s 5.2(1) *Criminal Code* (Cth).

[14] See *DPP v PJ* (2012) 36 VR 402; [2012] VSCA 146 at [76], *R v Zainudin* (2012) 115 SASR 165; [2012] SASCFC 133 at [57].

[15] See No 24.4 as to the drawing of inferences. See No 46.1 as to circumstantial evidence.

[16] "Recklessness" is defined in s 5.4(1) of the *Criminal Code Act* 1995 (Cth) as follows: "A person is reckless with respect to a circumstance if (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk." Section 232A(1)(b) of the *Migration Act* identifies the relevant circumstance for the purpose of s 5.4 of the *Code* as being the absence of "a lawful right to come to Australia" in a group of five or more people to whom s 42(1) of the *Migration Act* applies.

[17] Awareness of the precise visa status of a particular passenger is not decisive: *R v Razak* [2012] QCA 244 at [22]. See also *R v Jufri; Rv Nasir* [2012] QCA 248 at [15], while it may readily be accepted that the reference to a "lawful right to come to Australia assumes the existence of an Australian law which, at least in some circumstances, makes it unlawful for a person to enter Australia", it does not follow that the prosecution must necessarily prove that the defendant knew anything about the Australian visa system or had any knowledge of the content of Australian law.

aggravated offence of people smuggling involving exploitation or danger of death or serious harm etc (s 223B), the aggravated offence of people smuggling at least 5 people (s 223C), the offence of supporting another in people smuggling (s 233D), the offence of concealing and harbouring non-citizens, etc (s 233E), and the aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people) (s 234A).

These offences have territorial effect beyond Australia's boundaries.[18]

Aggravated offence of people smuggling (at least 5 people) – s 233C *Migration Act* 1958[19]

Directions –

The following directions may be given in respect of s 233C of the *Migration Act* aggravated offence of people smuggling at least 5 people:

The defendant is charged that […].

The offence is comprised of physical and fault (mental) elements.[20]

The elements of the offence which the prosecution must satisfy you beyond reasonable doubt are:

1. The defendant organised or facilitated the bringing [or coming or entry or proposed entry] to Australia of a group of at least five persons.

---

[18] See s 228A of the *Migration Act*, see *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1, *R v Zainudin* (2012) 115 SASR 165; [2012] SASCFC 133.

[19] "S 233C Aggravated offence of people smuggling (at least 5 people)

(1) A person (the *first person*) commits an offence if:

(a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 persons (the *other persons*); and

(b) at least 5 of the other persons are non-citizens; and

(c) the persons referred to in paragraph (b) who are non-citizens had, or have, no lawful right to come to Australia.

Penalty: Imprisonment for 20 years or 2,000 penalty units or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

(2) Absolute liability applies to paragraph (1)(b).

Note: For absolute liability, see section 6.2 of the *Criminal Code*.

(3) If, on a trial for an offence against subsection (1), the trier of fact:

(a) is not satisfied that the defendant is guilty of that offence; and

(b) is satisfied beyond reasonable doubt that the defendant is guilty of the offence of people smuggling;

The trier of fact may find the defendant not guilty of an offence against subsection (1) but guilty of the offence of people smuggling, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt."

[20] The people smuggling offences are governed by Ch 2 of the *Criminal Code* 1995 (Cth). As to the physical and fault elements see No 89.3.

2. **The defendant *intended* (or meant) to facilitate the bringing [or coming or entry or proposed entry] of that group of persons to Australia.**[21]

3. **At least five persons are non-citizens.**

4. **The defendant was reckless as to whether those persons had a lawful right to come to Australia.**

Non-citizens

The prosecution must prove that at least five of the group were non-citizens; that is persons who are not Australian citizens. [22] **It is not necessary for the prosecution to show that the defendant had any awareness of their status as such.**[23]

Organising or facilitating the bringing/coming/entry/proposed entry to Australia

To organise or facilitate the bringing or coming to Australia of people it is not necessary that the people actually entered Australia.[24]

Once the organisation or facilitation has occurred, the physical element of the crime is complete, regardless of whether the travel to Australia is undertaken or, if undertaken, is unsuccessful.[25]

"Organise" has its ordinary meaning of coordinate the activities, make arrangements or preparations or take responsibility for providing or arranging.[26]

"Facilitate" has its ordinary meaning of make easy or easier.[27]

Intention to organise/facilitate

The prosecution must prove that the conduct of the defendant in organising/facilitating the bringing to Australia of the passengers was carried out with the intention[28] **that they be brought to Australia. That is that the defendant**

---

21 The second element is the fault element relating to physical element one.

22 See s 5 *Migration Act*.

23 Because absolute liability applies to this physical element, no fault element has to be established (s 233C(2)). Accordingly, the defence of mistake of fact is unavailable: s 6.2(2) *Criminal Code*; *DPP v PJ* (2012) 36 VR 402; [2012] VSCA 146 at [17]. See s 6.2 of the *Criminal Code.*

24 *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1.

25 *R v Ahmad* (2012) 165 NTR 1; [2012] NTCCA 1 at [46].

26 Oxford English Dictionary (online version, February 2013).

27 Oxford English Dictionary (online version, February 2013).

28 Section 5.6 of the *Criminal Code* 1995 (Cth) provides that if the law creating an offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical

intended **(or meant)[29] to organise/facilitate the coming/bringing to Australia of the passengers.**

The prosecution is not required to show that the passengers entered Australia but it must be proved that the defendant knew that Australia was the ultimate destination.[30]

The prosecution seeks to prove the requisite intention by asking that you draw inferences from the following […].[31]

Reckless as to lawful right

The prosecution must prove beyond reasonable doubt that the defendant was reckless[32] as to whether those passengers had a lawful right to come to Australia.

In this context, a defendant is reckless,[33] if:

1. **he is aware of a substantial risk as to whether the passengers had a lawful right to come to Australia[34] and,**
2. **having regard to the circumstances known to the defendant, it is unjustifiable to take that risk.**

---

element. Because no fault element is specified for the conduct described in s 233(C) the relevant fault element that applies is "intention": see also *R v Razak* [2012] QCA 244.

29 A person has "intention" with respect to conduct if he or she means to engage in that conduct: s 5.2(1) *Criminal Code* (Cth).

30 See *DPP v PJ* (2012) 36 VR 402; [2012] VSCA 146 at [76], *R v Zainudin* (2012) 115 SASR 165; [2012] SASCFC 133 at [57].

31 See No 24.4 as to the drawing of inferences. See No 89.3 as to circumstantial evidence.

32 Section 233C(1)(c) contains a single physical element, being "a circumstance in which conduct…occurs": see s 4.1(1)(c) *Criminal Code, DPP v PJ* (2012) 36 VR 402; [2012] VSCA 146 at [18]. Section 233C makes no provision for a fault element with respect to this physical element, nor does it provide for strict or absolute liability. Accordingly, under s 5.6(2) of the *Criminal Code*, recklessness is the fault element for this physical element.

33 "Recklessness" is defined in s 5.4(1) of the *Criminal Code Act* 1995 (Cth) as follows:. "A person is reckless with respect to a circumstance if (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk." Section 233C(1)(c) of the *Migration Act* identifies the relevant circumstance for the purpose of s 5.4 of the *Code* as being the absence of "a lawful right to come to Australia" in a group of five or more people.

34 Awareness of the precise visa status of a particular passenger is not decisive. See *R v Razak* [2012] QCA 244 at [22]; *R v Jufri; Rv Nasir* [2012] QCA 248 at [15], while it may readily be accepted that the reference to a "lawful right to come to Australia assumes the existence of an Australian law which, at least in some circumstances, makes it unlawful for a person to enter Australia", it does not follow that the prosecution must necessarily prove that the defendant knew anything about the Australian visa system or had any knowledge of the content of Australian law.

GUIDELINES FOR CONDUCTING PRE-RECORDING OF AN AFFECTED WITNESS

Practices and procedures applicable to conducting pre-recordings of the evidence of affected witnesses pursuant to Division 4A *Evidence Act* 1977.

LISTING ISSUES

One of the purposes of Division 4A (s.21AA(a)) is "to preserve, to the greatest extent practicable, the integrity of an affected child's evidence". Section 9E(2)(d) *Evidence Act* 1977 provides that, in relation to child witnesses, the proceedings should be resolved as quickly as possible.

- Pre-recording proceedings should be listed to occur at the earliest time possible after the presentation of the indictment. Convenience of counsel (either prosecution or defence) is of minor consideration if it leads to a delay in the listing of the pre-recording. Only if good reason is shown (eg if the prosecutor has conferred with the witness) would availability of counsel lead to deferment of the listing from the earliest available date. Such listing should ideally occur on the presentation of the indictment.

Pursuant to s.21AJ, the indictment must be presented before the evidence can be taken pursuant to Division 4A. Section 21AS(2) provides that the prosecutor must inform the court at the time the indictment is presented, that an affected child may give evidence in the proceeding. Practice Direction 1 of 2005 requires that the Director of Public Prosecutions must inform the court at the time of presentation of the indictment of the need to pre-record evidence of an affected child. It further provides that at that time all parties must be prepared to indicate readiness to proceed with the pre-recording of evidence and supply a realistic estimate of time for the proposed hearing. It also provides that the Director of Public Prosecutions file a transcript of the affected witness's statement made pursuant to s.93A *Evidence Act* with the indictment.

- The judge, before whom the indictment is presented, should ensure that the prosecution has filed a transcript of the s.93A material.

- At the listing, parties should be asked to provide (realistic) time estimates for the pre-recording.

Experience has shown that a child witness should give evidence commencing as soon as possible to the listed time (ie 10am). The longer the child witness has to wait around on the pre-recording day, the more onerous the giving of evidence becomes.

- Ideally a pre-recording should be listed as the only matter before a particular judge on the day in question. This should ensure that the pre-recording should commence at 10am and the child gives evidence immediately. This will not always be possible, particularly where more than one child is to give evidence in a particular matter. Otherwise, the pre-recording should be listed to commence at 10am.

- At the listing proceeding, the parties should be requested to indicate whether there are any pre-trial issues to be resolved prior to the pre-recording. These should be listed to occur prior to the date of the pre-recording. For example, arguments about the admissibility of the s.93A material or the capacity of the child to give evidence need to be resolved prior to the day of the pre-recording.

- As a matter of caution, the matter should be listed for a mention two weeks prior to the pre-recording for the parties to advise as to whether there are any pre-trial issues and, if so, the matter should be listed for a s.590AA pre-trial hearing to occur before the date of pre-recording.

The trials of matters involving affected witnesses (particularly those involving alleged sexual offences) should also be given priority.

Practice Direction 1 of 2005 requires that an application to copy or edit a pre-recording should be made within 21 days of the conclusion of the pre-recording hearing after a consideration by the parties of the transcript of the pre-recording hearing.

- At the time of listing the pre-recording, a further mention date should be listed, within 21 days of the hearing, for applications to be made for copying or editing.

Some centres where indictments are presented do not have appropriate facilities to properly conduct pre-recordings. Pursuant to s.21AK(5), if it is not practicable at the place of the trial to take and videotape the child's evidence, the trial may be adjourned to an appropriately equipped place to allow the evidence to be taken and videotaped.

- At the time of listing, enquiries should be made of the parties as to where the pre-recording is proposed to be conducted and appropriate orders made.

- Use should be made of the draft orders attached to the Practice Direction as to the formal orders (eg s.21AK(3)) required for the pre-recording and the safe custody of the videotapes.

- The indictment should be endorsed as to the orders made

PREPARATION FOR THE PRE-RECORDING

The preparation of the affected witness in relation to the giving of evidence is a matter for the Director of Prosecutions. The court, if requested, should allow the availability of a court room for the familiarisation of the affected witness with the physical layout. The Director of Public Prosecutions is responsible for ensuring that the affected witness is appropriately dressed.

- Prior to the pre-recording proceeding the hearing judge should familiarise himself or herself with at least the s.93A material.

The judge's associate must, on being notified that the pre-recording has been listed before the judge, collect the file and check that the transcript of the s.93A statement is on the file and check whether there have been other pre-recordings of affected witnesses and, if so, whether the transcripts of those proceedings are on the file. The associate should also check whether other orders have been endorsed on the indictment and bring them to the attention of the judge.

The judge may also wish to read the depositions in relation to the matter although, in most cases, an affected witness may not have given evidence at committal. The depositions would need to be obtained from the DPP.

Whether a judge raises of his or her own volition a question of inadmissible material in the s.93A statement is a matter for the judge. This is really a matter for the parties.

THE PRE-RECORDING HEARING

On occasions the physical facilities have been deemed inappropriate to conduct a pre-recording. A judge, in those circumstances, should decline to conduct the hearing where the facilities are inappropriate (eg confined and oppressive remote rooms). That issue should be resolved prior to the date of the hearing (to avoid the attendance of the witness).

On the day of the pre-recording the equipment should be tested to ensure it is working correctly. This test will normally be conducted by the bailiff and the associate. The parties should also be invited to participate in a "dry run" to ensure the equipment is recording correctly.

There have been instances where hearings have been held only to later discover that the volume levels recorded for particular persons have been inadequate or that the volume levels differ between particular participants. It is particularly important that those volumes have been checked on the day of the prerecording. It would also be appropriate to check that the recording machine is properly recording as there have been instances where, although the machine appeared to be working, in fact nothing was being recorded. It may be appropriate, during any breaks in proceedings, to ensure that the parties again check the system to see that the evidence is being properly recorded. Additionally, at the end of the hearing, before the witness is permitted to leave, that the recording again be checked to ensure it recorded. There have been instances where an affected witness has had to attend for a second hearing where the equipment malfunctioned. All steps should be taken to avoid that.

- The equipment should be appropriately tested on the day of the pre-recording hearing.

The testing should also ensure that the appropriate view of the child is being recorded. The view of the child giving evidence should be a face and shoulders one. It may be appropriate that the recording also show the relative size of the witness. In those circumstances, the issue should be raised with the parties. The system should enable a shot of the witness being brought into the witness room so that the relative size of the witness is seen.

The scenes shown on each of the video screens may also need to be adjusted. For example, there sometimes appears on the screen in the remote witness room a smaller screen showing the witness. This should be deleted as it is distracting to the witness. The settings on the screens in the court room should be canvassed with the parties to ensure they are suitable. The judge's screen should allow a view of any support person in the remote room. Ideally the view available to the parties should also show the support person. In that way inappropriate behaviour of the support person may be monitored. However, some of the systems do not allow this view. A further possible safeguard may be the positioning of a second bailiff in the remote witness room. This option is not available in all centres and, in any event, may be detrimental to the witness in terms of giving evidence in the physical presence of a stranger. The scene on the screen in the witness room should show no view of the accused. Pursuant to s.21AL(4) at the preliminary hearing, the defendant must not be in the same room as the witness when the witness's evidence is being taken but must be capable of seeing and hearing the child while the child is giving evidence.

- The testing of equipment and preliminary issues raised with the parties should ensure that each screen is showing the appropriate view and that the view to be recorded is the appropriate one.

The movement of parties around the court room during the hearing is sometimes visible to the witness through the remote link. Movement of people through the section of court room which is visible to the witness should be restricted. It can be particularly distracting to a witness to see strangers (eg instructing solicitors) moving on screen.

- Pursuant to s.21AL(1) the court should make the orders thought appropriate restricting the movement of people through that section of the court room which is viewable to the witness through the video link.

Considering the priority to be given to these matters and the effect of long waiting periods on the capacity of affected witnesses (particularly young children) to give evidence, priority

should be given to commencing the pre-recording hearing promptly on the hearing day. The court should be aware of fatigue issues where evidence is given by a young witness in the afternoon.

- Priority should be given to the pre-recording on the day of listing so that it commences promptly at 10am.

There is no requirement to arraign the accused prior to the commencement of the pre-recording: See R -v- WAH [2009] QCA 263. The court should also be closed during the prerecording: See s 21AU.

Prior to the taping commencing the judge should canvass any preliminary matters with the parties. These matters should include in what form the prosecutor intends to lead the evidence-in-chief. Is it to be only the s.93A material? Does the prosecution propose to lead further evidence-in-chief? (See Hayne J. Gately -v- R [2007] HCA 55, paragraph 103).

Section 21AK(1) provides that the affected child's evidence must be taken and videotaped at a preliminary hearing. Section 21AL(4)(b) provides that, subject to the judicial officer's control, the child is to give evidence-in-chief and be cross-examined and re-examined at the preliminary hearing. The s.93A material should be tendered on the pre-recording as the child's evidence-in-chief and admitted as an exhibit in the pre-recording. This should occur before the child is sworn.

- The s.93A material should be tendered as an exhibit before the child is sworn on the pre-recording. Give an exhibit number to the s93A tape, and mark the accompanying transcript for identification.

The preliminary matters should include whether there are any issues concerning the ability of the witness to give sworn evidence. They should include whether there are any documentary exhibits or other items to be shown to the witness during the pre-recording. Appropriate arrangements need to be put in place to achieve that with minimum disruption. A second bailiff may be needed to take the items to the remote witness room whilst the first bailiff operates the equipment. They should include whether a view of the witness needs to be recorded to show the relative size of the witness.

It should also be canvassed whether the witness will be required to identify any person, particularly the accused. Appropriate orders would need to be made under s.21AT that ensure that those identification procedures are carried out in a way that limits the distress or trauma to the witness. The preliminary matters should include orders for the closing of the court and orders for the presence of a support person.

- Prior to the pre-recording commencing and in the absence of the witness, relevant preliminary matters should be canvassed with the parties.

The judge should speak to the witness over the video link prior to the recording commencing. The judge should introduce the participants by name, including himself or herself and the prosecution and defence counsel. The judge should explain that the court is closed. The judge should explain about those present in the courtroom (excluding the accused) and that the witness may see others moving around the court, but that they are permitted personnel. The judge should canvass that if the witness needs a break or doesn't understand a question, that the witness should raise that. The judge should canvass any issues with the witness to decide the witness's ability to give sworn testimony. The witness should be advised to raise immediately any difficulties they might experience with the equipment. The canvassing of these issues may settle the witness prior to the recording commencing. There is no need to record them as they form part of the transcript.

- Prior to the recording, the judge should canvass relevant preliminary issues with the witness.

If there is a support person, that person should be invited to advise if they perceive any problems with the equipment as operating in the remote room. On occasions the particular view (particularly of documents shown over the link) has "frozen" and the witness can no longer see the person questioning.

- The judge should invite the support person to advise immediately if a problem with the equipment arises.

Once any issue concerning the ability of the witness to give sworn testimony has been decided, the recording should be commenced. It should commence with the witness being sworn or taking the affirmation. The judge should then address the witness on the tape and advise that the prosecutor (by name) will now ask questions to be followed by questions by the defence counsel (by name.)

- The recording should commence with the swearing of the witness and a brief introduction of the counsel by the judge to the witness.

The oath to be administered is that pertaining to giving evidence before a jury rather than that pertaining to a voir dire. The matter is for eventual resolution by a jury and the jury trial oath is the appropriate one.

- The oath to be administered is that pertaining to evidence given before a jury.

The judge should monitor the need to have breaks in the evidence which, depending on the circumstances, may be frequent. The attention span of a young child is limited and there may be a need for frequent breaks, even if not requested. Repetition by a child witness of phrases such as "I don't remember" or "I don't know" may be indicative of the need for a break. Appropriate and regular breaks maintain the focus of a witness, particularly a young witness.

- The judge should ensure that appropriate breaks are taken.

Section 9E(2)(c) *Evidence Act* 1977 provides that one of the principles for dealing with child witnesses is that the child should not be intimidated in cross-examination. The judge should be vigilant in disallowing impermissible questioning. In determining this issue, regard needs to be had to the age of the witness ensuring that any question which is beyond the capacity of the child to answer is disallowed. Such questions could contain inappropriate language or terms which the witness cannot understand. For example, a child under a certain age may have no or little concept of time or distance. The use of double negatives and confusing questions should be disallowed. Similarly, repetitive questioning should be discouraged. The judge should be quick to intervene if questioning becomes harassing, intimidating (including volume and tone of voice), offensive or oppressive. Note the particular requirements as to special witnesses (s.21A(2)(f) *Evidence Act* 1977.

- The judge should ensure that the cross-examination of a child witness is not intimidating.

If legal argument occurs during the course of the pre-recording, the witness should be informed that the recording will cease while that is dealt with. The link with the remote room should be severed and the witness given a break. There is no need to record the legal argument as it will be transcribed in any event and obviate the need for editing the tape later.

- During any legal argument the taping should be ceased.

The completed recording should be marked as an exhibit in the preliminary hearing. The disc should be marked with the exhibit number. The indictment should be endorsed with the appearances and the date of the hearing, the name of the affected witness whose evidence has been recorded, the list of exhibits and items marked for identification, and any other orders. The file should be noted with any exhibit list. The recording should then be sent to the Principal Registrar as per the earlier draft order. In Brisbane the bailiff delivers the recording to the Principal Registrar.

- At the conclusion of the hearing the recording and the file should be appropriately annotated and the indictment endorsed. The recording should be sent to the Principal Registrar for safe keeping as per the original draft order.

If there is more than one witness to be pre-recorded, separate discs should be used for each witness. Each disc should be a separate exhibit and the notations to the file and endorsement of the indictment should so indicate.

- Where more than one witness is pre-recorded, separate discs should be used.

ORDERS FOR COPYING AND EDITING

Practice Direction 1 or 2005 provides that at the conclusion of the recording of the pre-recorded evidence of an affected witness, the SRB is directed to make available a transcript of the evidence of the witness to the principal registrar, the DPP and the legal representatives of the accused or, where the accused is not legally represented, to the accused.

The Practice Direction provides that a party is to apply for the copying and/or editing of the original recording within 21 days of the conclusion of the recording of the pre-recorded evidence. Any editing order shall specify the parts of the transcript to be edited and the associate shall forward to the principal registrar the entire transcript of the recording with the passages to be edited marked on the transcript.

- Applications for copying and/or editing should comply with Practice Direction 1 of 2005.

THE TRIAL

When a judge is listed to preside over a trial involving an affected child witness, the judge's associate must collect the file and check to ascertain how many affected child witnesses are involved. In Brisbane, the associate must collect the recordings from the Child Evidence Manager (Listings) before the commencement of the trial. The associate must also check the file to ensure that the s.93A material (including transcript) is present. When the trial is to take place on circuit, the associate should take the steps referred to above and also check with the Child Evidence Manager that the recordings are with the file at the circuit centre.

- Prior to the trial the judge's associate should obtain the file to ensure that the appropriate material is present and orders have been complied with. At a Brisbane trial, the associate should collect the pre-recordings from the Child Evidence Manager and, if a regional or circuit trial, ensure that the Child Evidence Manager has forwarded the recordings in sufficient time before the commencement of the trial.

At the commencement of the trial it should be confirmed with the parties as to which actual recording is to be played, particularly if it has been edited. Ideally the parties should view the disc to be played to ensure it is the correct one and that any editing has been correctly done. The disc should be in a position to be commenced with the actual swearing of the

witness. There is no need for the jury to see any preliminary matters that might have been recorded.

  - The discs played to the jury and any transcripts should be marked for indentification (See Gately -v- R [2007] HCA 55).

- At the commencement of the trial the parties should confirm which actual disc is to be played and the disc positioned to commence with the swearing of the witness.

The prosecution should also confirm as to how the evidence-in-chief is to be led. It should either be on the pre-recording or consist of s.93A material or both. The parties should also indicate their attitude to the transcripts of the various evidence. That is, whether there are any objections to the jury having a transcript and retaining that transcript after the recording has been played. In general, transcripts of the s.93A material should be retrieved from the jury at the conclusion of the playing of those recordings. For purposes of consistency, the transcript of the pre-recorded evidence should also be retrieved after the recordings have been played. These practices should be confirmed with the parties before the evidence is introduced.

- The trial judge should confirm with the parties any relevant aspects concerning the jury's access to transcripts.

When the prosecution "calls" the first affected witness, the trial judge should explain to the jury that the evidence has been pre-recorded at an earlier date, inform the jury of that date, inform the jury as to the presence of any support person and the role that person plays, that the court was closed, and tell the jury that the counsel and judge on the trial may well be different from those at the pre-recording. It may also be advisable at that stage to give the warnings to the jury set out in s.21AW(2). That is, that the measure is a routine practice of the court, that the jury should draw no adverse inference as to the defendant's guilt from it, that the probative value of the evidence is not increased or decreased because of the measure and the evidence is not to be given any greater or lesser weight because of the measure.

- The trial judge should inform the jury of the details of the pre-recording and give appropriate warnings.

Division 4A provides no power to close the court during the playing of the pre-recorded material. Similarly, with respect to s.93A material, there is no power to close the court.

- The various discs and the transcripts should be marked for identification.

During the playing of the recordings it is usual for a transcript to be supplied for the benefit of the jury. The usual warning should be given to the jury that the evidence is as is contained on the recordings rather than the transcript, and to warn of the dangers of inaccuracies in the transcript. Unless the parties agree otherwise, the transcripts should be taken back from the jury at the conclusion of the playing of the recordings. The transcripts should be marked for identification but held back from the jury.

- Transcripts of the pre-recorded evidence should be taken back from the jury at the conclusion of the playing of the recordings unless the parties agree otherwise.

Auscript will not further transcribe the recordings (whether s.93A or pre-recorded discs) as they are played at the trial. Any later references from transcripts must rely on those already supplied.

During the summing-up the trial judge must give the warnings about the pre-recording procedure as contained in s.21AW. That is, that the measure is a routine practice of the court and that the jury should not draw any inference as to the defendant's guilt from it and

the probative value of the evidence is not increased or decreased because of the measure and the evidence is not to be given any greater or lesser weight because of the measure. Court of Appeal decisions have held that not to give the full warning amounts to a miscarriage of justice: *R v SAW* [2006] QCA 378; *R v MBE* [2008] QCA 381.

- The jury should be given the appropriate warnings pursuant to s.21AW.

The recorded evidence of a child which is admitted under s.93A *Evidence Act* 1977 should not go into the jury room during deliberations: *R v H* [1999] 2 Qd R 283 at 290. The rationale of that decision was that the transcript of the cross-examination of the witness would not similarly be available to the jury. This concern does not apply to a recording of evidence admitted under s.21AM where both the evidence-in-chief and cross-examination of the witness are contained in the pre-recording: *R v GT* [2005] QCA 478. Provided that both the s.93 recording and the recording of the cross-examination are available, there appears to be no rationale from *R v H* which would still prohibit their being sent into the jury room. The safest course, unless the parties agree otherwise, would still seem to be to keep the recordings out of the jury room (in view of the danger of over reliance on that part of the evidence). Should the jury request to see the recorded evidence again, it should be played to them in open court. Should the latter course be followed, an appropriate warning should be given that due regard should be given to the other evidence called in the trial (See Gately -v- R [2007] HCA 55).

- The recordings under s.93A and s.21AM should not go into the jury room unless the parties agree. If the jury request to see the recordings again, this should be done in open court. Appropriate warnings should be given.

At the conclusion of the trial, the recordings of the pre-recorded evidence should be ordered to be returned to the safe keeping of the Principal Registrar in Brisbane.

R v [Insert name of accused]

Instructions from the Trial Judge to the Jury

No outside influence or information

It is of critical importance that you comply with the following instructions because a failure to do so will not only render the trial unfair, it may very well result in a mistrial:

1. **You must not discuss the case with anyone, other than with your other jurors when you are in the jury room.** Do not to allow yourself to be drawn into conversations about the case or any aspect of the case. You can tell family, employers and people who have to know that you are on a jury, but avoid telling them the name of the case and under no circumstances tell them what the case is about.

2. **You must decide the case on the evidence presented to you in court – and only that evidence.** The evidence presented to you in court will consist of what you see and hear the witnesses say as well as such photographs, documents, recordings or other things that are received in evidence as exhibits. If at any stage any other material should find its way into the jury room that is not an exhibit in the case, you should notify me through the bailiff immediately.

3. **You must not decide the case, or in any way take into account in your deliberations any outside information or other outside influence.** Ignore anything you may hear or read about the case out of court. There may have been some media reporting about this case in the past. There may be some as the trial proceeds. You are must ignore all of it.

4. **You must not make your own enquiries or investigations about the case or anyone connected with the case.** Do not consult any source such as a newspaper, reference book or the internet for information. Do not conduct any research. This includes using the internet or communicating with someone by telephone, email or social media such as Twitter, Facebook or Instagram to discuss the case or to make enquiries about it, some aspect of it or some person connected with it. You may commit a criminal offence if you do.

5. **You must immediately report to me any breach of the above instructions that you have made or which you become aware has been made by any of the other jurors.** If anyone, including a member of your family or a friend, attempts to speak to you about the case, stop them immediately. Should the attempt persist, report that to me via the bailiff as soon as possible; although do not mention it to any other juror. If, while you are outside this courtroom, you inadvertently overhear something about this trial, do not tell anyone else on the jury but tell the bailiff so that it can also be brought to my attention. If any of you learns that an impermissible inquiry or investigation has been made by another juror, or that another juror had engaged in discussions about the case outside the jury room, you are duty-bound to bring that to my attention, via the bailiff, as soon as possible but you should not mention it to any other juror.